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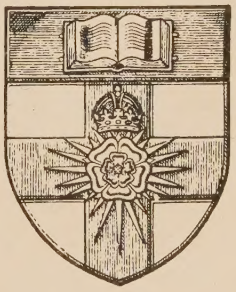

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CASES REPORTED

(VOL. 1)

A

	Page
Ackland & Pratten Ltd. (In Liquidation) *v.* Inland Revenue Commissioners	1117
Ackroyd & Sons *v.* Hasan (pet. dis.)	736
Addison *v.* Addison and Holden	1088
Airport Restaurants Ltd. *v.* Southend Corporation	880
Akerib *v.* Booth and Others Ltd.	454
Allen's Settlement Trusts, *In re*	6
Almond *v.* Heathfield Laundry (Birmingham) Ltd.	1339
Angus' Will Trusts, *In re*	1296
Ansbacher (Henry) & Co. *v.* Inland Revenue Commissioners	337

B

Bedford, decd., *In re*	1331
Beesly *v.* Hallwood Estates Ltd.	549
Best *v.* Glenville	1198
Black *v.* Black (May Intervening)	182
Black Bolt and Nut Association's Agreement, *In re*	884
Blatcher *v.* Heaysman	663
Bohnel *v.* Bohnel	590
Boulton, *In re*	140
Braithwaite *v.* Winwood	1257
Briggs (Henry), Son & Co. Ltd. *v.* Inland Revenue Commissioners	532, 568
Brown *v.* National Coal Board	67
Brown *v.* Rolls-Royce Ltd.	210
Browne (A Bankrupt), *In re*	692
Bryan *v.* Robinson	506
Bullock *v.* Bullock	975
Burdett-Coutts *v.* Inland Revenue Commissioners	1027
Burnett & Hallamshire Fuel Ltd. *v.* Sheffield Telegraph & Star Ltd.	502
Buxton *v.* Jayne	783

C

C., 1958, No. 1950, *In re*	92
C. S. C., *In re*	304
Carl-Zeiss-Stiftung *v.* Rayner & Keeler Ltd.	1145
Carr *v.* Boxall	314
Ceylon University *v.* Fernando	223
Ching Garage Ltd. *v.* Chingford Corporation	947
Ching Garage Ltd. *v.* Chingford Corporation (pet. all.)	1185
Chung Kwok Hotel Co. Ltd. *v.* Field	1112
Cocke, decd., In the Estate of	491
Collins *v.* Collins	660
Cook *v.* "X" Chair Patents Co. Ltd.	60
Cook, decd., In the Estate of	353
Corfe *v.* Corfe	208
Corn *v.* Weir's Glass (Hanley) Ltd.	577
Cotterell *v.* Price	1097
Cracknell *v.* Smith	1239

D

D. (An Infant) *v.* Parsons	797
Davies *v.* Davies	1004
Daws *v.* Daily Sketch and Daily Graphic Ltd. Darke *v.* Same	126
Director of Public Prosecutions *v.* Milbanke Tours Ltd.	630
Dixon *v.* Cementation Co. Ltd.	746
Doncaster and Retford Co-operative Society's Agreement, *In re*	1186
Drewery and Drewery *v.* Ware-Lane	1204
Duple Motor Bodies Ltd. *v.* Inland Revenue Commissioners	510

E

Evans *v.* Roper	814

F

PAGE
FARR (A. E.) LTD. v. MINISTRY OF TRANSPORT 956
FEDERATION OF BRITISH CARPET MANUFACTURERS' AGREEMENT, *In re* 356
FEDERATION OF WHOLESALE AND MULTIPLE BAKERS' (GREAT BRITAIN AND NORTHERN IRELAND) AGREEMENT, *In re* 393
FERGUSON (HARRY) RESEARCH LTD. v. DAWKINS 639
FINCH v. FINCH 429
FISCHLER v. ADMINISTRATOR OF ROUMANIAN PROPERTY 917
FOX v. GENERAL MEDICAL COUNCIL 1017
FRENCH v. ELLIOTT 40

G

GARDNER v. BLAXILL 752
GODLEY v. PERRY 9
GREAT UNIVERSAL STORES LTD., *In re* 78
GREEN v. BOWES-LYON 176

H

HALL v. HALL 52
HAMBLEDEN'S WILL TRUSTS, *In re* 82
HANIVER v. HANIVER 310
HAYNES v. HAYNES AND SAWKILL 968
HEBRIDEAN COAST, THE (PET. ALL.) 861
HERBERT (ALFRED) LTD. v. HANCOCKS 271
HESZ v. SOTHEBY & CO. 285
HOLLOWAY v. DOVER CORPORATION 604
HOPKINS v. MANNERS 599
HORTON v. HORTON 987
HORWITZ v. ROWSON 803
HUGHES v. HALL 733

I

INLAND REVENUE COMMISSIONERS v. H. DUNNING & CO. (1946) LTD. 1106
INLAND REVENUE COMMISSIONERS v. JACKSON 873
ISAAC v. HOTEL DE PARIS LTD. 239
ISAACS v. MARKET BOSWORTH R. D. C. 277

J

J., *In re* 253
JACOBS v. JACOBS 1236
JAQUIN v. HOLLAND 258
JEFFREY v. ROLLS-ROYCE LTD. 720
JEWISH ORPHANAGE CHARITY ENDOWMENTS TRUSTS, *In re* 344
JODLA v. JODLA 236
JUDD v. HAMMERSMITH, ETC., HOSPITALS BOARD 328

K

KEATS v. GRAHAM 30
KENSINGTON NORTH PARLIAMENTARY ELECTION, *In re* 762
KENTWOOD CONSTRUCTIONS LTD., *In re* 646
KIMPTON v. STEEL CO. OF WALES LTD. 527

L

LANGTON, DECD., *In re* 246
LEACH v. LITCHFIELD 1392
LENTON v. TREGONING 333
LESLIE v. LIVERPOOL CORPORATION 1
LEWIS v. PACKER 452
LINCOLN v. DANIELS 852
LITTLE, DECD., IN THE ESTATE OF 495
LITTLE LEIGH PAROCHIAL CHURCH COUNCIL v. CHURCH COMMISSIONERS 567
LONG v. LONG 546
LONGMUIR v. KEW 862
LOWE v. LOMBANK LTD. 196

M

PAGE
McKinley v. McKinley .. 120
Mallinson (William) & Sons (Mfg.) Ltd. v. Key Transport Co. Ltd. .. 1301
Margate Corporation v. Roach .. 1380
Marshall v. Nottingham Corporation .. 707
Mascherpa v. Direct Ltd. .. 447
Mayer v. Harte .. 770
Moore v. Gooderham .. 1308
Morgan v. Jones .. 1220
Morris Motors Ltd. v. Phelan .. 352, 566
Morris's Will Trusts, *In re* .. 1210
Morton v. Chaney .. 1312

N

National Association of British and Irish Millers Ltd.'s Scheme, *In re* .. 63
National Pig Progeny Testing Board v. Greenall .. 1265

O

Ohochuku v. Ohochuku .. 183
Onions v. Onions .. 983
Orman v. Saville Sportswear Ltd. .. 1055
Ostime (Inspector of Taxes) v. Duple Motor Bodies Ltd. (pet. all.) .. 621

P

Pachner v. Parker .. 486
Parish v. Judd .. 867
Parker v. Clark .. 286
Parker v. Ealing Borough Council .. 1398
Peak v. Burley Golf Club .. 568
Pearce v. Pearce .. 855
Pearce Duff & Co. Ltd., *In re* .. 1014
Pease v. George .. 427
Pemberton v. Bright .. 436
Pepper v. Pepper .. 131
Phenol Producers' Agreement, *In re* .. 464
Piddock v. Clifford Products Ltd. .. 1383
Practice Direction (Address of Petitioner) .. 548
Practice Direction (Appearance) .. 494
Practice Direction (Costs) .. 114, 125
Practice Direction (Court of Protection) .. 17, 1253
Practice Direction (Drawing Up of Orders) .. 1166
Practice Direction (Guardianship of Infants) .. 744
Practice Direction (Jury Actions) .. 658
Practice Direction (Maintenance) .. 566
Practice Direction (Minutes of Order) .. 1168
Practice Direction (Patents) .. 1272
Practice Direction (Powers of Masters) .. 1195
Practice Direction (Review of Taxation) .. 1142, 1194, 1226
Practice Direction (Trustee's Absence) .. 355
Prenn's Settlement, *In re* .. 1248
Price v. Romilly .. 1360

Q

Quintas v. National Smelting Co. Ltd. .. 217

R

Ramia (Edward) Ltd. v. African Woods Ltd. .. 86
Reg. v. Agricultural Land Tribunal for South Eastern Area. *Ex parte* Bracey .. 911
Reg. v. Bennett. *Ex parte* Radburn .. 102
Reg. v. Chapman .. 147
Reg. v. Dangerfield .. 268
Reg. v. Davey .. 1287
Reg. v. Dawson .. 163
Reg. v. Edmonton Justices. *Ex parte* Brooke .. 697
Reg. v. Golder .. 1169
Reg. v. Governor of Parkhurst Prison. *Ex parte* Philpot .. 115
Reg. v. James .. 812
Reg. v. Keeley .. 749

PAGE

REG. *v.* LEWES JUSTICES. *Ex parte* PLUMPTON AND DISTRICT CLUB TRUSTEES 700
REG. *v.* LIVERPOOL JUSTICES. *Ex parte* ROBERTS 585
REG. *v.* MINISTER OF HOUSING AND LOCAL GOVERNMENT. *Ex parte* CHICHESTER R. D. C. .. 587
REG. *v.* MORDANAM 7
REG. *v.* NICHOLLS 658
REG. *v.* NOTTINGHAM JUSTICES. *Ex parte* BROWN 1315
REG. *v.* REGISTRAR OF BUILDING SOCIETIES. *Ex parte* A BUILDING SOCIETY 669
REG. *v.* STALLY 79
REG. *v.* WENLOCK 163
REG. *v.* WILLIS 55
REG. *v.* WOODBURY LICENSING JUSTICES. *Ex parte* ROUSE 461
ROBERTSON'S WILL TRUSTS, *In re* 1050
ROBINS *v.* ROBINS 1089
RORKE (H. J.) LTD. *v.* INLAND REVENUE COMMISSIONERS 1132
ROSSAGE *v.* ROSSAGE 249
ROUTH'S TRUSTEES *v.* CENTRAL LAND BOARD 737, 1388
ROYAL MUTUAL BENEFIT BUILDING SOCIETY, *In re* 1143
RUSHTON *v.* TURNER BROTHERS ASBESTOS CO. LTD. 96

S

ST. GEORGE'S, BIRMINGHAM, *In re* 1069
SAMSON *v.* SAMSON 190
SCOTT *v.* SCOTT (QUINE CITED) 915
SCREMBY CORN RENTS, *In re* 648, 1227
SEISTAN, THE 186
SERVERS OF THE BLIND LEAGUE, *In re* 564
SHINDLER *v.* NORTHERN RAINCOAT CO. LTD. 1038
SHORT *v.* SHORT 833
SMITH *v.* HUGHES 830
SOFAER *v.* SOFAER 1173
STANTON *v.* EWART F. YOULDON LTD. 543
STIRLAND *v.* STIRLAND 18
STROUD BUILDING SOCIETY *v.* DELAMONT 431

T

TAYLOR *v.* MUNROW 151
THOMPSON'S WILL TRUSTS, *In re* 1165
TICKNER *v.* HEARN 1406
TINKER'S SETTLEMENT, *In re* 1011
TREPCA MINES LTD., *In re* 24, 1273
TRUNDLE, DECD., *In re* 1388
"TRUTH" (N.Z.) LTD. *v.* HOLLOWAY 997
TUKER *v.* MINISTRY OF AGRICULTURE, FISHERIES AND FOOD 819

U

ULLAH *v.* HALL LINE LTD. 1320
UNION OF INDIA *v.* COMPANIA NAVIERA AEOLUS S.A. 297
UNITY THEATRE SOCIETY LTD. *v.* SPEIDEL (PET. ALL.) 985

V

VAUGHAN *v.* BIGGS 622
VERNAZZA, *In re* (PETS. DIS. AND ALL.) 139
VICTORY (EX-SERVICES) ASSOCIATION LTD. *v.* PADDINGTON BOROUGH COUNCIL 106
VUMA LTD., *In re* 1283

W

WARE URBAN DISTRICT COUNCIL *v.* GAUNT 1364
WESSANEN'S KONINKLIJKE FABRIKIEN *v.* ISAAC MODIANO BROTHER & SONS LTD. 1243
WESTCOTT *v.* STRUCTURAL AND MARINE ENGINEERS LTD. 349
WHITEHOUSE *v.* BOARD OF CONTROL 1093
WHOLESALE CONFECTIONERS ALLIANCE'S AGREEMENT, *In re* 1417
WILLAN *v.* WILLAN 624
WILLIAMS *v.* SETTLE 1072
WILSON *v.* WREXHAM CORPORATION 319
WINE SHIPPERS (LONDON) LTD. *v.* BATH HOUSE SYNDICATE LTD. 613, 989
WOYNO *v.* WOYNO 986
WRING, *In re* (PRACTICE NOTE) 138

Z

ZALIHE VELI *v.* SEVIM ISMAIL 1254

SUBJECT-MATTER

(VOL. 1)

ADMINISTRATIVE OR JUDICIAL ACT

Quarter sessions

Order varying corn rents under Inclosure Act

No obligation to hear parties—Whether judicial decision—Whether power to state case—Inclosure Act, 1801 (Scremby). *In re* **Scremby Corn Rents,** Divl.Ct. **648.**

ADOPTION

Adoption order

Child in possession of mother on three occasions

Whether "continuously in the care and possession" of applicants—Refusal of consent by mother—Duty of justices to consider possible legitimation of child—Whether power to order applicants to retain child pending appeal—Adoption Act, 1958, ss. 3 (1), 35 (3). *In re* **C. S. C.,** Roxburgh J. **304.**

AGENCY

Estate agent

Commission

"Prospective purchaser"—Meaning—Contract by vendor to pay commission if and when prospective purchaser signs estate agents' purchaser's agreement and vendor signs vendor's agreement—Agreements signed by prospective purchaser and vendor—Prospective purchaser unable to purchase without mortgage—Termination of negotiations for sale by vendor—Whether estate agents entitled to commission. **Drewery v. Ware-Lane,** C.A. **1204.**

AGRICULTURE

Agricultural holding

Notice to quit

Reasons stated—Failure to remedy breaches of tenancy—Reference to arbitration of one reason under previous notice to quit—Whether second reason premature—Validity of notice to quit—Agricultural Holdings Act, 1948, ss. 24 (2) (*d*), 26 (1) (*a*) (*d*)—Agricultural (Control of Notices to Quit) Regulations, 1948, regs. 4, 5 and 7. **French v. Elliott,** Paull J. **40.**

Agricultural land tribunal

Issue of sound management

Tenant's personal fortunes as farmer not to be considered—Discretion of tribunal—Agricultural Holdings Act, 1948, s. 25 (1) (*b*)—Agriculture Act, 1958, s. 3 (2). **Evans v. Roper,** Divl.Ct. **814.**

Agricultural marketing

Scheme

"Scheme regulating the marketing of an agricultural product"—Apple and Pear Publicity Scheme—Prohibition on sales by unregistered producers—Discretionary powers of board as to advertising, distribution and sales to authorised merchants—Whether scheme "regulating the marketing"—Agricultural Marketing Act, 1931, ss. 1 (1) (8), 5 (as amended by the Agricultural Marketing Act, 1933, ss. 19, Sch. 3), 6 (1)—Agricultural Marketing Act, 1958, ss. 1 (1), 2 (7), 6 (1) (2), 7 (1), 8 (1). **Tuker v. Ministry of Agriculture, Fisheries and Food,** C.A. **819.**

Deficiency payments

Nature

Whether part of "price" of wheat for purposes of tithe corn rents—Cereals (Deficiency Payments) Order, 1955, arts. 3, 4. *In re* **Scremby Corn Rents,** C.A. **1227.**

AIRCRAFT

Carriage by air

Nationalisation

Private aircraft company—Flights organised by association for own members—Public becoming members of association to participate in tours—"Scheduled journey"—Meaning—Air Corporations Act, 1949, s. 24. **Director of Public Prosecutions v. Milbanke Tours Ltd.,** Divl.Ct. **630.**

ANIMAL

Dog

Control

Complaint—Information laid against owner that dog was dangerous and not kept under proper control—Order by justices that dog to be kept under proper control—Whether proceedings correctly instituted—Dogs Act, 1871, s. 2. **Reg. v. Nottingham Justices.** *Ex parte* **Brown,** Divl.Ct. **1315.**

ARBITRATION
Arbitrator
Misconduct
Waiver—Two arbitrators appointed under rules of trade association—Disagreement—Appointment of umpire—Status of arbitrators before umpire—Extent of authority.
Wessanen's Koninklijke Fabrikien v. Issac Modiano Brother & Sons Ltd., Diplock J. **1243.**

BANKRUPTCY
Debt
Proof of debt
Application to expunge proof—Commission agent's proof of debt for money due on taking accounts—Debtor and creditor dead—Whether debtor's statement of affairs admissible against trustees of creditor's estate—Whether gaming debt—Burden of proof—Bankruptcy Act, 1914, s. 141, Sch. II, r. 24. *In re* **Browne (A Bankrupt)**, Cross J. **692.**

BARRISTER
Discipline
Bar Council
Whether complaint to Council absolutely privileged. **Lincoln v. Daniel**, Salmon J. **852.**

BASTARDY
Corroboration
Opportunity
Evidence given in support of complainant's evidence—Mere evidence of opportunity—No evidence given by defendant—Whether defendant's silence can amount to corroboration—Whether statute satisfied—Affiliation Proceedings Act, 1957, s. 4 (2).
Cracknell v. Smith, Divl.Ct. **1239.**

BUILDING
Contract
I.C.E. form
Engineer's certificate—Reference of "dispute" to arbitration—No reference to arbitration "except as to the withholding by the engineer of any certificate . . . until after "the completion . . . of the works unless with . . . consent of the employer and the "contractor"—Refusal by engineer to include certain claims not in certificate—Whether "dispute"—Whether certificate withheld.
A. E. Farr Ltd. v. Ministry of Transport, Buckley J. **956.**

Safety regulations
"*Hand-rail*" *or* "*guard-rail*"
Meaning of—Factories Act, 1937, s. 25 (2)—Building (Safety, Health and Welfare) Regulations, 1948 (S.I. 1948, No. 1145), reg. 27 (1) (2).
Corn v. Weir's Glass (Hanley) Ltd., C.A. **577.**
"*Temporary platform*"
Fixed structure temporarily used as working place—Whether breach of statutory duty—Building (Safety, Health and Welfare) Regulations, 1948, reg. 24 (1) (5) (*d*).
Westcott v. Structural and Marine Engineers Ltd., Lord Parker C.J. **349.**

BUILDING SOCIETY
Order against advertisement for capital
Hearing of representations by society
Determination by registrar to make order—Information subsequently received—Whether registrar's decision affected—Whether capacity of registrar quasi-judicial or administrative—Whether publication of society's name should be withheld—Prevention of Fraud (Investments) Act, 1958, s. 11 (1) (2) (3).
Reg. v. Registrar of Building Societies. *Ex parte* **A Building Society**, Divl.Ct. & C.A. **669.**

BURDEN OF PROOF
Husband and wife
Wilful neglect to maintain
Justices. **Stirland v. Stirland**, Divl.Ct. **18.**

CAPITAL OR INCOME
Administration or trust
Debentures
Scheme of arrangement—Statement by company that principal secured and interest accrued should be satisfied by payment of cash and securities—Whether binding as between tenant for life and remainderman—Whether payment apportionable.
In re **Morris's Will Trusts**, Cross J. **1210.**
Parliamentary election
Breach of rules
Whether burden rests on respondent to prove compliance.
In re **Kensington North Parliamentary Election**, Election Ct. **762.**

CAUSATION

Breach of statutory duty

Contributory negligence

Dangerous machinery—Deliberate act of folly by plaintiff—Personal injury.
Rushton v. Turner Brothers Asbestos Co. Ltd., Ashworth J. **96.**

Onus of proof

Lack of hand-rail for stairs—Fall. **Corn v. Weir's Glass (Hanley) Ltd.**, C.A. **577.**

CHARITY

Investments

Variation of powers

Whether power to alter scheme includes power to enlarge investment clause.
In re **Jewish Orphanage Charity Endowments Trusts**, Cross J. **344.**

Rules

Alteration

Charity established by scheme—Power to alter scheme provided that no "deviation from "the main principles"—Purported alteration of investment clause—Whether power to alter investment clause—Whether permitted range of investments one of "main prin-"ciples" of scheme.
In re **Jewish Orphanage Charity Endowments Trusts**, Cross J. **344.**

COMPANY

Capital

Defective special resolution—Short notice—Second resolution for payment of premium on paid off preference shares submitted to meeting—Written consent by shareholders to second resolution—Whether effective to cure defect in initial notice—Subsequent consent by all shareholders to both resolutions being treated as valid—Whether sufficient basis for confirmation of reduction of capital—Companies Act, 1948, s. 14 (2).
In re **Pearce, Duff & Co. Ltd.**, Buckley J. **1014.**

Reduction

Practice—Scheme of arrangement and reduction of capital—Petition for sanction of court—Whether necessary to aver that company carrying on business—Companies Act, 1948, s. 206. *In re* **Great Universal Stores Ltd.**, Roxburgh J. **78.**

Private company

Exempt private company

Settlement of sum of money by principal shareholder—Settlor's shares in company subsequently brought into settlement by purchase with part of settled sum—Whether "will "or family settlement disposing of the shares . . ."—Companies Act, 1948, ss. 127, 129 (1) (2) (*a*), Sch. 7, para. 3 (1) (*b*) (2) (*b*).
In re **Prenn's Settlement**, Cross J. **1248.**

Director

Managing Director

Service agreement for ten years—Resolution of company removing from directorship and terminating appointment as managing director.—Whether breach of contract—Companies Act, 1929, Sch. I, Table A, art. 68.
Shindler v. Northern Raincoat Co. Ltd., Diplock J. **1038.**

Winding up

Appeal from liquidator

Rejection of proof by liquidator—Power of appellate court.
In re **Trepca Mines Ltd.**, C.A. **1273.**

——— Whether court should consider rights of claimant in light of evidence before liquidator—Whether matter to be considered de novo—Companies (Winding-Up) Rules, 1949, r. 108.
In re **Kentwood Constructions Ltd.**, Buckley J. **646.**

Costs

Petition abandoned—Whether company entitled to order dismissing petition with costs—Companies (Winding-Up) Rules, 1949, r. 33.
In re **Royal Mutual Benefit Building Society**, Pennycuick J. **1143.**

Petition

Judgment creditor's petition for compulsory winding up—Opposition by majority of creditors—No evidence supporting opposition—Company insolvent and without assets—Whether opposition of majority conclusive—Discretion of court—Companies Act, 1948, s. 346. *In re* **Yuma Ltd.**, C.A. **1283.**

Void dissolution

Bequest to company after dissolution—Application for declaration that dissolution void—Whether discretion of court should be exercised—Charity—Companies Act, 1948, s. 352.
In re **Servers of the Blind League**, Pennycuick J. **564.**

COMPULSORY PURCHASE

Compensation

Expired lease

Notice to treat during term—No claim until lease expired—Validity—Whether any interest expropriated. **Holloway v. Dover Corporation**, C.A. **604.**

CONFLICT OF LAWS

Foreign judgment

Immovables

Mineral action involving mining rights—Action to enforce.
In re **Trepca Mines Ltd.**, C.A. **1273.**

CONTEMPT OF COURT

Appeal

Civil contempt

Refusal of committal order—Jurisdiction of Court of Appeal—Discretion or substantive law.
Lenton v. Tregoning, C.A. **333.**

Witnesses

Civil

Passing-off action—Application to rectify Register of Trade Marks—Statement to persons engaged in the trade that defendant entitled to trade marks—Whether likely to deter possible witnesses from giving evidence—Whether contempt.
Carl-Zeiss-Stiftung v. Rayner & Keeler Ltd., Russell J. **1145.**

CONTRACT

Construction

Power to amend terms unilaterally

Pension scheme—" Unforeseen circumstances."
Alfred Herbert Ltd. v. Hancocks, Cross J. **271.**

Exceptions clause

Negligence

Tenancy agreement — Landlord not " in any circumstances " responsible for damage caused by water—Damage to tenant's goods by water escaping from cistern in water closet retained in landlord's possession—Landlord's liability for negligence.
Akerib v. Booth Ltd., Jones J. **454.**

Formation

Intention to create legal relationship

Family arrangement—Sharing home—Agreement by plaintiffs to leave their own home and share home of defendants and by defendants to devise their house to female plaintiff.
Parker v. Clark, Devlin J. **286.**

No intention to create new obligations

Intention to give effect to believed existing rights—Mistake of law—Whether new contract created.
Beesly v. Hallwood Estates Ltd., Buckley J. **549.**

Illegality

Landlord and tenant

Agreement—User requiring planning permission—Undertaking by tenant during negotiations for letting to apply for permission — Planning permission refused — Whether agreement to let before permission obtained void for illegality — Town and Country Planning Act, 1947, ss. 12 (1), 23 (1), 24 (3).
Best v. Glenville, C.A. **1198.**

Termination

Family agreement

Sharing home—Promise of bequest by owners—Whether agreement for their lives.
Parker v. Clark, Devlin J. **286.**

COSTS

" Bullock " order

" Bullock " or Sanderson order

Discretion of court—County court—Action against three defendants—Judgment against insolvent defendant—Whether unsuccessful defendant should pay costs of successful defendants—Whether plaintiff should pay costs of successful defendants with right to recover from unsuccessful defendant.
Mayer v. Harte, C.A. **770.**

County court action

Payment into court with fixed costs accepted

Accepted by plaintiff but subsequent application for " further costs " — Costs incurred before issue of summons—Discretion of court—Refusal to allow amendment of incomplete bill—County Court Rules, 1957, amended by County Court (Amendment) Rules, 1959, Ord. 11, r. 1 (3) (*c*).
Hopkins v. Manners, C.A. **599.**

Justices

Crown practice

Liability of justices for costs—Certiorari—General practice.
Reg. v. Liverpool Justices. *Ex parte* **Roberts,** Divl.Ct. **585.**

Taxation

Application to review

Chancery Division—Supreme Court Costs Rules, 1959 (S.I. 1959, No. 1958, Sch. 2), s. 35.
Practice Direction 1194.

Order for

Form—Chancery Division—Originating summons—Construction of document or variation of trust.
Practice Direction, Ch.D. **114.**

COUNTY COURT

High Court

Action transferred

Jurisdiction of county court—Action for unliquidated damages begun in High Court—Agreement contained in letters between parties to transfer action to county court—No express abandonment by plaintiff of excess of claim over £400—Consent order by master to transfer—No statement in order of provision under which master acted—Whether jurisdiction of county court unlimited—Agreement not in existence when summons to transfer issued—Agreement not filed until after judgment—Whether county court deprived of jurisdiction—County Courts Act, 1934, ss. 43, 45, 65—County Court Rules, 1936, Ord. 16, r. 10 (2) (*b*)—County Courts Act, 1959, ss. 41, 42, 45, 67.
Williams v. Settle, C.A. **1072.**

COURT OF APPEAL

Appeal out of time

Legally aided case

Notice of appeal should be filed without waiting for the grant of legal aid.
Addison v. Addison and Holden, C.A. **1088.**

County court

Appeal from

Claim exceeding £200—Form of plaint—County Courts Act, 1934, ss. 40, 41—County Courts Act, 1955, ss. 1, 12. **Leslie v. Liverpool Corpn.,** C.A. **1.**

Jurisdiction—Fact, question of—Claim exceeding £200—Claim for damages originally exceeding £200 amended to reduce claim to less than £200 — Prayer for damages "limited to £400"—Third party proceedings by defendants for indemnity—Whether claim as between defendants and third party an action for damages exceeding £200 – Whether third party entitled to appeal on question of fact—County Court Rules, 1936, Ord. 12, r. 3 (2)—County Courts Act, 1959, s. 109.
William Mallinson & Sons (Mfg.) Ltd. v. Key Transport Co. Ltd., C.A. **1301.**

Discretion of judge, matter within

Application for jury

Whether court will interfere with judge's decision. **Pease v. George,** C.A. **427.**

Jurisdiction

New Act after hearing below

Whether applicable on appeal—Powers of highway authority—Declaration—Highways Act, 1959. **Ching Garage Ltd. v. Chingford Corpn.,** C.A. **947.**

——————————— Procedural or substantive point — Act against vexatious litigants—Supreme Court of Judicature (Consolidation) Act, 1925, ss. 27 (1), 51 (1)—Supreme Court of Judicature (Amendment) Act, 1959, s. 1 (1).
In re **Vernazza,** H.L.(E.) (pets. dis. and all.) **139.**

CRIME

Aiding and abetting

Continuing offence

Taking and driving away motor-vehicle—Accessory to driving away only.
Reg. v. Stally, C.C.A. **79.**

Evidence

Offences by driver of motor-cycle—Sitting on pillion—No evidence of joint enterprise—Road Traffic Act, 1930, ss. 28 (1), 35 (1). **D. (An Infant) v. Parsons,** Divl.Ct. **797.**

Conspiracy

Complicated charge

"Rolled-up" charge—Undesirability. **Reg. v. Davey,** C.C.A. **1287.**

Undesirability—Whether one conspiracy—Substantive charge to be considered first.
Reg. v. Dawson, C.C.A. **163.**

Court of Criminal Appeal

Substitution of verdict

Alternative counts—Convictions on both—No rule that lesser charge should be preferred—Criminal Appeal Act, 1907, s. 5 (2). **Reg. v. Dawson,** C.C.A. **163.**

Evidence

Depositions

Incriminating evidence by prosecution witness on deposition before committing magistrates—Contradictory evidence at trial—Witness treated as hostile—Refusal to admit truth of deposition—Whether jury entitled to rely on original statement.
Reg. v. Golder, C.C.A. **1169.**

Hearsay

Admissible to show fact that statement was made—Charge of stealing—Defendant's lack of candour with police after commission of offence—Conversation between defendant and co-defendant before defendant's interviews with police—Evidence of conversation sought to be adduced by defendant—Whether admissible as evidence of defendant's state of mind at time of interviews, to explain his conduct. **Reg. v. Willis,** C.C.A. **55.**

Previous testimony of accused

Bankruptcy proceedings, in—Admissibility—Larceny Act, 1916, ss. 20, 43 (2) (3).
Reg. v. Dawson, C.C.A. **163.**

CRIME—*continued.*

Fraud

Credit by, obtaining

Sale—Agreement for—Price paid—Goods not delivered. **Reg. v. Dawson,** C.C.A. **163.**

Indictment

Duplicity

Two separate offences charged in one count—Larceny Act, 1916, ss. 26 (1), 27 (2). **Reg. v. Nicholls,** C.C.A. **658.**

Need for few counts

Inclusion of charges rejected at preliminary inquiry—Undesirability—Conspiracy count joined with substantive counts—Undesirability. **Reg. v. Dawson,** C.C.A. **163.**

Practice

Sentence

Preventive detention—Prison Commissioners' report—Copy of report not shown to prisoner—Effect on sentence—Criminal Justice Act, 1948, s. 21 (4) (5). **Reg. v. Governor of Parkhurst Prison.** *Ex parte* **Philpot,** Divl.Ct. **115.**

Sentence

Borstal training

Vagrancy — Probation order — Breach — Three months' maximum sentence for vagrancy offence—Whether Borstal appropriate sentence—Vagrancy Act, 1824, s. 4. **Reg. v. James,** C.C.A. **812.**

Probation order

Breach—Charge of—Breach found by justices—Remand to quarter sessions—Whether certificate of justices conclusive—Procedure—Criminal Justice Act, 1948, s. 6 (4). **Reg. v. Chapman,** C.C.A. **147.**

——— New probation order while former order not discharged—Subsequent breach of both probation orders—Preventive detention imposed in respect of breach of first probation order—Whether sentence valid—Whether and for what purposes first probation order effective after making of second probation order. **Reg. v. Keeley,** C.C.A. **749.**

Supervision order

Twelve months or more sentence—Two offences—Consecutive sentences of nine months in respect of each—Whether sentence of twelve months or more—Power of court to make order to notify address on discharge—Criminal Justice Act, 1948, s. 22. **Reg. v. Mordanam,** C.C.A. **7.**

Verdict of jury

Unanimity

Need for—Judge's direction. **Reg. v. Davey,** C.C.A. **1287.**

CROWN PRACTICE

Certiorari

Costs

Successful application to quash conviction—Application not resisted by prosecutor—No appearance by prosecutor—Whether costs may be awarded against non-appearing party. **Reg. v. Liverpool Justices.** *Ex parte* **Roberts,** Divl.Ct. **585.**

Error of law on face of record

Agricultural land tribunal—Evidence wrongly admitted—No error of law on face of record—Inadmissibility of affidavit evidence. **Reg. v. Agricultural Land Tribunal for South Eastern Area.** *Ex parte* **Bracey,** Divl.Ct. **911.**

Inferior tribunal

Jurisdiction—Evidence—Admissibility of affidavit evidence. **Reg. v. Lewes Justices.** *Ex parte* **Plumpton & District Club Trustees,** Divl.Ct. **700.**

Registrar of Building Societies—Order against society advertising for capital—Prevention of Fraud (Investments) Act, 1958, s. 11 (1) (2) (3). **Reg. v. Registrar of Building Societies.** *Ex parte* **A Building Society,** Divl.Ct. & C.A. **669.**

CYPRUS

Hotchpot

Undisposed residue

Surviving children of predeceased son—Whether advance by deceased to son to be brought into hotchpot by son's children—" Share "—Cyprus Wills and Succession Law (c. 220), 1942, ss. 49, 51 **Zalihe Veli v. Sevim Ismail,** J.C. **1254.**

DAMAGES

Exemplary

Copyright, breach of

Sale of photographs of murdered father of plaintiff's pregnant wife—Conduct rendering possible vulgar and offensive behaviour by national newspapers—Scandalous conduct and flagrant breach by defendant—Whether jurisdiction to award exemplary damages—Copyright Act, 1956, s. 17 (3). **Williams v. Settle,** C.A. **1072.**

DAMAGES—*continued.*
Mitigation
Service agreement
When duty to mitigate arises—Reasonableness of offer.
Shindler v. Northern Raincoat Co. Ltd., Diplock J. **1038.**

Personal injuries
Disability pension
Compulsory contributor to statutory superannuation fund—Injuries resulting in inability to work—Superannuation before normal retirement age—Whether pension to be set off against loss of wages.
Judd v. Hammersmith, etc., Hospitals Board, Finnemore J. **328.**

DEED
Execution
Escrow
Intention to execute in duplicate — Execution of one part conditional on execution of counterpart—Whether delivery imported.
Beesly v. Hallwood Estates Ltd., Buckley J. **549.**

ECCLESIASTICAL LAW
Faculty
Demolition of church
Jurisdiction. *In re* **St. George's, Birmingham**, Salt Q.C. Ch. **1069.**

Union of benefices
Scheme
Compliance by scheme framing authorities with statutory requirements—Jurisdiction of Judicial Committee to consider proposed scheme *de novo* and on its merits—Union of Benefices Measure, 1923, s. 10 (3) (5)—Pastoral Reorganisation Measure, 1949, s. 3 (2).
Little Leigh Parochial Church Council v. Church Comrs., J.C. **567.**

EDUCATION
University
Discipline
Domestic commission of inquiry—Duty to comply with natural justice.
Ceylon University v. Fernando, J.C. **223.**

ESTOPPEL
Conduct, by
Contract
Promise inducing—Unenforceable contract—No detriment to promisee—Whether promise can render enforceable. **Beesly v. Hallwood Estates Ltd.**, Buckley J. **549.**

Husband and wife
Bigamy—Circumstances fully disclosed to other spouse at marriage.
Bullock v. Bullock, Divl.Ct. **975.**

Motor car
Hire-purchase—Signature of hire-purchase documents unread—Effect.
Lowe v. Lombank Ltd., C.A. **196.**

Per rem judicatam
Maintenance—Quantum—Attachment of earnings order—Subsequent proceedings.
Pepper v. Pepper, Probate **131.**

Mortgage
Assignment of policy of assurance to mortgagee
Covenant by mortgagor to pay premiums—Premiums in arrears—Mortgagee's agreement to reinstatement of policy—Whether mortgagee estopped from exercising power of sale.
Braithwaite v. Winwood, Cross J. **1257.**

EVIDENCE
Affidavit
Hearsay
Scandalous hearsay allegations—Admissibility on application to suspend mother's access to child—R.S.C., Ord. 38, rr. 3, 11. **Rossage v. Rossage**, C.A. **249.**
Ward of court—Statement of information and belief—Whether admissible in application to take ward out of jurisdiction—R.S.C., Ord. 38, rr. 3, 11.
In re **J. (An Infant)**, Cross J. **253.**

Cross-examination
Material unproved, on
Discretion of advocate. **Fox v. General Medical Council**, J.C. **1017.**

Deceased's statement
Bankrupt
Statement of affairs—Whether admissible—Whether a "deposition"—Bankruptcy Act, 1914, s. 141. *In re* **Browne (A Bankrupt)**, Cross J. **692.**

Denial
Prior denial of charge to friend
Whether admissible—Recent invention alleged.
Fox v. General Medical Council, J.C. **1017.**

EVIDENCE—*continued.*
Privilege
Justices' clerk
Note of evidence in other proceedings. **McKinley v. McKinley,** Wrangham J. **120.**

FACT OR LAW
Income tax
Profits of trade
Work in progress—Method of valuation.
Duple Motor Bodies v. Inland Revenue Comrs., C.A. **510.**
Negligence
Standard of care
Always a question of fact. **Brown v. Rolls Royce Ltd.,** H.L.(Sc.) **210.**

FACTORY
Dangerous machinery (fencing)
Duty to guard against acts reasonably foreseeable
Hand deliberately placed in position of danger—Effective cause of accident—Factories Act, 1937, s. 14 (1). **Rushton v. Turner Brothers Asbestos Co. Ltd.,** Ashworth J. **96.**

Fence, extent of duty to
Handrail three feet high—Gap of eighteen inches—Overhead travelling cable way—Buckets suspended from cable—Whether cable way "machinery" requiring to be fenced—Factories Act, 1937, s. 14 (1).
Quintas v. National Smelting Co. Ltd., Devlin J. **217.**
Vehicle
Truck used for carrying materials produced in factory—Workman injured by revolving fan of truck engine while adjusting oil feed—Whether truck "any machinery" requiring to have all dangerous parts fenced—Meaning of "any machinery"—Factories Act, 1937, s. 14 (1). **Cherry v. International Alloys Ltd.,** C.A. **563.**

Staircase
Handrails
Meaning of "staircase"—Three steps wedged into platform—Factories Act, 1937, s. 25 (2).
Kimpton v. Steel Company of Wales Ltd., C.A. **527.**

FATAL ACCIDENTS ACTS
Damages
Funeral expenses
Tombstone—Erection of memorial over grave six months after funeral—Law Reform (Miscellaneous Provisions) Act, 1934, ss. 1 (2) (*c*), 2 (3).
Stanton v. Ewart F. Youldon Ltd., McNair J. **543.**

FIREARM
Certificate
Ambit
"Sporting purposes"—Loan to person not holding certificate with instructions to shoot rats—Firearms Act, 1937, s. 4 (7). **Morton v. Chaney,** Divl.Ct. **1312.**
Meaning
"*Lethal . . . weapon*"
Airgun—Gun capable of causing serious injury only when misused by firing it at close range at vulnerable part of body—Least powerful type of airgun obtainable—Whether lethal weapon—Firearms Act, 1937, ss. 19 (1), 32 (1).
Moore v. Gooderham, Divl.Ct. **1308.**

GAMING
Betting
Promise to pay
Debtor and creditor both dead—Onus of proving whether debt is enforceable—Proof of debt admitted by debtor's trustee in bankruptcy.
In re **Browne (A Bankrupt),** Cross J. **692.**

HABEAS CORPUS
Criminal cause or matter
Prisoner serving sentence
Application by—Practice. *In re* **Wring (Practice Note),** Divl.Ct. **138.**

HIGHWAY
Access
Adjoining owner
Proposal by highway authority to erect "refuge" at point where means of access emerged on to highway. **Ching Garage Ltd. v. Chingford Corpn.,** C.A. **947.**

HIGHWAY—*continued.*
Private street works
Footpath
Occupation way—Strip of land laid out as occupation way—Subsequent use by public for right of way on foot only—Whether a highway repairable by inhabitants at large—Highway Act, 1835, s. 23—Private Street Works Act, 1892, ss. 5, 7.
Margate Corporation v. Roach, Divl.Ct. **1380.**

Improvements by local authority
Material defect in resolution—No reference to street lighting or sewering—Specification providing for new street lighting and surface water drainage—Limitation on power of justices to amend resolution—"Channel"—Meaning of—Whether apt to cover subterranean drainage. **Ware Urban District Council v. Gaunt,** Divl.Ct. **1364.**

Objection to proposals
Jurisdiction of justices—Resolution to make up street and apportion expenditure on one basis — Service of notices — Further resolution on different basis — Whether valid—Private Street Works Act, 1892, ss. 6, 7, 10, 11.
Wilson v. Wrexham Corpn., Divl.Ct. **319.**

Road made in 1885
Laid out alongside section of public footpath repairable by inhabitants at large—Further section of footpath diverted to lie alongside new road—Unfenced—Whole of road including footpath used by public on foot—No repairs carried out by local authority except to footpath—Whether road a "street" not repairable by inhabitants—Whether footpath fronts on street—Whether private premises fronting footpath "front" or "adjoin" street—Highway Act, 1835, s. 23—Private Street Works Act, 1892, ss. 5, 6, 8.
Ware Urban District Council v. Gaunt, Divl.Ct. **1364.**

Refuge
Power to erect
Power of highway authority to erect "refuge" at point where means of access emerged on to highway—"Carriageway"—Whether refuge prevented access to highway—Highways Act, 1959, ss. 67 (1) (2) (3), 68 (1), 85 (1) (*a*), (3) (*d*), 295 (1).
Ching Garage Ltd. v. Chingford Corpn., C.A. **947.**

HIRE-PURCHASE
Hire-purchase agreement
Implied statutory condition
Fitness for purpose—Acknowledgment by hirer of fitness of car—Whether hirer estopped from alleging that implied statutory condition broken—Hire-Purchase Act, 1938, s. 8 (2) (3). **Lowe v. Lombank,** C.A. **196.**

HOUSING
Requisitioned houses
Recoverable rent
Rent increases in respect of requisitioned properties released to owners — Payment of increases by local authority—Whether duty of local authority to make periodic reviews—Requisitioned Houses and Housing (Amendment) Act, 1955, s. 4 (4).
Taylor v. Munrow, Divl.Ct. **151.**

HOUSE OF LORDS
Leave to appeal
Mental deficiency
Refusal by Court of Appeal of leave to appeal against refusal of High Court of leave to bring proceedings—Whether jurisdiction to grant leave to appeal to House of Lords—Lunacy Act, 1890, s. 330 (2)—Mental Treatment Act, 1930, s. 16 (1)—Appellate Jurisdiction Act, 1876, s. 3—Supreme Court of Judicature (Consolidation) Act, 1925, s. 31 (1) (i). **Whitehouse v. Board of Control,** H.L.(E.) **1093.**

HUSBAND AND WIFE
Adultery
Connivance
Meaning — Husband turning wife out knowing she would return to lover — Absence of "corrupt" intention. **Haynes v. Haynes and Sawkill,** Wrangham J. **968.**

Effect of common law
Conduct conducing by husband—Whether wife's licence to matrimonial home terminated by her adultery. **Short v. Short,** C.A. **833.**

Evidence
Incriminating question — "Proceedings instituted in consequence of adultery" — Party cross-examined charged with cruelty—Party cross-examined alleging adultery—Question relevant to cruelty charge—Matrimonial Causes Act, 1950, s. 32 (3).
Haynes v. Haynes and Sawkill, Wrangham J. **968.**

HUSBAND AND WIFE—*continued.*

Condonation

Cruelty

Cruel conduct by wife to induce sexual intercourse—Final act of intercourse by husband. **Willan v. Willan,** C.A. **624.**

Revival of condoned offence

Pleading—Adultery unknown to condoning spouse and not pleaded—Whether capable of constituting revival—Matrimonial Causes Act, 1950, s. 4. **Scott v. Scott (Quine cited),** Karminski J. **915.**

Conduct conducing

Desertion, as

Constructive desertion — Wife's adultery condoned — Wife then turned out — Subsequent adultery. **Haynes v. Haynes and Sawkill,** Wrangham J. **968.**

Insanity

As defence—Knowledge that acts of cruelty "wrong"—Meaning of "wrong"—Evidence of knowledge. **Sofaer v. Sofaer,** Collingwood J. **1173.**

——— Whether genuine belief in false accusations arising from mental disorder is a defence to a charge of cruelty based thereon—Reasonable apprehension of injury to health. **Robins v. Robins,** Wrangham J. **1089.**

Intention to injure

Effeminacy of husband—Feminine proclivities concealed from wife—Chance discoveries by wife—Failure of husband to undergo treatment—Treatment unlikely to cure marital difficulties. **Bohnel v. Bohnel,** C.A. **590.**

Desertion

Separation agreement

Consensual separation recited in written maintenance agreement—Period of separation indefinite—Subsequent offers by husband to return rejected by wife—Whether wife in desertion. **Hall v. Hall,** Wrangham J. **52.**

Termination

Separation agreement before 1938—Right to disregard agreement under statute—Wife in desertion at time of agreement—Husband's refusal of wife's offers to return—Whether parties entitled to rely on statute—Divorce (Insanity and Desertion) Act, 1958, s. 3. **Pearce v. Pearce,** C.A. **855.**

Three years from presentation of answer

Amendment of answer to allege desertion by way of cross-petition—Three years completed at date of amendment but not at date of answer—Leave at hearing to amend answer further by striking out prayer for divorce—Leave to file a fresh petition seeking divorce and to consolidate the two suits. **Jacobs v. Jacobs,** Karminski J. **1236.**

Divorce

Costs

Statement taken by petitioner's solicitor from respondent — Costs incurred excluded by commissioner—Whether wrongly excluded. **Davies v. Davies,** C.A. **1004.**

Cross-petition

Bar to petition removed; whether cross-petition barred—Separation agreement before 1938—Respondent's desertion before separation agreement of 1936—Petitioner's desertion in 1943—Divorce (Insanity and Desertion) Act, 1958, s. 3. **Pearce v. Pearce,** C.A. **855.**

"Proceedings instituted in consequence of adultery"—Whether cross-petition for cruelty part of proceedings—Meaning of "proceedings"—Question relevant to cruelty tending to show adultery—Matrimonial Causes Act, 1950, s. 32 (3). **Haynes v. Haynes and Sawkill,** Wrangham J. **968.**

Discretion

Failure to pray for exercise—Disclosure of petitioner's adultery after decree nisi but before decree absolute—Leave to amend notwithstanding. **Onions v. Onions,** Collingwood J. **983.**

Evidence

Adultery—Denial of adultery in answer—Verified by affidavit—Not denied in evidence-in-chief — Whether cross-examination thereon permissible — Matrimonial Causes Act, 1950, s. 32 (3). **Corfe v. Corfe,** C.A. **208.**

Jurisdiction

Residence, based on—Polygamous marriage in Nigeria—Subsequent ceremony at register office in England—Jurisdiction of English court—Matrimonial Causes Act, 1950, s. 18 (1) (*a*). **Ohochuku v. Ohochuku,** Wrangham J. **183.**

No evidence advanced by one party seeking decree

Jurisdiction of court. **Black v. Black (May intervening),** Sachs J. **182.**

INFANT

Custody

Appeal from justices

Practice—Guardianship of Infants Acts, 1886 and 1925—R.S.C., Ord. 55A. **Practice Direction,** Ch.D. **744.**

INJUNCTION

Form

Joint or several

Injunction not expressed to restrain severally—Breach of injunction by one defendant—Jurisdiction to commit for contempt. **Lenton v. Tregoning,** C.A. **333.**

Nuisance

Mandatory order on occupiers of land " at all times " to keep culvert clear and unobstructed—Whether too wide. **Pemberton v. Bright,** C.A. **436.**

Trap

Injunction to restrain sales of cars as new—Disputed meaning of " new "—Need for definition in injunction. **Morris Motors Ltd. v. Phelan,** Roxburgh J. **352, 566.**

INTEREST

Unliquidated damages

Time from which interest to be awarded

Discretion of court—Law Reform (Miscellaneous Provisions) Act, 1934, s. 3 (1). **Carr v. Boxall,** Cross J. **314.**

JUDICIAL PRECEDENT

Question of fact

Jury question

Decision of judge on it not a precedent. **Brown v. Rolls-Royce Ltd.,** H.L.(Sc.) **210.**

JUSTICES

Appeal to High Court

Stay pending appeal

No power to stay refusal of order—Adoption Act, 1958, s. 35 (3). *In re* **C. S. C.,** Roxburgh J. **304.**

" Care and possession " of applicant for three months

Whether " continuous "

Child spent three nights with mother—Adoption Act, 1958, s. 3 (1). *In re* **C. S. C.,** Roxburgh J. **304.**

Case stated

Jurisdiction to state case

Quarter sessions—Order varying corn rents under Inclosure Act—No obligation to hear parties — Whether judicial decision — Whether power to state consultative case — Inclosure Act, 1801 (Scremby). *In re* **Scremby Corn Rents,** Divl.Ct. **648.**

Committal to quarter sessions

Best method

Young person—Desirability of committal under section 29—Magistrates' Courts Act, 1952, ss. 28, 29. **Reg. v. Dangerfield,** C.C.A. **268.**

Discretion of court

Possibility of legitimising child

Relevance—Putative father willing to marry mother after divorce. *In re* **C. S. C.,** Roxburgh J. **304.**

Election to go for trial

Indictable offence triable summarily

Consent to summary trial—Magistrate's right to allow accused to withdraw consent—Whether he had begun to try information—Prosecution witness heard—Magistrates' Courts Act, 1952, ss. 19 (5), 24. **Reg. v. Bennett.** *Ex parte* **Radburn,** Lord Parker C.J. **102.**

Fine or penalty

National Insurance contribution

Failure to pay—Order for arrears—Jurisdiction to mitigate payment of arrears—" Recoverable as a penalty "—National Insurance (Contributions) Regulations, 1948, reg. 19 (5)—Magistrates' Courts Act, 1952, s. 27 (1). **Leach v. Litchfield,** Divl.Ct. **1392.**

Information

Information or complaint

Control of dog—Whether proceedings instituted by information or complaint—Dogs Act, 1871, s. 2—Magistrates' Courts Act, 1952, ss. 42, 100 (1). **Reg. v. Nottingham Justices.** *Ex parte* **Brown,** Divl.Ct. **1315.**

Judicial separation

Discretion

Prayer for discretion not required in petition for judicial separation—Discretion statement not required—Matrimonial Causes Act, 1950, s. 14 (1)—Matrimonial Causes Rules, 1957, rr. 4 (4), 28 (1). **Haniver v. Haniver,** Sachs J. **310.**

JUSTICES—*continued.*

Jurisdiction

Functi officio

Plea of guilty followed by fine—Accused recalled and acquitted—Whether justices have jurisdiction so to act—Whether functi officio. **Morton v. Chaney,** Divl.Ct. **1312.**

Justices

Clerk

Note of evidence—Whether privileged. **McKinley v. McKinley,** Wrangham J. **120.**

Public interest in proceedings

Election to call no evidence—Whether evidence may be called at rehearing. **Horton v. Horton,** Divl.Ct. **987.**

Submission of no case

Submission upheld—Appeal—Rehearing ordered—Right of husband to call evidence at rehearing. **Horton v. Horton,** Divl.Ct. **987.**

Maintenance

Divorce

Time bar—Application several years after decree—No prayer for maintenance in petition. **Pachner v. Parker,** Marshall J. **486.**

Justices

Attachment of earnings—Effect of order in subsequent proceedings as to quantum—Married Women (Summary Jurisdiction) Act, 1895, s. 7—Maintenance Orders Act, 1958, s. 6. **Pepper v. Pepper,** Probate **131.**

Jurisdiction—Wife's application for custody of and maintenance for child—No cross-complaint by husband—Whether original maintenance ordered for wife may be decreased. **Pepper v. Pepper,** Probate **131.**

Variation—Appeal—Procedure—R.S.C., Ord. 41A, r. 3 (3). **Practice Direction,** Probate **566.**

Wilful neglect to maintain—Burden of proof—Whether husband's delusion of physical disability an excuse. **Stirland v. Stirland,** Divl.Ct. **18.**

Marriage

Declaration of validity

Power of court to make—R.S.C., Ord. 25, r. 5. **Woyno v. Woyno,** Mr. Comr. Edgedale Q.C. **986.**

Nullity

Wilful refusal to consummate

Just excuse—Husband aware that subsequent religious ceremony an essential pre-condition to matrimonial cohabitation—Refusal to arrange ceremony. **Jodla v. Jodla,** Hewson J. **236.**

Practice

Costs. See also **Divorce** (*Death of party*).

Taxation—Application to review—Supreme Court Rules, 1959, r. 35. **Practice Direction,** Probate **1142.**

Taxation—Bill to show item numbers—Supreme Court Costs Rules, 1959, Appendix 2. **Practice Direction,** Probate, **125.**

Pleading

Affidavit in support — Whether evidence at hearing — Cross-examination — Matrimonial Causes Act, 1950, s. 32 (3). **Corfe v. Corfe,** C.A. **208.**

Amendment to allege adultery—Discretion statement—Amendment at trial after discretion statement put in evidence—Costs. **Long v. Long,** Karminski J. **546.**

Answer—Bare denial—Provocation and other matters of the nature of confession and avoidance alleged at hearing. **Finch v. Finch,** Mr. Comr. Latey Q.C. **429.**

Petition — Address of petitioner — Application for leave to omit address — Matrimonial Causes Rules, 1959, r. 4 (1) (*d*). **Practice Direction,** Probate **548.**

Service of notice of charge on named woman

Allegation by wife of improper association by husband with named woman—No application to intervene—Costs. **Collins v. Collins,** Mr. Comr. Gallop, Q.C. **660.**

Property

Act of 1882, s. 17

Divorce proceedings pending—Wife's admitted adultery in matrimonial home—Husband's application for possession—Extent of court's discretion—Married Women's Property Act, 1882, s. 17. **Short v. Short,** C.A. **833.**

Wedding presents—To whom?—Married Women's Property Act, 1882, s. 17. **Samson v. Samson,** C.A. **190.**

Act of 1958, s. 7

Wedding presents—To whom?—Matrimonial Causes (Property and Maintenance) Act, 1958, s. 7. **Samson v. Samson,** C.A. **190.**

JUSTICES—*continued.*
Quarter sessions
Jurisdiction
Sentence—Borstal training—Whether jurisdiction in addition to disqualify from driving —Criminal Justice Act, 1948, s. 20 (5) (*a*)—Magistrates' Courts Act, 1952, s. 28.
Reg. v. Dangerfield, C.C.A. **268.**

LAND REGISTRATION
Land Charge
Estate contract
Option for new lease—Non-registration—Whether void against purchaser of reversion—Land Charges Act, 1925, ss. 10 (1), Class C (iv), 13 (2).
Beesly v. Hallwood Estates Ltd., Buckley J. **549.**

LANDLORD AND TENANT
Assignment
Judgment for possession
Sale of property—Assignment of property to company without benefit of judgment—Whether company entitled to enforce order for possession—County Court Rules, 1936, Ord. 25, r. 6. **Chung Kwok Hotel Co. Ltd. v. Field,** C.A. **1112.**

Business premises (security of tenure)
Discovery
Landlord's intention to demolish or reconstruct—Landlord and Tenant Act, 1954, s. 30 (1) (*f*).
Wine Shippers (London) Ltd. v. Bath House Syndicate Ltd., Buckley J. **613, 989.**

Dual proceedings
Notice to determine tenancy—Application to county court for new tenancy—Subsequent commencement of High Court action disputing validity of notice—Adjournment of county court proceedings—Landlord and Tenant Act, 1954, ss. 24 (1), 25 (1).
Airport Restaurants Ltd. v. Southend Corporation, C.A. **880.**

Notice of opposition to new tenancy
Form—Application for new tenancy on terms proposed by tenants—Failure of landlord to state in his notice of opposition whether or not he objected to proposed new terms—No agreement in writing as to terms of new tenancy—Landlord appearing with evidence as to valuation at hearing—Duty of court to determine on evidence reasonability of new terms as to duration and rent—Whether parties' documents on application for new tenancy to be treated as pleadings—Landlord and Tenant Act, 1954, ss. 29 (1), 33, 34.
Morgan v. Jones, C.A. **1220.**

Holding over
"*Wilfully*"
Double rent—Meaning of "wilfully"—Landlord and Tenant Act, 1730.
French v. Elliott, Paull J. **40.**

Option to extend term
Notice of exercise
Tenant remaining in premises and paying rent after expiry of original term—Rent accepted by landlords—Whether option validly exercised by tenant—"Option for continuing for an extension of seven or fourteen years"—Provided tenant "has reasonably fulfilled covenants." **Gardner v. Blaxill,** Paull J. **752.**

Option to purchase
Construction
Lease for five years—Option to tenant to purchase freehold of premises "at any time" —Expiry of term in 1944—Tenant holding over as statutory tenant—Whether tenant entitled to exercise option in 1959—"At any time."
Longmuir v. Kew, Cross J. **862.**

Rent restriction
Personal occupation
Mental illness—Prolonged absence therefrom—Animus revertendi—Test—Onus of proof.
Tickner v. Hearn, C.A. **1406.**

Repairs
Act of 1927
Demolition required by planning authority—Whether premises to be demolished "at or "shortly after . . . termination of tenancy"—Meaning—Admissibility of evidence of events after tenancy terminated—Landlord and Tenant Act, 1927, s. 18 (1).
Keats v. Graham, C.A. **30.**

Covenant
Measure of damages for failure to yield up premises in "good and tenantable" repair—Diminution in value of reversion where premises immediately relet—Landlord and Tenant Act, 1927, s. 18 (1). **Jaquin v. Holland,** C.A. **258.**

Reversionary tenancy
Agreement for future tenancy
Distinction—Landlord and Tenant Act, 1954, ss. 28, 65 (3).
Green v. Bowes-Lyon, Divl.Ct. **176.**

LANDS TRIBUNAL
Appeal from
Fact
Further evidence—Lands Tribunal Act, 1949, s. 3 (4).
Routh's Trustees v. Central Land Board, C.A. **737.**

LAW REPORT
Citation
Authenticity
Revision of The Law Reports by judges.
Reg. v. Agricultural Land Tribunal for South Eastern Area. *Ex parte* **Bracey,** Divl.Ct. **911.**

LEGAL AID
Certificate
Appeal
Notice of Appeal to be filed without waiting for grant of legal aid.
Addison v. Addison and Holden, C.A. **1088.**
Costs
Aided plaintiff and defendant
Action for damages for fraud—Plaintiffs awarded damages—No order as to costs—Liability of defendants to pay costs—Proper order—Legal Aid and Advice Act, 1949, ss. 1 (7) (*b*), 2 (*e*), 3 (1). **Blatcher v. Heaysman,** C.A. **663.**
Order for costs against aided person
Damages awarded to aided person—Payment into court—Payment out on satisfaction of costs to be paid by aided person. **Carr v. Boxall,** Cross J. **314.**
Taxation
Expert witnesses—Solicitor and client costs—Disallowance of costs allowed on party and party taxation — Items not authorised — Payable by defendants to legal aid fund — Solicitor's right to recover—Legal Aid (General) Regulations, 1950 (as amended by the Legal Aid (General) (Amendment No. 1) Regulations, 1954, and Legal Aid (General) (Amendment No. 2) Regulations, 1955), reg. 14 (4) (5) (6).
Ullah v. Hall Line Ltd., Davies J. **1320.**

LIBEL AND SLANDER
Newspaper
Absolute privilege
Statement by solicitor at criminal trial—Whether newspaper bound to verify accuracy.
Burnett & Hallamshire Fuel Ltd. v. Sheffield Telegraph & Star Ltd., Salmon J. **502.**
Republication
Innuendo—Onus of proof—Alleged misdirection.
"Truth" (N.Z.) Ltd. v. Holloway, J.C. **997.**
Privilege
Absolute privilege
Judicial tribunal — Bar Council — Whether complaint to Council protected by absolute privilege. **Lincoln v. Daniels,** Salmon J. **852.**

LICENCE OR TENANCY
Exclusive occupation
Payment of rent
Hotel premises—Permissive occupation under business arrangement—Whether conclusive of tenancy. **Isaac v. Hotel de Paris Ltd.,** J.C. **239.**

LICENSING
Forfeiture
Conviction of "the owner or occupier"
Members' club—Unlawful sale of liquor—Seizure by police—Conviction of one member—Liquor forfeited—Whether member was "the owner or occupier"—Licensing Act, 1953, s. 152 (2).
Reg. v. Lewes Justices. *Ex parte* **Plumpton & District Club Trustees,** Divl.Ct. **700.**
Justices
Jurisdiction
Meeting subsequent to general annual licensing meeting fixed beyond statutory period—Mandamus—Licensing Act, 1953, Sch. 2, Part I, para. 5.
Reg. v. Woodbury Licensing Justices. *Ex parte* **Rouse,** Divl.Ct. **461.**

LIMITATION OF ACTION
Bankruptcy
Mortgage
Order in bankruptcy against mortgagor—Rights of mortgagee not barred before bankruptcy—Whether time runs—Notice to trustee to elect whether to redeem security—Whether effective—Bankruptcy Act, 1914, Sch. II, r. 13 (*c*).
Cotterell v. Price, Buckley J. **1097.**

LIMITATION OF ACTION—*continued.*

Crime

Continuing offence

Litter depositing—Magistrates' Courts Act, 1952, s. 104.
Vaughan v. Biggs, Divl.Ct. **622.**

Mortgage

Second mortgage

Order in bankruptcy against mortgagor—Second mortgagee's rights against mortgagor statute barred—Whether entitled to redeem first mortgage—Law of Property Act, 1925, s. 95. **Cotterell v. Price,** Buckley J. **1097.**

LOCAL GOVERNMENT

Powers

Duty to exercise statutory discretion

Resolution by local authority to bear whole of rent increases of derequisitioned properties —Whether periodic reviews called for—Requisitioned Houses and Housing (Amendment) Act, 1955, s. 4 (4). **Taylor v. Munrow,** Divl.Ct. **151.**

MASTER AND SERVANT

Conduct of service

Implied term

Absence from work through sickness — Whether remuneration payable — Notice ending service—Whether one week sufficient—Weekly salary.
Orman v. Saville Sportswear Ltd., Pilcher J. **1055.**

Remuneration

Absence from work through sickness

Production manager employed at basic salary plus bonus—Whether implied term negativing employee's right to payment during period of sickness—Whether employee entitled to be paid bonus. **Orman v. Saville Sportswear Ltd.,** Pilcher J. **1055.**

MEDICAL PRACTITIONER

Medical Disciplinary Committee

Conduct of hearing

Appeal—Rehearing—Powers and duties of Board—"Due inquiry"—Evidence—Admissibility—Medical Act, 1956, s. 36—General Medical Council Disciplinary Committee (Procedure) Rules Order in Council, 1958, r. 43 (2).
Fox v. General Medical Council, J.C. **1017.**

MENTAL DEFICIENCY

Court of Protection

Proceedings under Variation of Trusts Act, 1958

Procedure. **Practice Direction,** Ct. of Protection **17.**

Jurisdiction

Patient's property—Settlement or gift of patient's property for benefit of patient's family —Mental Health Act, 1959, s. 103 (1) (*d*). **Practice Direction,** Ct. of Protection **1253.**

Leave to bring order

Reasonable care

Urgent removal—Whether substantial ground for contention that officer acted without reasonable care—Whether reasonable belief that patient of unsound mind—Meaning of "unsound mind"—Lunacy Act, 1890, s. 14 (1) (*a*) (as amended by the National Health Service Act, 1946, s. 50 and Sch. 9, Pt. I) and s. 330 (as amended by Mental Treatment Act, 1930, s. 16 (1). **Buxton v. Jayne,** C.A. **738.**

Settlement of patient's property

Discretion of court

Possibility that patient might squander property on recovery—Mental Health Act, 1959, s. 103—Law of Property Act, 1925, s. 171 (1) (5).
In re **C.,** 1958, No. 1950, Danckwerts J. **92.**

METROPOLIS

Insulting behaviour occasioning breach of peace

Touting

Hostess standing in door of restaurant beckoning to passers-by—Metropolitan Police Act, 1839, s. 54 (13). **Bryan v. Robinson,** Divl.Ct. **506.**

MINES

Act of 1954

Breach of statutory duty

Roof and sides—Fall of stone from roof following fall of girder—Injury to electrician working on fitting on fallen girder—Duty to keep road or working place secure—Whether impracticable to avoid or prevent contravention—Whether electrician "workman employed in that part of the mine"—Whether fitting was "debris"—Work "necessary for the setting of the supports"—Mines and Quarries Act, 1954, ss. 48 (1), 51 (3) (*b*), 157—Coal and Other Mines (Support) Order, 1956, Sch. I, reg. 12.
Brown v. National Coal Board, Thesiger J. **67.**

MONEYLENDER
Action for recovery of money
Originating summons
Form—R.S.C., Ords. 3, r. 10; 20, r. 10; 55, r. 5A.
Lewis v. Packer, Danckwerts J. **452.**

MORTGAGE
Practice
Summons for possession
Adjournment—Mortgage not repayable by instalments—Mortgagee's power of sale exercisable—Discretion of court to adjourn summons—R.S.C., Ord. 55, r. 5A.
Braithwaite v. Winwood, Cross J. **1257.**

Receiver
Receipt of rent, by
Trespasser, from—Whether tenancy created—Surrounding circumstances—Law of Property Act, 1925, s. 109 (2). **Stroud Building Society v. Delamont,** Cross J. **431.**

NATIONAL INSURANCE
Contribution
Failure to pay
Conviction for failing to pay one contribution—Order for payment of arrears—Whether justices have power to mitigate payment of arrears—"Recoverable as a penalty"—National Insurance (Contributions) Regulations, 1948, reg. 19 (5)—Magistrates' Courts Act, 1952, s. 27 (1). **Leach v. Litchfield,** Divl.Ct. **1392.**

NATURAL JUSTICE
Open court. *See* OPEN COURT.
Opportunity to meet charge
Notice of charge
Court of formal investigation—Expression of censure without previous notice of charge against officer censured. **The Seistan,** Admiralty **186.**
Whether accused entitled to question witnesses
University—Allegation of pre-knowledge of examination paper—Inquiry under domestic statute. **Ceylon University v. Fernando,** J.C. **223.**

NEGLIGENCE
Onus of proof
Safe system of work
Failure to follow usual precautions. **Brown v. Rolls-Royce Ltd.,** H.L.(Sc.) **210.**
Safe system of work
Dangerous substance
Standard of care—Dermatitis contracted—Contact with oil—Precautionary system—Onus of proof. **Brown v. Rolls-Royce Ltd.,** H.L.(Sc.) **210.**
Pleading
Whether onus on servant to show alternative and safe system.
Dixon v. Cementation Co. Ltd., C.A. **746.**

NEW ZEALAND
Libel
Newspaper
Republication—Innuendo—Onus of proof—Alleged misdirection.
"Truth" (N.Z.) Ltd. v. Holloway, J.C. **997.**

NUISANCE
Highway
Obstruction
Motor-vehicle stationary and unlit on road at night—Illuminated by light from street lamp—Whether dangerous obstruction constituting nuisance.
Parish v. Judd, Edmund Davies J. **867.**
Potential nuisance
Damage reasonably foreseeable
Entrance to culvert left unprotected. **Pemberton v. Bright,** C.A. **436.**
Watercourse
Interference by highway authority
Extension of ancient culvert with new entrance on adjoining occupiers' land—Entrance left unprotected by grid—Neighbouring land flooded by blocking of unprotected entrance 30 years after completion of work—Liability of highway authority—Highways Act, 1835, s. 67. **Pemberton v. Bright,** C.A. **436.**

OPEN COURT
Proceedings in
Master
Reference under R.S.C., Ord. 36B, rr. 2, 6.
Hesz v. Sotheby & Co., Master Diamond **285.**

OPEN COURT—*continued.*
Publication of name
Whether court has jurisdiction to forbid publication
Name of party—Court of Appeal.
Reg. v. Registrar of Building Societies. *Ex parte* **A Building Society,** Divl.Ct. & C.A. **669.**

PARLIAMENT
Election
Petition
Validity of election—Petition alleging breaches of Parliamentary Elections Rules—Whether election conducted substantially in accordance with law—Act or omissions not affecting result—Onus of proof—Representation of the People Act, 1949, s. 16 (3).
In re **Kensington North Parliamentary Election,** Election Ct. **762.**

PARTNERSHIP
Dissolution
Continuance of business afterwards
Proprietary rights of former partners.
Burdett-Coutts v. Inland Revenue Comrs., Buckley J. **1027.**

PASSING OFF
Contempt. *See* CONTEMPT OF COURT.
Goodwill, damage to
Sale of article as new
Motor-car—Injunction to restrain—Terms of injunction.
Morris Motors v. Phelan, Roxburgh J. **352, 566.**

PATENT
Practice
Motions
To whom made—R.S.C., Ord. 53A, r. 2. **Practice Direction,** Ch.D. **1272.**

PENSIONS SCHEME
Construction
Amendment
Reservation by employers of right to discontinue, suspend or amend in the event of "unforeseen circumstances"—Whether power to amend beneficial interests of employees. **Alfred Herbert Ltd. v. Hancocks,** Cross J. **271.**

POWER OF APPOINTMENT
Fraud on power
Benefit to non-object
Purpose to benefit objects—Subsequent discovery of possible benefit to appointor—Whether purpose changed—Whether fraud on power.
In re **Robertson's Will Trusts,** Russell J. **1050.**

PRACTICE
Adjournment
Discretion of court
Dual proceedings—High Court proceedings started after county court proceedings in same matter—Adjournment of county court proceedings pending outcome of High Court action. **Airport Restaurants Ltd. v. Southend Corporation,** C.A. **880.**

Appearance
Memorandum
Modified form of writ—R.S.C., Ord. 12, r. 8 (as amended by R.S.C. (No. 1) 1960, r. 1).
Practice Direction, Divl.Ct. **494.**

Chancery Division
Master
Powers—Amendment of R.S.C., Ord. 55, r. 15. **Practice Direction 1195.**
Order, drawing up
Minutes of order drawn by counsel—Functions of registrar. **Practice Direction,** Ch.D. **1168.**
Procedural orders. **Practice Direction,** Ch.D. **1166.**

Consolidation of actions
Libel
Whether order for consolidation can be made out on summons for direction in second action—Discretion—Principles of exercise.
Daws v. Daily Sketch and Daily Graphic Ltd., C.A. **126.**

Declaratory judgment
Discretion
Change in law pending—New Act not yet in force.
Ching Garage Ltd. v. Chingford Corpn., C.A. **947.**

PRACTICE—*continued.*

Discovery

Originating summons

Landlord and tenant—Application for a new lease—Affidavit evidence—Summons adjourned for trial on affidavit and oral evidence—Whether tenants entitled to discovery.
Wine Shippers (London) Ltd. v. Bath House Syndicate Ltd., Buckley J. **613.**

Landlord and tenant—Application for a new lease—Affidavit evidence—Summons adjourned for trial on affidavit and oral evidence—Whether tenants entitled to discovery.
Wine Shippers (London) Ltd. v Bath House Syndicate Ltd., C.A. **989.**

Interlocutory proceedings

Meaning

Infant—Application to suspend access by mother—Whether interlocutory proceeding—Admissibility of hearsay evidence in affidavits—Scandalous matter—Discretion of court to strike out—R.S.C., Ord. 38, rr. 3, 11. **Rossage v. Rossage**, C.A. **249.**

———Ward of court—Application to take out of jurisdiction—Whether interlocutory proceeding—Admissibility of hearsay evidence in affidavits—Discretion of court to strike out—R.S.C., Ord. 38, rr. 3, 11. *In re* **J.**, Cross J. **253.**

Interpreter

Plaintiff in person

Summons—Foreign applicant ignorant of English—Whether applicant entitled to open case through interpreter—Discretion of court.
In re **Trepca Mines Ltd.**, Roxburgh J. **24.**

Jury, civil action

Opening of pleadings by junior counsel

Discontinuance of practice. **Practice Direction**, Q.B.D. & P. **658.**

Right to jury

Judge's discretion—Whether Court of Appeal will interfere—Personal injuries—Very grave injuries—R.S.C., Ord 36, r. 1 (1) (3). **Pease v. George**, C.A. **427.**

Note of Evidence

Right of party to

Matrimonial proceedings—Note of clerk to justices—Required for divorce suit—Right to subpoena clerk. **McKinley v. McKinley**, Wrangham J. **120.**

Originating summons

Moneylender

Application by originating summons for payment of moneys secured—Whether summons should contain facts to be contained in statement of claim—R.S.C., Ords. 3, r. 10; 20, r. 10; 55, r. 5A. **Lewis v. Packer**, Danckwerts J. **452.**

Parties

Joinder

Third party procedure—Third, fourth and fifth parties—Application by third party to serve fourth party notice on fifth party—Supreme Court of Judicature (Consolidation) Act, 1925, s. 39 (1) (*b*)—R.S.C., Ord. 16A, rr. 1, 11—Ord. 16, r. 11.
Piddock v. Clifford Products Ltd., C.A. **1383.**

Pleadings

Amendment

Red ink—Whether necessary—R.S.C., Ord. 19, r. 10; Ord. 28, r. 8.
In re **Langton, decd.**, C.A. **246.**

Particulars

Traverse negative pregnant — Income tax — Penalty — Failure to make returns within prescribed time "without reasonable excuse"—Denial by taxpayer that he failed to furnish particulars required "without reasonable excuse"—Whether denial a negative averment—Whether plaintiffs entitled to particulars of reasonable excuse to be relied on—Income Tax Act, 1952, ss. 19, 232 (2)—R.S.C., Ord. 19, r. 6.
Inland Revenue Comrs. v. Jackson, C.A. **873.**

Stay of Proceedings

Action against company in voluntary liquidation

Action for wrongful dismissal — Application by liquidator to stay action — Substantial dispute as to amount of damages—Whether a matter to be determined in the liquidation —Whether any advantage gained by stay of proceedings—Discretion of court.
Cook v. "X" Chair Patents Co. Ltd., Wynn-Parry J. **60.**

Title of proceedings

Plaintiffs "trustees of estate"

Change in trusteeship. **Routh's Trustees v. Central Land Board**, C.A. **737.**

PRESUMPTION

Death

Long absence

Spouse not heard of for 14 years despite police inquiries—Subsequent marriage—Present spouse aware of circumstances when marrying—Whether estopped from later alleging marriage bigamous. **Bullock v. Bullock**, Divl.Ct. **975.**

PRIVY COUNCIL
Jurisdiction
Professional discipline
Appeal from General Medical Council—Powers and duties of Board.
Fox v. General Medical Council, J.C. **1017.**
Union of benefices
Jurisdiction to consider proposed scheme de novo and on its merits—Union of Benefices Measure, 1923, s. 10 (3) (5)—Pastoral Reorganisation Measure, 1949, s. 3 (2).
Little Leigh Parochial Church Council v. Church Comrs., J.C. **567.**

PROBATE
Costs
Taxation
Bill to show item numbers—Supreme Court Costs Rules, 1959, Appendix 2.
Practice Direction, Probate **125.**

PUBLIC HEALTH
Litter
Leaving
Whether depositing and leaving litter continuing offence—Litter Act, 1958, s. 1 (1).
Vaughan v. Biggs, Divl.Ct. **622.**

RATING
Agricultural building
Pig progeny testing research station
Surrounding land arable meadow or pasture—Buildings—Whether occupied together with and used solely in connection with agricultural operations on the land—"Agricultural "land"—"Agricultural building"—"Thereon"—Meanings—Rating and Valuation (Apportionment) Act, 1928, s. 2 (2).
National Pig Progeny Testing Board v. Greenall, C.A. **1265.**
Industrial hereditament
Laundry
Whether retail shop or "premises of a similar character where retail trade or business . . . "carried on"—Shop—Rating and Valuation (Apportionment) Act, 1928, s. 3 (1) (4).
Almond v. Heathfield Laundry (Birmingham) Ltd., C.A. **1339.**
Research establishment
Hereditament owned by subsidiary of commercial concern—Used for construction and testing of prototypes—Whether industrial hereditament—Whether used for factory purposes—Primary purpose—Factory and Workshop Act, 1901, s. 149 (1) (*a*) (i), Sch. VI —Rating and Valuation (Apportionment) Act, 1928.
Harry Ferguson Research Ltd. v. Dawkins, C.A. **639.**
Playing field
Intermittent use by sports club
Whether "occupied for purposes of" club—"Occupied"—"For the purposes of"—Rating and Valuation (Miscellaneous Provisions) Act, 1955, s. 8 (1) (*c*).
Parker v. Ealing Borough Council, Pennycuick J. **1398.**
Rateable occupation
Golf course
Golf courses occupied in New Forest under licence without prejudice to the rights of commoners—Public not prevented from wandering over golf courses—Whether any rateable occupation of golf courses. **Peak v. Burley Golf Club**, C.A. **568.**
Intermittent use
Playing field used by sports club.
Parker v. Ealing Borough Council, Pennycuick J. **1398.**
"Social welfare"
Ex-services club
"Main objects" contained in written constitution—"To promote comradeship between "and improve the condition and welfare of all ranks, both past and present" of the forces—Whether main objects of organisation "concerned with the advancement of . . . "social welfare"—Rating and Valuation (Miscellaneous Provisions) Act, 1955, s. 8 (1) (*a*). **Victory (Ex-services) Association Ltd. v. Paddington Borough Council**, Divl.Ct. **106.**
Organisation whose purpose is advanced
Trade union or trustees—Convalescent home and home for the aged—Trustees subject to strict control by executive council of union—Rating and Valuation (Miscellaneous Provisions) Act, 1955, s. 8 (1) (*a*).
Isaacs v. Market Bosworth R. D. C., Divl.Ct. **277.**

RESTITUTION
Unjust enrichment
Enemy property
Received by bank to use of enemy person—Claim after Peace Treaty.
Fischler v. Administrator of Roumanian Property, H.L.(E.) **917.**

RESTRICTIVE PRACTICES

Practice

Parties

Non-appearance of parties to agreement—Refusal by six respondents to be represented by trade association—Submission by association to agreed order declaring restrictions contrary to public interest—Undertaking by association not to revive or reintroduce similar scheme without giving notice to registrar—Whether registrar entitled to injunction against non-appearing respondents—Form of order—Restrictive Trade Practices Act, 1956, s. 20 (3) (*a*) (*b*)—Restrictive Practices Court Rules, 1957, r. 11.

In re **National Association of British and Irish Millers Ltd.'s Scheme,** R.P.Ct. **63.**

Reference

Variation of agreement—Scope of inquiry—Reference of agreement containing home and export restrictions—Subsequent deletion of export restrictions from original agreement—Export restrictions incorporated in new document—Justification of restrictions by reference to maintenance of exports—Application to exclude consideration of export restrictions from hearing of reference—Whether court should restrict scope of inquiry—Discretion of court—Restrictive Trade Practices Act, 1956, ss. 8 (8), 18 (1), 31 (1).

In re **Federation of British Carpet Manufacturers' Application,** R.P.Ct., L.R. 1 R.P. 550; **356.**

Recommendation

No powers for enforcing observance

Restriction deemed in law to arise by virtue of recommendation—Whether "restriction "accepted in pursuance of any agreement"—Whether presumption that contrary to public interest—Restrictive Trade Practices Act, 1956, ss. 6 (1) (7) (8), 21 (1).

In re **Federation of Wholesale and Multiple Bakers' (Great Britain and Northern Ireland) Agreement,** R.P.Ct. L.R. 1 R.P. 387; **393.**

Restriction

Price restriction

Whether contrary to public interest—Phenol industry—Fixed prices for phenol—No formula or costings system—Natural phenol produced from distillation of tar—Current fixed price higher than free market price—Whether tar producers would divert tar to burning if phenol price fell—Whether benefits or advantages conferred on public by restrictions—Restrictive Trade Practices Act, 1956, s. 21 (1) (*b*).

In re **Phenol Producers' Agreement,** R.P.Ct. **464.**

Whether contrary to public interest

Price restriction—Baking industry—Fixed retailers' margin—Ascertainment of retail price from average costs—System based on method evolved by Government Department during period of price control—Recommended prices low for high cost section of industry—Whether a true maximum—Whether retail prices in general lower by reason of recommendation—Whether benefits or advantages conferred on public—Restrictive Trade Practices Act, 1956, s. 21 (1) (*b*).

In re **Federation of Wholesale and Multiple Bakers' (Great Britain and Northern Ireland) Agreement,** R.P.Ct. **393.**

——————— Black bolt and nut industry—Fixed prices for black bolts and nuts, carriage bolts and nuts and railway fastenings—Fixed prices reasonable—Quantity discount based on aggregate of purchases from association members—Minimum price for large users—Lowest price quoted by members interested—Large variety and number of bolts—Avoidance of necessity of stockholders and large and medium sized buyers to "go shopping"—Whether "the public as purchasers . . . of any goods"—Whether specific and substantial benefit—Whether benefits or advantages conferred on public by restrictions—Possibility of higher prices under restrictions—Whether restrictions reasonable—Restrictive Trade Practices Act, 1956, s. 21 (1) (*b*) (*g*).

In re **Black Bolt and Nut Association's Agreement,** R.P.Ct.(E. & W.) **884.**

——————— Carpet industry—Minimum prices for standard quality carpets—No formula or costings system—Restrictions on discounts and direct sales to consumers—Whether removal of restrictions would result in reduction in export business—Whether benefit or advantages conferred on public—Restrictive Trade Practices Act, 1956, s. 21 (1) (*b*) (*f*). *In re* **Federation of British Carpet Manufacturers' Agreement,** R.P.Ct. **356.**

——————— Confectionery industry—Recommended wholesale prices for confectionery—Wholesalers' buying and selling.

In re **Wholesale Confectioners Alliance's Agreement,** R.P.Ct. **1417.**

Territorial and membership restrictions—Retail co-operative societies in contiguous areas—Boundary agreement delimiting trading areas of societies—Restriction on trading outside delimited area—Restriction on accepting members outside area—Avoidance of overlapping—Whether specific and substantial benefit—Whether benefits or advantages conferred on public by restrictions—Whether membership restriction a registrable restriction—Restrictive Trade Practices Act, 1956, ss. 6 (1) (*b*) (*e*), 21 (1) (*b*).

In re **Doncaster and Retford Co-operative Societies' Agreement,** R.P.Ct. **1186.**

REVENUE

Estate duty

Business

Partnership assets—Partnership for joint lives—Death of one partner—Partnership a going concern—Whether "interest in a business passes on death"—Whether estate duty chargeable "in respect of" plant and machinery used in partnership business—Finance Act, 1955, s. 28 (1). **Burdett-Coutts v. Inland Revenue Comrs.,** Buckley J. **1027.**

Contribution to

Estate duty not claimed on assigned part of fund—Whether duty payable rateably out of whole fund—Finance Act, 1894, ss. 1, 9. *In re* **Boulton,** C.A. **140.**

Income Tax

Capital or income expenditure

Opencast coal mining—Payment for right of entry on land—Compensation payment for diminution in value—Payments normal and recurrent incident of trade—Whether revenue or capital expenditure—Whether "wholly and exclusively laid out . . . for the "purposes of the trade"—Profits tax—Income Tax Act, 1952, s. 137 (*a*).
H. J. Rorke Ltd. v. Inland Revenue Commissioners, Cross J. **1132.**

Capital or income receipt

Sale of "know-how" by manufacturers of aircraft engines to foreign governments and companies—To aid establishment of aircraft engine industry in foreign countries—Whether receipt of company's trade or proceeds of sale of capital asset—Income Tax Act, 1952, s. 123 (Sch. D, Case I).
Jeffrey v. Rolls-Royce Ltd., Pennycuick J. **720.**

Employment

Perquisite—Valuation—Cost or value in hands of recipient—Gift from employer of new suit of clothes—Whether employee taxable on second-hand value only of suit—Income Tax Act, 1952, Sch 9, r. 1. **Wilkins v. Rogerson,** Danckwerts J. **515.**

Penalty

Pleading—Application of normal rules in civil actions—Income Tax Act, 1952, ss. 19, 232 (2). **Inland Revenue Comrs. v. Jackson,** C.A. **873.**

Profits of trade

Work in progress—Method of valuation—Whether "on cost" or "direct cost" method to be applied—Whether any principle involved.
Duple Motor Bodies v. Inland Revenue Comrs., C.A. **510.**

Profits tax

Avoidance

Capitalisation of profits followed by liquidation and reconstruction—Distribution of surplus assets by liquidator—Direction by commissioners of basis of computation of profits tax liability—Whether main purpose of transaction avoidance or reduction of tax liability—No determination of last accounting period—Whether direction premature—Liability of company to profits tax—Finance Act, 1937, s. 20 (2) (*b*)—Finance Act, 1947, ss. 35 (1), 36 (1) (4); Finance Act, 1951, s. 32 (1) (3) (4).
Ackland & Pratten Ltd. (In Liquidation) v. Inland Revenue Commissioners, Cross J. **1117.**

"*Distribution*"

Director-controlled company—Royalties paid to director for licence to manufacture patented article — Genuine commercial transaction — Whether payments made by way of "re-"muneration, loans or otherwise" — Whether "distributions" — Finance Act, 1947, s. 36 (1) (*c*).
Inland Revenue Commissioners v. H. Dunning & Co. (1946) Ltd., Cross J. **1106.**

Nationalised industry—compensation

Dividends paid by subsidiary, a former colliery company in receipt of interim income payments — Subsidiary company remaining in being solely to receive compensation—Whether had "function" of holding property—Dividends received by parent company not "franked investment income"—Finance Act, 1937, s. 19 (4), Sch. 4 (1A), para. 7 (as substituted by Finance Act, 1947, s. 32 (1)).
Henry Briggs, Son & Co. Ltd. v. Inland Revenue Comrs., C.A. **532.**

Stamp duty

Security

Contract for sale—Supplemental guarantee by bank—Contract not a primary document—Whether guarantee "primary security"—Stamp Act, 1891, Sch. 1.
Henry Ansbacher & Co. v. Inland Revenue Comrs., Danckwerts J. **337.**

ROAD TRAFFIC

Notice of intended prosecution

Issue whether notice given

Procedure — Appropriate time to dispute service of notice — Whether necessary to raise matter as preliminary point—Road Traffic Act, 1930, s. 21.
Reg. v. Edmonton Justices. *Ex parte* **Brooks,** Divl.Ct. **697.**

ROAD TRAFFIC—*continued.*

Negligence

Collision

Unlit vehicle standing on road at night—Presumption of negligence—Failure of lighting mechanism due to break in electric wiring—Car reasonably and properly maintained by owner—Whether presumption of negligence displaced.
Parish v. Judd, Edmund Davies J. **867.**

Pedestrian crossing

Duty of drivers

Uncontrolled pedestrian crossing—Limits of crossing—Pedestrian Crossings Regulations, 1954, reg. 4. **Hughes v. Hall,** Divl.Ct. **733.**

Taking and driving away motor-vehicle

Accessory

Appellant not present at taking—Whether entry into vehicle subsequently knowing it to have been taken and driven away without owner's consent sufficient to constitute offence—Road Traffic Act, 1930, s. 28 (1). **Reg. v. Stally,** C.C.A. **79.**

Aiding and abetting

Whether riding on pillion some hours after taking sufficient to constitute offence—Road Traffic Act, 1930, s. 28 (1). **D. (An Infant) v. Parsons,** Divl.Ct. **797.**

Third party insurance

Aiding and abetting offence

Vehicle taken and driven away without owner's consent—Riding on cycle subsequently as pillion passenger—Whether sufficient evidence to justify conviction—Road Traffic Act, 1930, s. 35 (1). **D. (An Infant) v. Parsons,** Divl.Ct. **797.**

SALE OF GOODS

Implied term

Fitness for purpose

Merchantable quality—Sale of toy by retailer to child—Sale of toys to retailer by wholesaler and by importer to wholesaler — Sales by sample — Defect rendering toy unmerchantable—Whether apparent on reasonable examination—Sale of Goods Act, 1893, ss. 14 (1) (2), 15 (2) (*c*). **Godley v. Perry,** Edmund Davies J. **9.**

SHIPPING

Charterparty

Demurrage

Exceptions clause—Centrocon charter—"Time for loading or discharging . . . shall not "count" during strike—Whether receivers liable for demurrage during strike period after expiry of lay time.
Union of India v. Compania Naviera Aeolus S.A., McNair J. **297.**

Court of formal investigation

Report

Expression of censure in rider signed by one assessor—Absence of notice of charge against officer censured—Irregularity. **The Seistan,** Admiralty **186.**

SHIPS' NAMES

Seistan. **The Seistan,** Admiralty **186.**

Spalmatori. **Union of India v. Compania Naviera Aeolus S.A.,** McNair J. **297.**

SOLICITOR

Discipline

Jurisdiction of court

Deprivation of costs—Inapt in case of alleged professional misconduct.
Davies v. Davies, C.A. **1004.**

STATUTE

Construction

Directory or obligatory

Privilege or power conferred—Regulative provisions or acquisition or exercise—Timber concession. **Edward Ramia Ltd. v. African Woods Ltd.,** J.C. **86.**

Procedural requirement—Whether condition precedent to effective order—Criminal Justice Act, 1948, s. 21 (4) (5).
Reg. v. Governor of Parkhurst Prison. *Ex parte* **Philpot,** Divl.Ct. **115.**

Retroactive effect

Appeal

Whether new law applicable—Procedural point on substantive right—Vexatious litigant—Court of Appeal—Jurisdiction to vary High Court order to accord with new Act.
Attorney-General v. Vernazza, H.L.(E.) **466.**

STATUTE—*continued.*
Purchase notice by owner
Minister's reasons for confirming notice
Whether fact that land of less use to owner than if developed proper test—Town and Country Planning Act, 1947, s. 19 (1) (2).
Reg. v. Minister of Housing and Local Government. *Ex parte* **Chichester R. D. C.,** Divl.Ct. **587.**

TITHE
Corn rents
Rents payable based on "average price" of wheat
Deficiency payments—No relation between amount of payments and value of wheat sold—Whether "price" includes deficiency payments—Inclosure Act, 1801 (Scremby)—Cereals (Deficiency Payments) Order, 1955, arts. 3, 4.
In re **Scremby Corn Rents,** C.A. **1227.**

TOWN AND COUNTRY PLANNING
Development
Agreement to let premises for user requiring planning permission
Undertaking by proposed tenant to apply for permission—Permission refused—Whether agreement to let illegal—Town and Country Planning Act, 1947, ss. 12 (1), 23 (1), 24 (3). **Best v. Glenville,** C.A. **1198.**

TRIBUNAL
Domestic
Bar Council
Function. **Lincoln v. Daniels,** Salmon J. **852.**

TRUSTS
Abroad, trustee going
Power of attorney
Statutory declaration—To be filed with each power of attorney—Trustee Act, 1925, s. 25 (4). **Practice Direction,** Q.B.D. **355.**

Variation
Act of 1958
Affidavit by stockbroker—Variation of Trusts Act, 1958, s. 1.
In re **Allen's Settlement Trusts,** Vaisey J. **6.**
Form of order—Effect of court's approval of arrangement—Whether direction to trustees necessary—Variation of Trusts Act, 1958, s. 1.
In re **Hambleden's Will Trusts,** Wynn-Parry J. **82.**
Mental defective beneficiary—Application to Court of Protection—Procedure—Variation of Trusts Act, 1958, s. 1 (3). **Practice Direction,** Ct. of Protection **17.**
Powers of investment—Application for variation of trustees' power of investment—Form of clause—Variation of Trusts Act, 1958, s. 1.
In re **Thompson's Will Trusts,** Cross J. **1165.**
Protective trust—Exercise of power of appointment—Appointment to enable arrangement for division of trust fund—Intention to benefit appointees—Consequential benefit to appointor — Whether fraud on power — Whether court should approve arrangement — Variation of Trusts Act, 1958, s. 1. *In re* **Robertson's Will Trusts,** Russell J. **1050.**
Rectification of settlement—Fund divided in equal shares between son and daughter—Son absolutely entitled to share on attaining 30—Gift over to daughter's share should son die under 30—Income from daughter's share payable to daughter for life and after her death capital held on trust for her children—Omission to provide for children of son should son not attain 30—Omission not intended by settlor—Application for variation to rectify—Settlement—Whether for benefit of "any person unborn"—Variation of Trusts Act, 1958 (6 & 7 Eliz. 2, c. 53), s. 1. *In re* **Tinker's Settlement,** Russell J. **1011.**

VAGRANCY
Prostitution
"In a street"
Soliciting from house, men passing in street—Whether soliciting "in a street"—Street Offences Act, 1959, s. 1 (1). **Smith v. Hughes,** Divl.Ct. **830.**

Sentence
Whether Borstal training appropriate sentence
Vagrancy Act, s. 4. **Reg. v. James,** C.C.A. **812.**

VENDOR AND PURCHASER
Contract
Memorandum in writing
Offer in writing—Loss of letter of acceptance—Law of Property Act, 1925, s. 40 (1).
Parker v. Clark, Devlin J. **286.**

WEST AFRICA

Gold Coast

Concession, application for

Timber lands—Failure to comply with imperative statutory requirements for protection of grantor—Concession invalid—Laws of the Gold Coast (1951 Ed., c. 136), ss. 12 (2) (3) (4), 13 (11). **Edward Ramia Ltd. v. African Woods Ltd.**, J.C. **86.**

WILL

Execution

Will consisting of several sheets

Duly executed while pressed together by hand of deceased—Subsequent holograph additions inserted above signature—Testamentary intention—Wills Act, 1837, s. 9—Wills Act Amendment Act, 1852, s. 1. *In the Estate of* **Little, decd.**, Sachs J. **495.**

Construction

"*Free of duty*"

Chattels of artistic or historic interest—Specific legacy free of duty—Direction to trustees to pay duties payable "on my death"—Whether duty contingently payable on sale by legatees payable out of residue—Finance Act, 1930, s. 40.

In re **Bedford, decd.**, Cross J. **1331.**

Implied gift

Gift of moiety of residue remaining after "my wife has received her jus relictae"—Wife not entitled to jus relictae—Whether implied gift of residue to wife.

In re **Angus' Will Trusts**, Buckley J. **1296.**

"*Money in bank*"

Whether confined to credit balance—Whether inclusive of travellers' cheques.

In re **Trundle, decd.**, Cross J. **1388.**

Dependent relative revocation

Two wills

First will followed by subsequent will containing revocation clause and inchoate clause referring to residue—Both wills treated as composite document.

In the Estate of **Cocke, decd.**, Lloyd-Jones J. **491.**

Signature

Sufficiency

Description of deceased in own hand in place of signature—"Your loving mother"—Wills Act, 1837, s. 9. *In the Estate of* **Cook, decd.**, Collingwood J. **353.**

WORDS AND PHRASES

"*Agricultural building*"—Rating and Valuation (Apportionment) Act, 1928, s. 2 (2).
National Pig Progeny Testing Board v. Greenall, C.A. **1265.**

"*Agricultural land*"—Rating and Valuation (Apportionment) Act, 1928, s. 2 (2).
National Pig Progeny Testing Board v. Greenall, C.A. **1265.**

"*Any person unborn*"—Variation of Trusts Act, 1958, s. 1.
In re **Tinker's Settlement**, Russell J. **1011.**

"*At any time*"—Landlord and tenant—Option to purchase.
Longmuir v. Kew, Cross J. **862.**

"*Care and possession*"—Adoption Act, 1958, s. 3 (1).
In re **C. S. C.**, Roxburgh J. **304.**

"*Carriageway*"—Highways Act, 1959, s. 295 (1).
Ching Garage Ltd. v. Chingford Corpn., C.A. **947.**

"*Channel*"—Private Street Works Act, s. 6 (1).
Ware Urban District Council v. Gaunt, Divl.Ct. **1364.**

"*Connivance*"—Matrimonial Causes Act, 1950, s. 32 (3).
Haynes v. Haynes and Sawkill, Wrangham J. **968.**

"*Disposition*"—Bankruptcy Act, 1914, s. 141.
In re **Browne (A Bankrupt)**, Cross J. **692.**

"*Dispute*"—Institute of Civil Engineering General Conditions of Contract, cl. 66.
A. E. Farr Ltd. v. Ministry of Transport, Buckley J. **956.**

"*Distribution*"—Finance Act, 1947, s. 36 (1) (*c*).
Inland Revenue Comrs. v. H. Dunning & Co. (1946) Ltd., Cross J. **1106.**

"*Due inquiry*"—Medical Act, 1956, s. 36. **Fox v. General Medical Council**, J.C. **1017.**

"*Guard-rail*"—Building (Safety, Health and Welfare) Regulations, 1948, reg. 27 (2).
Corn v. Weir's Glass (Hanley) Ltd., C.A. **577.**

"*Hand-rail*"—Building (Safety, Health and Welfare) Regulations, 1948, reg. 27 (1).
Corn v. Weir's Glass (Hanley) Ltd., C.A. **577.**

"*Interest in a business passes on death*"—Finance Act, 1954, s. 28 (1).
Burdett-Coutts v. Inland Revenue Comrs., Buckley J. **1027.**

WORDS AND PHRASES—*continued.*

"*Light industrial building*"—Town and Country Planning (Use Classes) Order, 1950, art. 2 (2). **Horwitz v. Rowson,** Havers J. **803.**

"*Machinery*"—Factories Act, 1937, s. 14 (1). **Quintas v. National Smelting Co. Ltd.,** Devlin J. **217.**

"*Option for continuing for an extension of seven or fourteen years*"—Landlord and tenant. **Gardner v. Blaxill,** Paull J. **752.**

"*Owner*"—Treaty of Peace (Roumania) Order, 1948, art. 1 (5) (*g*). **Fischler v. Administrator of Roumanian Property,** H.L.(E.) **917.**

"*Owner or occupier*"—Licensing Act, 1953, s. 152 (2). **Reg. v. Lewes Justices.** *Ex parte* **Plumpton and District Club Trustees,** Divl.Ct. **700.**

"*Plant and machinery*"—Finance Act, 1954, s. 28 (1). **Burdett-Coutts v. Inland Revenue Comrs.,** Buckley J. **1027.**

"*Proceedings*"—Matrimonial Causes Act, 1950, s. 32 (3). **Haynes v. Haynes and Sawkill,** Wrangham J. **968.**

"*Public as purchasers . . . of any goods*"—Restrictive Trade Practices Act, 1956, s. 21 (1) (*b*). *In re* **Black Bolt and Nut Association's Agreement,** R.P.Ct.(E.&W.) **884.**

"*Refuge*"—Highways Act, 1959, s. 68 (1). **Ching Garage Ltd. v. Chingford Corpn.,** C.A. **947.**

"*Regulating the marketing*"—Agricultural Marketing Act, 1931, s. 1 (1). **Tuker v. Ministry of Agriculture, Fisheries and Food,** C.A. **819.**

"*Remuneration, loans or otherwise*"—Finance Act, 1947, s. 36 (1) (*c*). **Inland Revenue Comrs. v. H. Dunning & Co. (1946) Ltd.,** Cross J. **1106.**

"*Repository*"—Town and Country Planning (Use Classes) Order, 1950, Sch. **Horwitz v. Rowson,** Havers J. **803.**

"*Restriction accepted in pursuance of any agreement*"—Restrictive Trade Practices Act, 1956, s. 21 (1). *In re* **Federation of Wholesale and Multiple Bakers' (Great Britain and Northern Ireland) Agreement,** R.P.Ct. **393.**

"*Scheduled journey*"—Air Corporations Act, 1949, s. 24. **Director of Public Prosecutions v. Milbanke Tours Ltd.,** Divl.Ct. **630.**

"*Scheme regulating the marketing of an agricultural product*"—Agricultural Marketing Act, 1931. **Tuker v. Ministry of Agriculture, Fisheries and Food,** C.A. **819.**

"*Shop*"—Town and Country Planning (Use Classes) Order, 1950, art. 2 (2). **Horwitz v. Rowson,** Havers J. **803.**

"*Social welfare*"—Rating and Valuation (Miscellaneous Provisions) Act, 1955, s. 8 (1) (*a*). **Victory (Ex-Services) Association Ltd. v. Paddington Borough Council,** Divl.Ct. **106.**

"*Staircase*"—Factories Act, 1937, s. 25 (2). **Kimpton v. Steel Co. of Wales Ltd.,** C.A. **527.**

"*State in which [land] was immediately before beginning of the period of requisition*"—Town and Country Planning Act, 1947, s. 89 (1). **Routh's Trustees v. Central Land Board,** C.A. **737.**

"*Street, (In a)*"—Street Offences Act, 1959, s. 1 (1). **Smith v. Hughes,** Divl.Ct. **830.**

"*Temporary platform*"—Building (Safety, Health and Welfare) Regulations, 1948, reg. 24 (5) (*d*). **Westcott v. Structural and Marine Engineers Ltd.,** Divl.Ct. **349.**

"*Unsound mind*"—Lunacy Act, 1890, s. 14. **Buxton v. Jayne,** C.A. **783.**

"*Wholly and exclusively laid out . . . for the purposes of the trade*"—Income Tax Act, 1952, s. 137 (*a*). **H. J. Rorke Ltd. v. Inland Revenue Comrs.,** Cross J. **1132.**

"*Wilfully*"—Landlord and Tenant Act, 1730, s. 1. **French v. Elliott,** Paull J. **40.**

"*Wrong*"—M'Naghten Rules. **Sofaer v. Sofaer,** Collingwood J. **1173.**

CASES JUDICIALLY CONSIDERED

PAGE

Admiralty Commissioners *v.* S.S. Volute [1922] 1 A.C. 129; 38 T.L.R. 225. *Applied*, Rushton *v.* Turner Brothers Asbestos Co. Ltd. 96
Alderslade *v.* Hendon Laundry Ltd. [1945] K.B. 189; [1945] 1 All E.R. 244. *Applied*, Akerib *v.* Booth and Others Ltd. 454
Arthur, decd., In the Goods of (1871) L.R. 2 P. & P. 273; 25 L.T. 274. *Considered*, In the Estate of Little, decd. 495, 501
Astle *v.* Astle [1939] P. 415; 55 T.L.R. 1045; [1939] 3 All E.R. 967. *Applied*, Robins *v.* Robins 1089

Balfour *v.* Balfour [1919] 2 K.B. 571; 35 T.L.R. 609. *Distinguished*, Parker *v.* Clark . . 286
Bank voor Handel en Scheepvaart N.V. *v.* Administrator of Hungarian Property [1954] A.C. 584; [1954] 2 W.L.R. 867; [1954] 1 All E.R. 969. *Considered*, Fischler *v.* Administrator of Roumanian Property 917
Bath *v.* British Transport Commission [1954] 1 W.L.R. 1013, 1015; [1954] 2 All E.R. 542, C.A. *Applied*, Kimpton *v.* Steel Co. of Wales Ltd. 527
Bendall *v.* McWhirter [1952] 2 Q.B. 466; [1952] 1 T.L.R. 1332; [1952] 1 All E.R. 1307. *Considered*, Short *v.* Short 833
Benzon, In re [1914] 2 Ch. 68; 30 T.L.R. 435, C.A. *Considered*, Cotterell *v.* Price . . 1097
Betty's Cafés Ltd. *v.* Phillips [1959] A.C. 20; [1958] 2 W.L.R. 513; [1958] 1 All E.R. 607, H.L. *Considered*, Wine Shippers (London) Ltd. *v.* Bath House Syndicate Ltd. . . 613
Bluett *v.* Stuchbury's (1908) 24 T.L.R. 469, C.A. *Considered*, Shindler *v.* Northern Raincoat Co. Ltd. 1038
Board of Education *v.* Rice [1911] A.C. 179, 182; 27 T.L.R. 378, H.L. *Applied*, Ceylon University *v.* Fernando 223
Borthwick, In re [1948] Ch. 645; 64 T.L.R. 471; [1948] 2 All E.R. 635, C.A. *Applied*, Wine Shippers (London) Ltd. *v.* Bath House Syndicate Ltd. 613, 989
Bosley *v.* Bosley [1958] 1 W.L.R. 645; [1958] 1 All E.R. 167. *Applied*, Hall *v.* Hall . . 52
Bramwell *v.* Bramwell [1942] 1 K.B. 370, 374; 58 T.L.R. 148; [1942] 1 All E.R. 137, C.A. *Dicta of Goddard L.J. applied*, Short *v.* Short 833
Bristol Tramways Carriage Co. *v.* Fiat Motors [1910] 2 K.B. 831; 26 T.L.R. 629, C.A. *Applied*, Godley *v.* Perry 9
British Homophone Ltd. *v.* Kunz (1935) 152 L.T. 589. *Distinguished*, Beesly *v.* Hallwood Estates Ltd. 549
British and American Trustee and Finance Corpn. Ltd. *v.* Couper [1894] A.C. 399; 10 T.L.R. 415. *Applied*, In re Great Universal Stores Ltd. 78, 79
Brown *v.* Rolls Royce Ltd., 1959 S.L.T. (Notes) 73. *Decision of the First Division of the Court of Session affirmed* 210
Buckland *v.* Papillon (1866) 2 Ch. 67. *Considered*, Longmuir *v.* Kew 862
Butterworth *v.* Butterworth and Englefield [1920] P. 126, 136; 36 T.L.R. 265. *Dicta of McCardie J. applied*, Williams *v.* Settle 1072
Byrne *v.* Kinematograph Renters Society Ltd. [1958] 1 W.L.R. 762, 784; [1958] 2 All E.R. 578. *Applied*, Ceylon University *v.* Fernando 223

C. W. M., In re, 1941 No. 2396 [1951] 2 K.B. 714; [1951] 2 All E.R. 707. *Considered*, In re C., 1958 No. 1950 92
Caldow *v.* Pixell (1877) 36 L.T. 469, 470. *Applied*, Edward Ramia Ltd. *v.* African Woods Ltd. 86
Carroll *v.* Andrew Barclay & Sons Ltd. [1948] A.C. 477, 486; 64 T.L.R. 384; [1948] 2 All E.R. 386, H.L. *Applied*, Quintas *v.* National Smelting Co. Ltd. 217
Cavanagh *v.* Ulster Weaving Co. Ltd. [1959] 3 W.L.R. 262, 273; [1959] 2 All E.R. 745. *Dictum of Lord Keith of Avonholm considered*, Brown *v.* Rolls Royce Ltd. . . 210, 213
Ceylon University *v.* Fernando (1956) 58 N.L.R. 265. *Judgment of the Supreme Court of Ceylon reversed* 223
Clark *v.* Molyneux (1877) 3 Q.B.D. 237, 243. *Applied*, "Truth" (N.Z.) Ltd. *v.* Holloway . 997
Clarke *v.* Grant [1950] 1 K.B. 104; 65 T.L.R. 241; [1949] 1 All E.R. 768. *Considered*, Isaac *v.* Hotel de Paris Ltd. 239
Clear *v.* Clear [1958] 1 W.L.R. 467; [1958] 2 All E.R. 353, C.A. *Distinguished*, Long *v.* Long 546
Coats (J. & P.) *v.* Chadwick [1894] 1 Ch. 347; 10 T.L.R. 226. *Distinguished*, Carl-Zeiss-Stiftung *v.* Rayner & Keeler Ltd. 1145
Cobb *v.* Cobb [1955] 1 W.L.R. 731, 734; [1955] 2 All E.R. 696; *Dictum of Denning L.J. considered*, Short *v.* Short 833
Cobb *v.* Lane [1952] 1 T.L.R. 1037; [1952] 1 All E.R. 1199, C.A. *Considered*, Isaac *v.* Hotel de Paris Ltd. 239
Codd *v.* Delap [1906] W.N. 57. *Considered*, Gould *v.* National Provincial Bank Ltd. . . 417
Colfar *v.* Coggins & Griffith (Liverpool) Ltd. [1945] A.C. 197, 203; 61 T.L.R. 238; [1945] 1 All E.R. 326, H.L. *Dictum of Viscount Simon L.C. considered*, Dixon *v.* Cementation Co. Ltd. 746

PAGE

Colne Valley Water Co. *v.* Watford and St. Albans Gas Co. [1948] 1 K.B. 500; 64 T.L.R. 44; [1948] 1 All E.R. 104. *Considered*, Mascherpa *v.* Direct Ltd. 447, 451
Crofts *v.* Waterhouse (1825) 3 Bing. 319. *Considered*, Parish *v.* Judd 867
Crown Bedding Ltd. and South Wales Flock Co. Ltd. *v.* Inland Revenue Comrs. (1946) 34 T.C. 107; [1946] 1 All E.R. 452, C.A. *Applied*, Ackland & Pratten Ltd. (In Liquidation) *v.* Inland Revenue Comrs. 1117
Cundy *v.* Lindsay (1878) 3 A.C. 459, H.L. *Considered*, Ingram *v.* Little 504
Cunliffe *v.* Goodman [1950] 2 K.B. 237; 66 T.L.R. 109; [1950] 1 All E.R. 720, C.A. *Considered*, Wine Shippers (London) Ltd. *v.* Bath House Syndicate Ltd. 613
Currie *v.* Consolidated Kent Collieries Corpn. Ltd. [1906] 1 K.B. 134. *Applied*, Cook *v.* "X" Chair Patents Co. Ltd. 60

D. *v.* D. [1952] W.N. 486; [1952] 2 T.L.R. 791; [1952] 2 All E.R. 584. *Considered*, Collins *v.* Collins 660
Daw *v.* Eley (1868) 7 Eq.Cas. 49. *Distinguished*, Carl-Zeiss-Stiftung *v.* Rayner & Keeler Ltd. 1145
De Verteuil *v.* Knaggs [1918] A.C. 557, 560; 34 T.L.R. 325, J.C. *Dicta applied*, Ceylon University *v.* Fernando 223
Debtor (No. 80 of 1957), In re a [1958] Ch. 81, 91; [1957] 3 W.L.R. 184, 191; [1957] 2 All E.R. 551. *Dicta of Jenkins L.J. considered*, Samson *v.* Samson 190, 193
Donald Campbell and Co. Ltd. *v.* Pollak [1927] A.C. 732; 43 T.L.R. 495, H.L. *Applied*, Mayer *v.* Harte 770
Drummond & Sons *v.* Van Ingen (E. H.) & Co. (1887) 12 App.Cas. 296; 3 T.L.R. 541. *Dictum of Lord Macnaghten applied*, Godley *v.* Perry 9
Duke's Court Estates Ltd. *v.* Associated British Engineering Ltd. [1948] Ch. 458, 461; 64 T.L.R. 373; [1948] 2 All E.R. 137. *Dicta distinguished*, Inland Revenue Commissioners *v.* Jackson 873

Emanuel *v.* Symon [1908] 1 K.B. 302; 24 T.L.R. 85. *Considered*, In re Trepca Mines Ltd. 24, 29
Errington *v.* Errington [1952] 1 K.B. 290; [1952] 1 T.L.R. 231; [1952] 1 All E.R. 149, C.A. *Considered*, Isaac *v.* Hotel de Paris Ltd. 239
Errington *v.* Minister of Health [1935] 1 K.B. 249; 51 T.L.R. 44. *Considered*, Reg. *v.* Registrar of Building Societies, ex parte A Building Society (Div.Ct. and C.A.) . . 669
Evans Medical Supplies Ltd. *v.* Moriarty [1958] 1 W.L.R. 66, 76; 37 T.C. 540; [1957] 3 All E.R. 718, H.L. *Applied*, Jeffrey *v.* Rolls-Royce Ltd. 720

Farr (A. E.) Ltd. *v.* Admiralty [1953] 1 W.L.R. 965; [1953] 2 All E.R. 512. *Applied*, Akerib *v.* Booth and Others Ltd. 454
Featherstone, In re (1953) 37 Cr.App.R. 146. *Considered*, In re Wring: In re Cook (Practice Note) 138
Flanagan *v.* Fahy [1918] I.R. 2 K.B. 361. *Considered*, Fox *v.* General Medical Council . 1017
Flint *v.* Pike (1825) 4 B. & C. 473; 6 Dow. & Ry.K.B. 528. *Not followed*, Burnett & Hallamshire Fuel Ltd. *v.* Sheffield Telegraph & Star Ltd. 502

G. *v.* M. (1885) 10 App.Cas. 171, 186. *Considered*, Bullock *v.* Bullock 975
Gaskell & Chambers Ltd. *v.* Hudson, Dodsworth & Co. [1936] 2 K.B. 595. *Considered*, Carl-Zeiss-Stiftung *v.* Rayner & Keeler Ltd. 1145
General Medical Council *v.* Spackman [1943] A.C. 627, 638; 59 T.L.R. 412; [1943] 2 All E.R. 337. *Dictum of Lord Atkin considered*, Ceylon University *v.* Fernando . 223, 231
Gilbert *v.* Endean (1878) 9 Ch.D. 259, 269, C.A. *Dicta of Cotton L.J. applied*, Rossage *v.* Rossage [1960] 1 W.L.R. 249. *Considered*, In re J. 253
Gill *v.* Gill [1957] P. 151; [1956] 3 W.L.R. 695; [1956] 3 All E.R. 240. *Distinguished*, Onions *v.* Onions 983
Glen *v.* Inland Revenue, 1926 S.C. 44. *Considered*, Burdett-Coutts *v.* Inland Revenue Comrs. 1027
Goldthorpe *v.* Bain [1952] 2 Q.B. 455; [1952] 1 T.L.R. 1512; [1952] 2 All E.R. 23, C.A. *Explained*, Chung Kwok Hotel Co. Ltd. *v.* Field 1112
Goulard *v.* Sir Coutts Lindsay & Co. Ltd. (1887) 4 R.P.C. 189. *Distinguished*, Carl-Zeiss-Stiftung *v.* Rayner & Keeler Ltd. 1145
Grant, *v.* Australian Knitting Mills [1936] A.C. 85; 52 T.L.R. 38. *Applied*, Godley *v.* Perry 9
Green *v.* Green and Partridge [1958] 1 W.L.R. 1104; [1958] 3 All E.R. 242. *Considered*, Collins *v.* Collins 660
Greenock Corporation *v.* Caledonian Railway Co. Ltd. [1917] A.C. 556; 33 T.L.R. 531, H.L. *Followed*, Pemberton *v.* Bright 436
Gregory *v.* Queen's Proctor (1846) 4 Notes of Cases 620. *Applied*, In the Estate of Little, decd. 495
Griffith *v.* Pelton [1958] Ch. 205; [1957] 3 W.L.R. 522; [1957] 3 All E.R. 75, C.A. *Considered*, Beesly *v.* Hallwood Estates Ltd. 549
Guildford Rural District Council *v.* Fortescue [1959] 2 Q.B. 112; [1959] 2 W.L.R. 643; [1959] 2 All E.R. 111. *Dictum of Lord Evershed M.R. considered*, Marshall *v.* Nottingham Corpn. 707

PAGE

Hammersley *v.* De Biel (1845) 12 Cl. & Fin. 45, 78. *Dictum of Lord Lyndhurst L.C. applied*, Parker *v.* Clark 286
Hanson *v.* Newman [1934] Ch. 298, 304; 50 T.L.R. 191, C.A. *Dictum of Lawrence L.J. applied*, Jaquin *v.* Holland 258
Harper, In re (1882) 21 Ch.D. 537. *Considered*, In re Browne 692
Harward *v.* Hackney Union Guardians of the Poor (1898) 14 T.L.R. 306. *Considered*, Buxton *v.* Jayne 783
Haskell Golf Ball Co. *v.* Hutchinson (1904) 21 R.P.C. 497. *Considered*, Carl-Zeiss-Stiftung *v.* Rayner & Keeler Ltd. 1145
Helby *v.* Matthews [1895] A.C. 471; 11 T.L.R. 446, H.L. *Considered*, Beesly *v.* Hallwood Estates Ltd. 549
Henderson *v.* Henderson [1944] A.C. 49, 52–53; 60 T.L.R. 113; [1944] 1 All E.R. 44, H.L. *Applied*, Willan *v.* Willan 624
Hersey *v.* Giblett (1854) 18 Beav. 174. *Applied*, Gardner *v.* Blaxill 752
Hichens *v.* Hichens [1945] P. 23, 26; 61 T.L.R. 302; [1945] 1 All E.R. 451, C.A. *Dictum of Lord Goddard considered*, Samson *v.* Samson 190
Hill *v.* William Hill (Park Lane) Ltd. [1949] A.C. 530; 65 T.L.R. 471; [1949] 2 All E.R. 452, H.L. *Considered*, In re Browne 692
Hollington Bros. Ltd. *v.* Rhodes [1951] 2 T.L.R. 691. *Considered*, Beesly *v.* Hallwood Estates Ltd. 549, 562
Holloway's Trusts, In re (1909) 26 T.L.R. 62. *Distinguished*, In re Jewish Orphanage Charity Endowments Trusts 344
Hong *v.* A. & R. Brown Ltd. [1948] 1 K.B. 515; 64 T.L.R. 132; [1948] 1 All E.R. 185. *Considered*, Mayer *v.* Harte 770
Hope *v.* Great Western Railway Co. [1937] 2 K.B. 130; 53 T.L.R. 399; [1937] 1 All E.R. 625, C.A. *Applied*, Pease *v.* George 427
Horn *v.* Minister of Health [1937] 1 K.B. 164, 186; [1936] 2 All E.R. 1299. *Dictum of Scott L.J. considered*, Reg. *v.* Registrar of Building Societies, Ex parte A Building Society, C.A. 669
Horton *v.* Horton, 64 T.L.R. 62; [1947] 2 All E.R. 871, H.L. *Applied*, Jodla *v.* Jodla . . 236
Horwood *v.* Statesman Publishing Co. (1929) 98 L.J.K.B. 450, 453; 45 T.L.R. 237, C.A. *Dictum of Scrutton L.J. applied*, Daws *v.* Daily Sketch and Daily Graphic Ltd. . . 126
Hutchinson *v.* Hutchinson (sub nom. H. *v.* H.) 63 T.L.R. 645; [1947] 2 All E.R. 792. *Considered*, Short *v.* Short 833
Hutton *v.* Watling [1948] 1 Ch. 26; 64 T.L.R. 326; [1948] 1 All E.R. 803, C.A. *Considered*, Longmuir *v.* Kew 862
Hyams *v.* Stuart King [1908] 2 K.B. 596; 24 T.L.R. 675, C.A. *Considered*, In re Browne 669

Inland Revenue Comrs. *v.* Buxton Palace Hotel Ltd. (1948) 29 T.C. 329, 334. *Observations of Atkinson J. considered*, Henry Briggs, Son & Co. Ltd. *v.* Inland Revenue Comrs. 532, 540
Inland Revenue Comrs. *v.* Chappie Ltd. (1953) 34 T.C. 509, C.A. *Applied*, Inland Revenue Comrs. *v.* H. Dunning & Co. (1946) Ltd. 1106
Inland Revenue Comrs. *v.* Desoutter Bros. (1945) 62 T.L.R. 110; [1945] 2 All E.R. 532; 29 T.C. 155. *Applied*, Henry Briggs, Son & Co. Ltd. *v.* Inland Revenue Comrs. . . 532
Inland Revenue Comrs. *v.* Lactagol Ltd. (1954) 35 T.C. 230. *Distinguished*, Inland Revenue Comrs. *v.* H. Dunning & Co. (1946) Ltd. 1106
Inland Revenue Comrs. *v.* Pollock & Peel Ltd. (In Liquidation) [1957] 1 W.L.R. 822; 37 T.C. 240; [1957] 2 All E.R. 483, C.A. Ackland & Pratten Ltd. (In Liquidation) *v.* Inland Revenue Comrs. 1117
Islington, West Division Case, Medhurst *v.* Lough and Gasquet (1901) 17 T.L.R. 210, 230; 5 O'M. & H. 120. *Distinguished*, In re Kensington North Parliamentary Election . 762

Jamieson *v.* Jamieson [1952] A.C. 525, 550; [1952] 1 T.L.R. 833; [1952] 1 All E.R. 875, H.L. *Applied*, Bohnel *v.* Bohnel 590
Joseph's Will Trusts [1959] 1 W.L.R. 1019; [1959] 3 All E.R. 474n. *Not followed*, In re Hambleden's Will Trusts 82

Kinally *v.* Home Office, The Times, July 25, 1959. *Considered*, Reg. *v.* Governor of Parkhurst Prison, Ex parte Philpot 115, 117
Knight *v.* Calder Grove Estates (1954) 35 T.C. 447. *Considered*, H. J. Rorke Ltd. *v.* Inland Revenue Comrs. 1132

Lancaster Banking Corporation, Ex parte. In re Westby (1878) 10 Ch.D. 776. *Considered*, Cotterell *v.* Price 1097
Lane *v.* Esdaile [1891] A.C. 210, H.L. *Applied*, Whitehouse *v.* Board of Control . . . 1093
Lee *v.* Lee [1952] 2 Q.B. 489; [1952] 1 T.L.R. 968; [1952] 1 All E.R. 1294. *Dicta of Somervell L.J. considered*, Short *v.* Short 833
Leeds and Batley Breweries Ltd., In re [1920] 2 Ch. 548. *Considered*, Longmuir *v.* Kew . 862

PAGE

Lever Finance *v.* Trustee of the Property of L. N. & H. M. Needleman (Bankrupts) [1956] Ch. 375, 382; [1956] 3 W.L.R. 72; [1956] 2 All E.R. 378. *Dictum of Harman J. applied*, Stroud Building Society *v.* Delamont 431
Lewis *v.* Lewis [1908] P. 1; 24 T.L.R. 45. *Applied*, In the Estate of Little, decd. . . 495
Lilley *v.* Roney (1892) 8 T.L.R. 642; 61 L.J.Q.B. 727, D.C. *Distinguished*, Lincoln *v.* Daniels 852
London & Globe Finance Corporation, In re [1903] 1 Ch. 728, 732; 19 T.L.R. 314. *Dictum of Buckley J. considered*, Welham *v.* Director of Public Prosecutions 669
Loudon *v.* Ryder [1953] 2 Q.B. 202, 209; [1953] 2 W.L.R. 537; [1953] 1 All E.R. 741. *Dicta of Singleton L.J. applied*, Williams *v.* Settle 1072

McIlroy *v.* Clements [1923] W.N. 81, C.A. *Considered*, Longmuir *v.* Kew 862
Maitland *v.* Raisbeck and Hewitt Ltd. [1944] 1 K.B. 689; 60 T.L.R. 521; [1944] 2 All E.R. 272, C.A. *Applied*, Parish *v.* Judd 867
Manley *v.* Sartori [1927] 1 Ch. 157. *Applied*, Burdett-Coutts *v.* Inland Revenue Comrs. . 1027
Marrison *v.* Bell [1939] 2 K.B. 187; 55 T.L.R. 475; [1939] 1 All E.R. 745, C.A. *Considered*, Orman *v.* Saville Sportswear Ltd. 1055
Merigan (Doe d.) *v.* Daly (1846) 8 Q.B. 934. *Considered*, Short *v.* Short 833
Mexborough (Earl) *v.* Whitwood Urban District Council [1897] 2 Q.B. 111; 13 T.L.R. 443, C.A. *Applied*, Mascherpa *v.* Direct Ltd. 447
Miles *v.* Chilton (orse. Miles) (1849) 1 Rob.Ecc. 684. *Distinguished*, Bullock *v.* Bullock . 975
Moon *v.* London County Council [1931] A.C. 151, 166; 47 T.L.R. 154. *Dictum of Lord Dunedin applied*, Harry Ferguson Research Ltd. *v.* Dawkins 639
Moor Line Ltd. *v.* Distillers Co. Ltd., 1912 S.C. 514. *Considered*, Union of India *v.* Compagnia Naviera Aeolus S.A. 297
Morelli *v.* Fitch & Gibbons [1928] 2 K.B. 636; 44 T.L.R. 737, D.C. *Applied*, Godley *v.* Perry 9
Morris Motors Ltd. *v.* Lilley [1959] 1 W.L.R. 1184; [1959] 3 All E.R. 737. *Considered*, Morris Motors Ltd. *v.* Phelan (Practice Note) 352, 353
Morton *v.* William Dixon Ltd., 1909 S.C. 807, 809. *Dictum of Lord President Dunedin considered*, Brown *v.* Rolls Royce Ltd. 210, 213
Moss *v.* Barton (1866) L.R. 1 Eq. 474. *Considered*, Longmuir *v.* Kew 862
Mountney *v.* Watton (1931) 2 B. & Ad. 673, 678. *Applied*, "Truth" (N.Z.) Ltd. *v.* Holloway 997
Mullard Radio Valve Co. Ltd. *v.* Rothermel Corpn. Ltd. (1933) 51 R.P.C. 1. *Considered*, Carl-Zeiss-Stiftung *v.* Rayner & Keeler Ltd. 1145
Munday *v.* Asprey (1880) 13 Ch.D. 855, 857. *Dictum of Fry J. not followed*, Parker *v.* Clark 286

National Deposit Friendly Society Trustees *v.* Skegness Urban District Council [1959] A.C. 293, 317; [1958] 3 W.L.R. 172; [1958] 2 All E.R. 601. *Dictum of Lord Denning considered*, Victory (Ex-Services) Association Ltd. *v.* Paddington Borough Council . 106
Nelson *v.* Nelson (James) & Sons Ltd. [1914] 2 K.B. 770; 30 T.L.R. 368, C.A. *Considered*, Shindler *v.* Northern Raincoat Co. Ltd. 1038
Newgrosh *v.* Newgrosh (cited in Rimmer *v.* Rimmer) [1953] 1 Q.B. 63, 68; [1952] 2 T.L.R. 767; [1952] 2 All E.R. 863, C.A. *Considered*, Samson *v.* Samson 190
Newman (R. S.) Ltd., In re Raphael's Claim [1916] 2 Ch. 309. *Considered*, Cook *v.* "X" Chair Patents Co. Ltd. 60, 62

Osborne *v.* Barton (1951) 66 T.L.R. (Pt. 1) 115. *Considered*, Reg. *v.* Dawson . . 163, 175
Osgood *v.* Nelson (1872) L.R. 5 H.L. 636, H.L. *Considered*, Ceylon University *v.* Fernando 223
Oxted Motor Co. Ltd., In re [1921] 3 K.B. 32; 37 T.L.R. 757. *Distinguished*, In re Pearce Duff & Co. Ltd. 1014

Pardy *v.* Pardy [1939] P. 288; 55 T.L.R. 1037; [1939] 3 All E.R. 779. *Distinguished*, Hall *v.* Hall 52
Pargeter *v.* Pargeter [1946] 1 All E.R. 570. *Considered*, Short *v.* Short 833
Paris *v.* Stepney Borough Council [1951] A.C. 367; [1951] 1 T.L.R. 25; [1951] 1 All E.R. 42, H.L. *Applied*, Brown *v.* Rolls Royce Ltd. 210
Parker and Cooper Ltd. *v.* Reading [1926] Ch. 975. *Distinguished*, In re Pearce Duff & Co. Ltd. 1014
Patrick *v.* Broadstone Mills Ltd. (1954) 35 T.C. 44; [1954] 1 All E.R. 163, C.A. *Considered*, Duple Motor Bodies Ltd. *v.* Inland Revenue Comrs. 510
Payne *v.* Railway Executive [1951] 1 K.B. 26; [1951] 2 T.L.R. 929; [1951] 2 All E.R. 910, C.A. *Applied*, Judd *v.* Hammersmith, etc., Hospitals Board 328
Perpetual Executor and Trustee Association of Australia Ltd. *v.* Commissioner of Taxes for the Commonwealth of Australia [1954] A.C. 114; [1954] 2 W.L.R. 171; [1954] 1 All E.R. 339, P.C. *Applied*, Burdett-Coutts *v.* Inland Revenue Comrs. 1027
Petrie *v.* MacFisheries Ltd. [1940] 1 K.B. 258; 56 T.L.R. 119; [1939] 4 All E.R. 281, C.A. *Considered*, Orman *v.* Saville Sportswear Ltd. 1055
Pinson *v.* Lloyds and National Provincial Foreign Bank Ltd. [1941] 2 K.B. 72; 57 T.L.R. 558; [1941] 2 All E.R. 636, C.A. *Applied*, Inland Revenue Commissioners *v.* Jackson 873

PAGE

Practice Note (Prison Commissioners' Report) [1959] 1 W.L.R. 849; [1959] 2 All E.R. 734; sub nom. Reg. *v.* Wintle, 43 Cr.App.R. 191. *Considered*, Reg. *v.* Governor of Parkhurst Prison, Ex parte Philpot **115, 118**
Preston-Jones *v.* Preston-Jones [1951] A.C. 391, 401, 417; [1951] 1 T.L.R. 8; [1951] 1 All E.R. 124, H.L. *Dicta applied*, Horton *v.* Horton **987**
Proudfoot *v.* Hart (1890) 25 Q.B.D. 42; 6 T.L.R. 305, C.A. *Applied*, Jaquin *v.* Holland . **258**

Rahimtoola *v.* Nizam of Hyderabad [1958] A.C. 379; [1957] 3 W.L.R. 884; [1957] 3 All E.R. 441. *Considered*, Fischler *v.* Administrator of Roumanian Property . . . **917**
Read *v.* Astoria Garage (Streatham) Ltd. [1952] 1 T.L.R. 1059; [1952] 1 All E.R. 922; [1952] Ch. 637; [1952] 2 T.L.R. 130; [1952] 2 All E.R. 292, C.A. *Considered*, Shindler *v.* Northern Raincoat Co. Ltd. **1038**
Rederiaktiebolaget Transatlantic *v.* La Compagnie Française des Phosphates de l'Oceanie (1926) 32 Com.Cas. 126, C.A. *Distinguished*, Union of India *v.* Compania Naviera Aeolus S.A. **297**
Rees *v.* Rees (1873) L.R. 3 P. & D. 84; 29 L.T. 375. *Applied*, In the Estate of Little, decd. **495, 499**
Reg. *v.* Camborne Justices, Ex parte Pearce [1955] 1 Q.B. 41; [1954] 3 W.L.R. 415; [1954] 2 All E.R. 850, D.C. *Applied*, Reg. *v.* Registrar of Building Societies, Ex parte A Building Society **669**
Reg. *v.* Cole (1889) 24 L.R.Ir. 522, C.C.R. *Considered*, Fox *v.* General Medical Council . **1017**
Reg. *v.* Craske, Ex parte Metropolitan Police Commissioner [1957] 2 Q.B. 591; [1957] 3 W.L.R. 308; [1957] 2 All E.R. 772. *Considered*, Reg. *v.* Bennett. Ex parte Radburn **102**
Reg. *v.* Devine [1956] 1 W.L.R. 236; [1956] 1 All E.R. 548. *Applied*, Reg. *v.* Chapman . **147**
Reg. *v.* Farquhar (1874) L.R. 9 Q.B. 258. *Applied*, Reg. *v.* Woodbury Licensing Justices, Ex parte Rouse **461**
Reg. *v.* Fulham, Hammersmith and Kensington Rent Tribunal. Ex parte Hierowski [1953] 2 Q.B. 147; [1953] 2 W.L.R. 1028; [1953] 2 All E.R. 4, 6, D.C. *Dictum of Lord Goddard C.J. not followed*, Reg. *v.* Agricultural Land Tribunal for South Eastern Area. Ex parte Bracey **911**
Reg. *v.* Gazard (1838) 8 C. & P. 595. *Considered*, McKinley *v.* McKinley . . . **120, 122**
Reg. *v.* Hammersley (1958) 42 Cr.App.R. 207. *Distinguished*, Reg. *v.* Dawson; Reg. *v.* Wenlock **163**
Reg. *v.* Harvey (1858) 8 Cox C.C. 99. *Considered*, McKinley *v.* McKinley . . . **120, 123**
Reg. *v.* Havant Justices. Ex parte Jacobs [1957] 1 W.L.R. 365; 41 Cr.App.R. 62; [1957] 1 All E.R. 475, D.C. *Distinguished*, Reg. *v.* Keeley **749**
Reg. *v.* Ingram [1956] 2 Q.B. 424; [1956] 3 W.L.R. 309; [1956] 2 All E.R. 639. *Considered*, Reg. *v.* Dawson **163, 175**
Reg. *v.* Judge Willis, Ex parte Abbey National Building Society [1954] 1 W.L.R. 136. *Applied*, Williams *v.* Settle **1072**
Reg. *v.* Kennedy [1893] 1 Q.B. 533, D.C. *Considered*, Holloway *v.* Dover Corporation . . **604**
Reg. *v.* Stally [1960] 1 W.L.R. 79; [1959] 3 All E.R. 814, C.A. *Applied*, D. (An Infant) *v.* Parsons **797**
Reigate *v.* Union Manufacturing (Ramsbottom) Co. Ltd. [1918] 1 K.B. 592, 605, C.A. *Applied*, Orman *v.* Saville Sportswear Ltd. **1055**
Reohorn *v.* Barry Corporation [1956] 1 W.L.R. 845; [1956] 2 All E.R. 742, C.A. *Considered*, Wine Shippers (London) Ltd. *v.* Bath House Syndicate Ltd. **613**
Revell, Ex parte, In re Tollemache (No. 1) (1884) 13 Q.B.D. 720, C.A. *Applied*, In re Browne **692**
Rex *v.* Benjamin (1913) 8 Cr.App.R. 146, C.C.A. *Considered*, Fox *v.* General Medical Council **1017**
Rex *v.* Birch (1924) 18 Cr.App.R. 26; 40 T.L.R. 365, C.C.A. *Applied*, Reg. *v.* Golder . . **1169**
Rex *v.* Cooper and Compton (1947) 32 Cr.App.R. 102. *Dicta of Sankey J. applied*, Reg. *v.* Dawson; Reg. *v.* Wenlock **163**
Rex *v.* Dickson [1950] 1 K.B. 394; 65 T.L.R. 749; [1949] 2 All E.R. 810. *Explained*, Reg. *v.* Governor of Parkhurst Prison. Ex parte Philpot **115**
Rex *v.* Harris (1927) 20 Cr.App.R. 144, C.C.A. *Applied*, Reg. *v.* Golder **1169**
Rex *v.* Johnson (1913) 9 Cr.App.R. 262. *Considered*, Reg. *v.* Dawson; Reg. *v.* Wenlock . **163**
Rex *v.* Luberg (1926) 19 Cr.App.R. 133, 137. *Dictum of Stanley J. applied*, Reg. *v.* Dawson; Reg. *v.* Wenlock **163**
Rex *v.* Meyrick and Ribuffi (1929) 21 Cr.App.R. 94. *Distinguished*, Reg. *v.* Dawson; Reg. *v.* Wenlock **163**
Rex *v.* Russell, The Times, May 30, 1935. *Explained*, Reg. *v.* Golder **1169**
Rex *v.* Smith (1915) 11 Cr.App.R. 81. *Considered*, Reg. *v.* Dawson; Reg. *v.* Wenlock . . **163**
Rex *v.* Sussex Justices, Ex parte McCarthy [1924] 1 K.B. 256; 40 T.L.R. 80, D.C. *Applied*, Reg. *v.* Registrar of Building Societies, Ex parte A Building Society **669**
Rex *v.* White (1922) 17 Cr.App.R. 59, C.C.A. *Applied*, Reg. *v.* Golder **1169**
Rider *v.* Ford [1923] 1 Ch. 541. *Considered*, Longmuir *v.* Kew **862**
Roberts *v.* Hopwood [1925] A.C. 578; 41 T.L.R. 436. *Applied*, Taylor *v.* Munrow . . **151**
Rossage *v.* Rossage [1960] 1 W.L.R. 249. *Applied*, In re J. **253**
Rudow *v.* Great Britain Mutual Life Assurance Society (1881) 17 Ch.D. 600, 607, 610. *Explained*, Mayer *v.* Harte **770**

PAGE

Russell *v.* Duke of Norfolk (1948) 65 T.L.R. 225, 231; [1949] 1 All E.R. 109, 118. *Dictum of Tucker L.J. considered*, Ceylon University *v.* Fernando 223, 231

St. Martin's Theatre, In re [1959] 1 W.L.R. 872; [1959] 3 All E.R. 298. *Considered*, Wine Shippers (London) Ltd. *v.* Bath House Syndicate Ltd. 613, 989
St. Mungo Manufacturing Co. *v.* Hutchinson Main & Co. Ltd. (1908) 25 R.P.C. 356. *Distinguished*, Carl-Zeiss-Stiftung *v.* Rayner & Keeler Ltd. 1145
Salisbury *v.* Gilmore [1942] 2 K.B. 38; 58 T.L.R. 226; [1942] 1 All E.R. 457. *Applied*, Keats *v.* Graham 30
Sanderson, Ex parte, In re Alexander (1856) 8 De G.M. & G. 849. *Considered*, In re Browne 692
Sedleigh-Denfield *v.* O'Callaghan [1940] A.C. 880, 895–896, 902, 912–913; 56 T.L.R. 887; [1940] 3 All E.R. 399. *Dicta considered and applied*, Pemberton *v.* Bright . . . 436
Sheffield Corporation *v.* Luxford [1929] 2 K.B. 180; 45 T.L.R. 491. *Considered*, Short *v.* Short 833
Sherwood *v.* Tucker [1924] 2 Ch. 440; 40 T.L.R. 782, C.A. *Considered*, Longmuir *v.* Kew . 862
Simmons *v.* Mitchell (1880) 6 App.Cas. 156, P.C. *Applied*, "Truth" (N.Z.) Ltd. *v.* Holloway 997
Sirdar Gurdyal Singh *v.* Rajah of Faridkote [1894] A.C. 670; 10 T.L.R. 621. *Considered*, In re Trepca Mines Ltd. 24, 29
Skegness Urban District Council *v.* Derbyshire Miners' Welfare Committee [1959] A.C. 807, 823, 827; [1959] 2 W.L.R. 717; [1959] 2 All E.R. 258, H.L.(E.). *Applied*, Isaacs *v.* Market Bosworth R. D. C. 277
Smith *v.* Neale (1857) 2 C.B.N.S. 67. *Applied*, Parker *v.* Clark 286
Southern Foundries (1926) Ltd. *v.* Shirlaw [1940] A.C. 701; 56 T.L.R. 637; [1940] 2 All E.R. 445, H.L. *Applied*, Shindler *v.* Northern Raincoat Co. Ltd. 1038
Sperling, In the Goods of (1863) 3 Sw. & Tr. 272. *Considered*, In the Estate of Cook, decd. 353, 354
Stewart *v.* Stewart [1948] 1 K.B. 507, 513; 64 T.L.R. 115; [1947] 2 All E.R. 813, C.A. *Dicta of Tucker L.J. applied*, Short *v.* Short 833
Stirling *v.* Maitland (1865) 34 L.J.Q.B. 1; 5 B. & S. 840. *Applied*, Shindler *v.* Northern Raincoat Co. Ltd. 1038
Subramaniam *v.* Public Prosecutor [1956] 1 W.L.R. 965. *Applied*, Reg. *v.* Willis . . 55
Summers (John) & Sons Ltd. *v.* Frost [1955] A.C. 740, 758; [1955] 2 W.L.R. 825; [1955] 1 All E.R. 870. *Applied*, Quintas *v.* National Smelting Co. Ltd. 217
Synge *v.* Synge [1894] 1 Q.B. 466; 10 T.L.R. 194, C.A. *Applied*, Parker *v.* Clark . . 286

Tideway Investment and Property Holdings *v.* Wellwood [1952] Ch. 791; [1952] 2 T.L.R. 365; [1952] 2 All E.R. 514, C.A. *Dictum of Evershed M.R. considered*, Leslie *v.* Liverpool Corporation 1
Tobacco Trade Benevolent Association Charitable Trusts, In re [1958] 1 W.L.R. 1113, 1116; [1958] 3 All E.R. 353. *Dictum of Harman J. considered*, In re Jewish Orphanage Charity Endowments Trusts 344
Trathan *v.* Trathan [1955] 1 W.L.R. 805; [1955] 2 All E.R. 701. *Applied*, Pepper *v.* Pepper 131
Travers (Joseph) & Sons Ltd. *v.* Cooper [1915] 1 K.B. 73. *Applied*, Akerib *v.* Booth and Others Ltd. 454

Wake *v.* Taylor, The Times, July 8, 1952. *Considered*, Short *v.* Short 833
Wallasey Brick and Land Co., In re [1894] W.N. 20. *Dicta of Kekewich J. explained*, In re Great Universal Stores Ltd. 78
Walsall Overseers of the Poor *v.* L. & N. W. Railway Co. (1878) L.R. 4 App.Cas. 30, 39, 40, H.L. *Applied*, In re Scremby Corn Rents 648
Watkins, In re, decd. [1953] 1 W.L.R. 1323; [1953] 2 All E.R. 1113. *Considered*, Bullock *v.* Bullock 975
Westminster City Council *v.* Southern Railway Co. [1936] A.C. 511, 532; 52 T.L.R. 541; [1936] 2 All E.R. 322. *Considered*, Peak *v.* Burley Golf Club 568
Whimster & Co. *v.* Inland Revenue Comrs., 1926 S.C. 20; 12 T.C. 813. *Considered*, Duple Motor Bodies Ltd. *v.* Inland Revenue Comrs. 510
White *v.* White [1950] P. 39, 53; 65 T.L.R. 524; [1949] 2 All E.R. 339. *Dicta of Asquith L.J. applied*, Sofaer *v.* Sofaer 1173
Wholesale and Retail Bakers of Scotland Association's Agreement (1959) L.R. 1 R.P. 347, 379, 382. *Applied*, In re Federation of Wholesale and Multiple Bakers' (Great Britain and Northern Ireland) Agreement [1960] 1 W.L.R. 393; In re Phenol Producers' Agreement 464
Wilkins *v.* Wilkins [1896] P. 108; 12 T.L.R. 212, C.A. *Considered*, Bullock *v.* Bullock . 975
Williams *v.* Sykes & Harrison [1955] 1 W.L.R. 1180; [1955] 3 All E.R. 225. *Applied*, Rushton *v.* Turner Brothers Asbestos Co. Ltd. 96
Williams *v.* Williams, The Times, March 15, 1958. *Distinguished*, Bohnel *v.* Bohnel . . 590
Woodland *v.* Woodland [1928] P. 169; 44 T.L.R. 495. *Considered*, Bullock *v.* Bullock . . 975
Working Men's Club and Institute Union Ltd. *v.* Swansea Corporation [1959] 1 W.L.R. 1197; [1959] 3 All E.R. 769. *Distinguished*, Victory (Ex-Services) Association Ltd. *v.* Paddington Borough Council 106

STATUTES JUDICIALLY CONSIDERED

PAGE

1730 **Landlord and Tenant Act** (4 Geo. 2, c. 28)—
s. 1: French *v.* Elliott 40
1801 **Inclosure Act (Scremby)** (41 Geo. 3, c. cxxiv)—
In re Scremby Corn Rents 648
1824 **Vagrancy Act** (5 Geo. 4, c. 83)—
s. 4: Reg. *v.* James 812
1835 **Highways Act** (5 & 6 Will. 4, c. 50)—
s. 67: Pemberton *v.* Bright 436
1837 **Wills Act** (7 Will. 4 & 1 Vict. c. 26)—
s. 9: *In the Estate of* Cook, decd. 353
s. 9: *In the Estate of* Little, decd. 495
1839 **Metropolitan Police Act** (2 & 3 Vict. c. 47)—
s. 54 (13): Bryan *v.* Robinson 506
1852 **Wills Act Amendment Act** (15 & 16 Vict. c. 24)—
s. 1: *In the Estate of* Little, decd. 495
1876 **Appellate Jurisdiction Act** (39 & 40 Vict. c. 59)—
s. 3: Whitehouse *v.* Board of Control 1093
1882 **Married Women's Property Act** (45 & 46 Vict. c. 75)—
s. 17: Samson *v.* Samson 190
s. 17: Short *v.* Short 833
1890 **Lunacy Act** (53 & 54 Vict. c. 5)—
s. 14 (1) (*a*) and s. 300: Buxton *v.* Jayne 783
s. 330 (2): Whitehouse *v.* Board of Control 1093
1891 **Stamp Act** (54 & 55 Vict. c. 39)—
Sch. 1: Henry Ansbacher & Co. *v.* Inland Revenue Comrs. 337
1892 **Private Street Works Act** (55 & 56 Vict. c. 57)—
ss. 6, 7, 8, 10, 11: Wilson *v.* Wrexham Corpn. 319
1893 **Sale of Goods Act** (56 & 57 Vict. c. 71)—
ss. 14 (1) (2), 15 (2) (*c*): Godley *v.* Perry 9
1894 **Finance Act** (57 & 58 Vict. c. 30)—
ss. 1, 9: *In re* Boulton 140
1895 **Summary Jurisdiction (Married Women) Act** (58 & 59 Vict. c. 39)—
s. 7: Pepper *v.* Pepper 131
1901 **Factory and Workshop Act** (1 Edw. 7, c. 22)—
s. 149 (1) (*a*) (i), Sch. VI: Harry Ferguson Research Ltd. *v.* Dawkins . . . 639
1907 **Criminal Appeal Act** (7 Edw. 7, c. 23)—
s. 5 (2): R. *v.* Dawson 163
1914 **Bankruptcy Act** (4 & 5 Geo. 5, c. 59)—
s. 141, Sch. 11, r. 24: *In re* Browne (A Bankrupt) 692
Sch. II, r. 13 (*c*): Cotterell *v.* Price 1097
1916 **Larceny Act** (6 & 7 Geo. 5, c. 50)—
ss. 20, 43 (2) (3): R. *v.* Dawson; R. *v.* Wenlock 163
ss. 26 (1), 27 (2): R. *v.* Nicholls 658
1923 **Union of Benefices Measure** (14 & 15 Geo. 5, No. 2)—
s. 10 (3) (5): Little Leigh Parochial Church Council *v.* Church Commissioners . . 567
1925 **Trustee Act** (15 Geo. 5, c. 19)—
s. 25 (4): Practice Direction (Trustee's Absence) 355
Law of Property Act (15 Geo. 5, c. 20)—
s. 40 (1): Parker *v.* Clark 286
s. 95: Cotterell *v.* Price 1097
s. 109 (2): Stroud Building Society *v.* Delamont 431
s. 146 (2): Mascherpa *v.* Direct Ltd. 447
s. 171 (1) (5): *In re* C., 1958 No. 1950 92
Land Charges Act (15 Geo. 5, c. 22)—
ss. 10 (1), Class C (iv), 13 (2): Beesly *v.* Hallwood Estates Ltd. 549
Supreme Court of Judicature (Consolidation) Act (15 & 16 Geo. 5, c. 49)—
s. 31 (1) (*i*): Whitehouse *v.* Board of Control 1093
1927 **Landlord and Tenant Act** (17 & 18 Geo. 5, c. 36)—
s. 18 (1): Keats *v.* Graham 30
s. 18 (1): Jaquin *v.* Holland 258
1928 **Rating and Valuation (Apportionment) Act** (18 & 19 Geo. 5, c. 44)—
s. 3 (1): Harry Ferguson Research Ltd. *v.* Dawkins 639
1930 **Mental Treatment Act** (20 & 21 Geo. 5, c. 23)—
s. 16 (1): Buxton *v.* Jayne 783
s. 16 (1): Whitehouse *v.* Board of Control 1093
Road Traffic Act (20 & 21 Geo. 5, c. 43)—
s. 21: R. *v.* Edmonton Justices. *Ex parte* Brooks 697
s. 28 (1): R. *v.* Stally 79
ss. 28 (1), 35 (1): D. (An Infant) *v.* Parsons 797

PAGE

1931 **Agricultural Marketing Act** (21 & 22 Geo. 5, c. 42)—
ss. 1 (1) (8), 5, 6 (1): Tuker *v.* Ministry of Agriculture, Fisheries and Food . . 819

1933 **Agricultural Marketing Act** (23 & 24 Geo. 5, c. 31)—
s. 19, Sch. 3: Tuker *v.* Ministry of Agriculture, Fisheries and Food 819

1934 **Law Reform (Miscellaneous Provisions) Act** (24 & 25 Geo. 5, c. 4)—
ss. 1 (2), 2 (3): Stanton *v.* Ewart F. Youldon Ltd. 543

Debts Clearing Offices and Imports Restrictions Act (24 & 25 Geo. 5, c. 31)—
s. 1: Fischler *v.* Administrator of Roumanian Property 917

Law Reform (Miscellaneous Provisions) Act (24 & 25 Geo. 5, c. 41)—
s. 3 (1): Carr *v.* Boxall 314

County Courts Act (24 & 25 Geo. 5, c. 53)—
ss. 40, 41: Leslie *v.* Liverpool Corpn. 1
ss. 43, 45, 65: Williams *v.* Settle 1072

1937 **Finance Act** (1 Edw. 8 & 1 Geo. 6, c. 54)—
s. 19 (4), sch. 4, para. 7 (1A): Henry Briggs, Son & Co. Ltd. *v.* Inland Revenue Comrs. 532

Factories Act (1 Edw. 8 & 1 Geo. 6, c. 67)—
s. 14 (1): Quintas *v.* National Smelting Co. Ltd. 217
s. 14 (1): Rushton *v.* Turner Brothers Asbestos Co. Ltd. 96
s. 20 (2) (*b*): Ackland & Pratten Ltd. (In Liquidation) *v.* Inland Revenue Comrs. . 1117
s. 25 (2): Corn *v.* Weir's (Glass) Ltd. 577
s. 25 (2): Kimpton *v.* Steel Co. of Wales Ltd. 527

1938 **Hire-Purchase Act** (1 & 2 Geo. 6, c. 53)—
s. 8 (2) (3): Samson *v.* Samson 190

1939 **Trading with the Enemy Act** (2 & 3 Geo. 6, c. 89)—
Fischler *v.* Administrator of Roumanian Property 917

1946 **National Health Service Act** (9 & 10 Geo. 6, c. 81)—
s. 50 and Sch. 9, Pt. I: Buxton *v.* Jayne 783

1947 **Treaties of Peace (Italy, Roumania, Bulgaria, Hungary and Finland) Act** (10 & 11 Geo. 6, c. 23)—
Fischler *v.* Administrator of Roumanian Property 917

Finance Act (10 & 11 Geo. 6, c. 35)—
s. 32 (1): Henry Briggs, Son & Co. Ltd. *v.* Inland Revenue Comrs. 532
ss. 35 (1), 36 (1) (4): Ackland & Pratten Ltd. (In Liquidation) *v.* Inland Revenue Comrs. 1117
s. 36 (1) (*c*): Inland Revenue Comrs. *v.* H. Dunning & Co. (1946) Ltd. . . . 1106

Town and Country Planning Act (10 & 11 Geo. 6, c. 51)—
s. 12 (1) (2) (*f*): Horwitz *v.* Rowson 803
ss. 58 (1), 61 (5), 89: Routh's Trustees *v.* Central Land Board 737

1948 **Companies Act** (11 & 12 Geo. 6, c. 38)—
s. 141 (2): *In re* Pearce Duff & Co. Ltd. 1014
s. 206: *In re* Great Universal Stores Ltd. 78
s. 352: *In re* Servers of the Blind League 564

Criminal Justice Act (11 & 12 Geo. 6, c. 58)—
s. 6 (4): R. *v.* Chapman 147
s. 20 (5) (*a*): R. *v.* Dangerfield 268
ss. 21 (4) (5), 23: R. *v.* Governor of Parkhurst Prison, *Ex parte* Philpot . . . 115
s. 22: R. *v.* Mordanam 7

Agricultural Holdings Act (11 & 12 Geo. 6, c. 63)—
ss. 24 (2) (*d*), 26 (1) (*a*) (*d*): French *v.* Elliott 40
s. 25 (1) (*b*): Evans *v.* Roper 814

1949 **Lands Tribunal Act** (12, 13 & 14 Geo. 6, c. 42)—
s. 3 (4): Routh's Trustees *v.* Central Land Board 737

Legal Aid and Advice Act (12, 13 & 14 Geo. 6, c. 51)—
ss. 1 (7) (*b*), 2 (*e*), 3 (1): Blatcher *v.* Heaysman 663

Representation of the People Act (12, 13 & 14 Geo. 6, c. 68)—
s. 16 (3): *In re* Kensington North Parliamentary Election 762

Pastoral Reorganisation Measure (12 & 13 Geo. 6, No. 3)—
s. 3 (2): Little Leigh Parochial Church Council *v.* Church Commissioners . . . 567

1950 **Matrimonial Causes Act** (14 Geo. 6, c. 25)—
s. 4: Scott *v.* Scott (Quine cited) 915
s. 14 (1): Haniver *v.* Haniver 310
s. 18 (1) (*a*): Ohochuku *v.* Ohochuku 183
ss. 19 (3), 29: Pachner *v.* Parker 486
s. 32 (3): Corfe *v.* Corfe 208
s. 32 (3): Haynes *v.* Haynes and Sawkill 968

1951 **Finance Act** (14 & 15 Geo. 6, c. 43)—
s. 32 (1) (3) (4): Ackland & Pratten Ltd. (In Liquidation) *v.* Inland Revenue Comrs. 1117

1952 **Income Tax Act** (15 & 16 Geo. 6 & 1 Eliz. 2, c. 10)—
ss. 19, 232 (2): Inland Revenue Comrs. *v.* Jackson 873
s. 123 (Sch. D, Case I): Jeffrey *v.* Rolls-Royce Ltd. 720
s. 137 (*a*): Rorke (H. J.) Ltd. *v.* Inland Revenue Comrs. 1132

PAGE

1952 **Magistrates' Courts Act** (15 & 16 Geo. 6 & 1 Eliz. 2, c. 55)—
ss. 19 (5), 24: R. *v.* Bennett, *Ex parte* Radburn 102
s. 28: R. *v.* Dangerfield 268
s. 104: Vaughan *v.* Biggs 622

1953 **Licensing Act** (1 & 2 Eliz. 2, c. 46)—
s. 152 (2): R. *v.* Lewes Justices. *Ex parte* Plumpton & District Club Trustees . 700
Sch. 2, Part I, para. 5: Reg. *v.* Woodbury Licensing Justices. *Ex parte* Rouse . 461

1954 **Finance Act** (2 & 3 Eliz. 2, c. 44)—
s. 28 (1): Burdett-Coutts *v.* Inland Revenue Comrs. 1027

Landlord and Tenant Act (2 & 3 Eliz. 2, c. 56)—
ss. 24 (1), 25 (1): Airport Restaurants Ltd. *v.* Southend Corporation 880
ss. 28, 65 (3): Green *v.* Bowes-Lyon 176
s. 30 (1) (*f*): Wine Shippers (London) Ltd. *v.* Bath House Syndicate Ltd. . 613, 989

Mines and Quarries Act (2 & 3 Eliz. 2, c. 70)—
ss. 48 (1), 51 (3) (*b*), 157: Brown *v.* National Coal Board 67

1955 **Requisitioned Houses and Housing (Amendment) Act** (3 & 4 Eliz. 2, c. 24)—
s. 4: Taylor *v.* Munrow 151

County Courts Act (4 Eliz. 2, c. 8)—
ss. 1, 12: Leslie *v.* Liverpool Corpn. 1

Rating and Valuation (Miscellaneous Provisions) Act (4 & 5 Eliz. 2, c. 9)—
s. 8: Victory (Ex-Services) Association Ltd. *v.* Paddington Borough Council . . 106
s. 8 (1) (*a*): Isaacs *v.* Market Bosworth R. D. C. 277

1956 **Restrictive Trade Practices Act** (4 & 5 Eliz. 2, c. 68)—
ss. 6 (1) (*b*) (*e*), 21 (1) (*b*): *In re* Doncaster and Retford Co-operative Societies' Agreement 1186
ss. 8 (8), 18 (1), 31 (1): *In re* Federation of British Carpet Manufacturers' Application 356
s. 20 (3) (*a*) (*b*): *In re* National Association of British and Irish Millers Ltd's Scheme 63
s. 21 (1) (*b*): *In re* Phenol Producers' Agreement 464
s. 21 (1) (*b*): *In re* Federation of Wholesale and Multiple Bakers' (Great Britain and Northern Ireland) Agreement 393
s. 21 (1) (*b*) (*g*): *In re* Black Bolt and Nut Association's Agreement 884

Copyright Act (4 & 5 Eliz. 2, c. 74)—
s. 17 (3): Williams *v.* Settle 1072

Medical Act (4 & 5 Eliz. 2, c. 76)—
s. 36: Fox *v.* General Medical Council 1017

1958 **Litter Act** (6 & 7 Eliz. 2, c. 34)—
s. 1 (1): Vaughan *v.* Biggs 622

Matrimonial Causes (Property and Maintenance) Act (6 & 7 Eliz. 2, c. 35)—
s. 1: Pachner *v.* Parker 486
s. 7: Samson *v.* Samson 190

Maintenance Orders Act (6 & 7 Eliz. 2, c. 39)—
s. 6: Pepper *v.* Pepper 131

Prevention of Fraud (Investments) Act (6 & 7 Eliz. 2, c. 45)—
s. 11 (1) (2) (3): R. *v.* Registrar of Building Societies. *Ex parte* A Building Society 669

Agricultural Marketing Act (6 & 7 Eliz. 2, c. 47)—
ss. 1 (1), 2 (7), 6 (1) (2), 7 (1), 8 (1): Tuker *v.* Ministry of Agriculture, Fisheries and Food 819

Variation of Trusts Act (6 & 7 Eliz. 2, c. 53)—
s. 1: *In re* Thompson's Will Trusts 1165
s. 1: *In re* Allen's Settlement Trusts. Allen *v.* Allen 6
s. 1: *In re* Hambleden's Will Trusts 82
s. 1: *In re* Tinker's Settlement 1011
s. 1: *In re* Robertson's Will Trusts 1050
s. 1 (3): Practice Direction (Court of Protection) 17

Divorce (Insanity and Desertion) Act (6 & 7 Eliz. 2, c. 54)—
s. 3: Pearce *v.* Pearce 855

Agriculture Act (6 & 7 Eliz. 2, c. 71)—
s. 3 (2): Evans *v.* Roper 814

Adoption Act (7 Eliz. 2, c. 5)—
ss. 3 (1), 35 (3): *In re* C. S. C. 304

1959 **County Courts Act** (7 & 8 Eliz. 2, c. 22)—
ss. 41, 42, 45, 67: Williams *v.* Settle 1072

Highways Act (7 & 8 Eliz. 2, c. 25)—
ss. 67 (1) (2) (3), 68 (1), 85 (1) (*a*), 3 (*d*), 295 (1): Ching Garage Ltd. *v.* Chingford Corpn., C.A. 947

Street Offences Act (7 & 8 Eliz. 2, c. 57)—
s. 1 (1): Smith *v.* Hughes 830

STATUTORY INSTRUMENTS JUDICIALLY CONSIDERED

R.S.C.— PAGE

Ord. 3, r. 10: Lewis *v.* Packer 452
Ord. 12, r. 8: Practice Direction 494
Ord. 19, r. 6: Inland Revenue Comrs. *v.* Jackson 873
Ord. 19, r. 10; Ord. 28, r. 8: *In re* Langton, decd. 246
Ord. 20, r. 10: Lewis *v.* Packer 452
Ord. 25, r. 5: Woyno *v.* Woyno 986
Ord. 36, r. 1 (1) (3): Pease *v.* George 427
Ord. 36B, rr. 2, 6: Hesz *v.* Sotheby & Co. 285
Ord. 36B, rr. 2, 6: Rossage *v.* Rossage 249
Ord. 38, rr. 3, 11: *In re* J. 253
Ord. 41D, r. 3 (3): Practice Direction (Maintenance) 566
Ord. 55, r. 5A: Lewis *v.* Packer 452
Ord. 55, r. 15: Practice Direction (Powers of Masters) 1195
Ord. 55A: Practice Direction (Guardianship of Infants) 744
Ord. 65, r. 11: Davies *v.* Davies 1004

Agriculture (Control of Notices to Quit) Regulations, 1948 (S.I. 1948, No. 190)—
regs. 4, 5 and 7: French *v.* Elliott 40

Building (Safety, Health and Welfare) Regulations (S.I. 1948, No. 1145)—
reg. 24 (1) (5) (*d*): Westcott *v.* Structural and Marine Engineers Ltd. 349
reg. 25 (2): Corn *v.* Weir's (Glass) Ltd. 577
reg. 27 (1) (2): Corn *v.* Weir's (Glass) Ltd. 577

Cereals (Deficiency Payments) Order, 1955 (S.I. 1955, No. 962)—
regs. 3, 4: *In re* Scremby Corn Rents 648

Clearing Office (Roumania) Order, 1936 (S.R. & O. 1936, No. 427)—
Fischler *v.* Administrator of Roumanian Property 917

Clearing Office (Roumania) Amendment Order, 1939 (S.R. & O., 1939, No. 750)—
Fischler *v.* Administrator of Roumanian Property 917

Clearing Office (Roumania) Amendment Order, 1940 (S.R. & O. 1940, No. 963)—
Fischler *v.* Administrator of Roumanian Property 917

Coal and Other Mines (Support) Order, 1956 (S.I. 1956, No. 1763)—
Sch. 1, reg. 12: Brown *v.* National Coal Board 67

Companies (Winding-Up) Rules, 1949 (S.R. & O. 1949, No. 330 (L. 4))—
r. 33: *In re* Royal Mutual Benefit Building Society 1143
r. 108: *In re* Kentwood Constructions Ltd. 646

County Court Rules, 1936 (as amended)—
Ord. 16, r. 10 (2) (*b*): Williams *v.* Settle 1072
Ord. 25, r. 6: Chung Kwok Hotel Co. Ltd. *v.* Field 1112

County Court Rules, 1957 (S.I. 1957, No. 174 (L. 1)), amended by County Court (Amendment) Rules, 1959 (S.I. 1959, No. 1251 (L. 7))—
Ord. 11, r. 1 (3) (*c*): Hopkins *v.* Manners 599

General Medical Council Disciplinary Committee (Procedure) Rules Order in Council, 1958 (S.I. 1958, No. 1805)—
r. 43 (2): Fox *v.* General Medical Council 1017

Matrimonial Causes Rules, 1957 (S.I. 1957, No. 619 (c. 4))—
rr. 3 (3), proviso (ii), 44 (1): Pachner *v.* Parker 486
rr. 4 (4), 28 (1): Haniver *v.* Haniver 310

Matrimonial Causes (Amendment) Rules, 1958 (S.I. 1958, No. 208)—
r. 12: Pachner *v.* Parker 486

Matrimonial Causes Rules, 1959 (S.I. 1959, No. 619)—
r. 4 (1) (*d*): Practice Direction (Address of petitioner) 548

Pedestrian Crossings Regulations, 1954 (S.I. 1954, No. 370)—
reg. 4: Hughes *v.* Hall 733

Restrictive Practices Court Rules (S.I. 1957, No. 603)—
r. 11: *In re* National Association of British and Irish Millers Ltd.'s Scheme . . 63

Supreme Court Costs Rules, 1959 (S.I. 1959, No. 1958, Sch. 2)—
r. 35: Practice Direction 1142
r. 35: Practice Direction 1194

Town and Country Planning (Use Classes) Order, 1960 (S.I. 1950, No. 1131)—
art. 2 (2) and Sch.: Horwitz *v.* Rowson 803
arts. 2, 3, Sch.: Marshall *v.* Nottingham Corpn. 707

Treaty of Peace (Roumania) Order, 1948 (S.I. 1948, No. 118)—
art. 1 (5) (*g*): Fischler *v.* Administrator of Roumanian Property 917

OVERSEAS ENACTMENTS JUDICIALLY CONSIDERED

Gold Coast—**Laws of the Gold Coast** (1951 Ed., c. 136)—
ss. 12 (2) (3) (4), 13 (11): Edward Ramia Ltd. *v.* African Woods Ltd. 86

ERRATA

[1960] 1 W.L.R.

Page 126: Solicitors for the plaintiff appellants in *Daws* v. *Daily Sketch and Daily Graphic Ltd.* were *Edward Thompson & Co.* and not as printed.

Page 163: The solicitors acting for the appellant Wenlock in *Reg.* v. *Dawson and Wenlock* were *H. Davies & Co.* and not as printed.

Page 184: Line 6 of the judgment should read "by virtue of section 18 (1) (*b*) "of the Matrimonial Causes Act, 1950," and not as printed.

Page 447: The title to the case beginning on this page is MASCHERPA *v.* DIRECK LTD. and not as printed.

Page 502: The solicitors in *In the Estate of Little decd.* should read *Enever, Strong, Freeman & Co.; Kinch & Richardson for Robert H. Kerrison, Coulsdon,* and not as printed.

Page 504, para. 1 of judgment, line 13: For "libel" *read* "defamation."

Page 548: The relevant statutory instrument in the Practice Direction should read: *Matrimonial Causes Rules*, 1957 (*S.I.* 1957, *No.* 619), *r.* 4 (1) (*d*), and not as printed.

Page 566: The relevant Order in the Practice Direction should read: *Order* 41D and not as printed.

THE
WEEKLY LAW REPORTS

Volume I

Containing those cases of value to practitioners which are not intended to be included in The Law Reports and also practice notes and directions.

[COURT OF APPEAL.]

* LESLIE *v.* LIVERPOOL CORPORATION.

C. A.

1959
Nov. 13, 16, 25.

Lord Evershed M.R., Sellers and Harman L.JJ.

[Plaint No. 266.]

Court of Appeal—County court—Appeal from—Jurisdiction—Fact, question of—Claim exceeding £200—*Form of plaint—County Courts Act,* 1934 (24 *&* 25 *Geo.* 5, *c.* 53), *ss.* 40, 41—*County Courts Act,* 1955 (4 *Eliz.* 2, *c.* 8), *ss.* 1, 12.

The plaintiff suffered relatively minor injuries as the result of a road accident in which the motor-bicycle which he was riding came into collision with the defendant corporation's motor-omnibus. He started proceedings against the defendants in the county court alleging that the accident was due to the negligence of their servant. In his particulars of claim he claimed damages expressly limited to £400. The county court judge dismissed the action holding that the accident was due to the plaintiff's own negligence. The plaintiff appealed, and on the appeal the question was raised whether, having regard to the terms of section 12 (2) of the County Courts Act, 1955,[1] an appeal lay on a question of fact to the Court of Appeal:—

Held, (1) that in the circumstances, including the nature of the claim, it would not be right to say that the plaintiff was not, when he started the proceedings, claiming damages exceeding £200, and that he had brought himself within section 12 (1) and (2) of the County Courts Act, 1955, since it was therefore open to the plaintiff to appeal to the Court of Appeal on matters of fact.

[1] County Courts Act, 1955, s. 12: "(1) . . . if any party to any such "proceedings in a county court as "are mentioned in the next following "subsection is dissatisfied with the "determination of the judge or jury "on any question of fact, the party "aggrieved by the judgment or order "of the court, may appeal therefrom "to the Court of Appeal. . . . (2) ". . . the proceedings in which a "right of appeal is conferred by this "section are—(*a*) any action founded "on contract or tort, or for money "recoverable by statute, where either "—(i) the debt, demand or damage "claimed exceeds £200; . . ."

C. A.

1959

LESLIE
v.
LIVERPOOL
CORPN.

Per curiam. The language of section 12 (2) of the Act of 1955 makes it clear that the question whether there is or is not a right of appeal depends on the claim which is made and not upon the amount which may later be recovered. In many cases it will be apparent from the language of the particulars of claim whether the amount which the plaintiff claims does or does not exceed £200. In other cases, however, and more especially in actions founded on tort where the damages are at large, they often may not be so. As a matter of general practice a prayer in particulars of claim should state whether or not the claim does or does not exceed £200.

It is a matter of common county court practice to state in the particulars of claim that the claim does not exceed £400; while there is no good ground for altering that practice, it is not necessary, as a matter of right, that such a limitation should be expressly put into particulars of claim in order that the county court may have jurisdiction.

Dictum of Evershed M.R. in *Tideway Investment and Property Holdings Ltd.* v. *Wellwood* [1952] Ch. 791, 808; [1952] 2 T.L.R. 365; [1952] 2 All E.R. 514, 520 considered.

APPEAL from Judge Harold Brown sitting at Liverpool County Court.

The plaintiff, Edward Leslie, on September 13, 1958, at 6 p.m. was riding a motor-bicycle travelling in a westerly direction along Utting Avenue East, Liverpool, when his bicycle came into collision with an omnibus owned by the defendants, the Liverpool Corporation, and driven by one of their servants. The omnibus at the time was crossing the avenue from Broadway. As a result of the accident the plaintiff suffered minor injuries and shock. He alleged that the accident was due to negligence of the defendants' driver, and in these proceedings claimed damages. In his particulars of claim the plaintiff expressly limited his damages to £400. The county court judge dismissed the action holding that the accident was solely due to the plaintiff's own negligence.

The plaintiff appealed. On the appeal the question was raised whether any appeal lay on questions of fact having regard to the provisions of section 12 (2) of the County Courts Act, 1955, since in his particulars of claim the plaintiff had not stated that his claim for damages exceeded £200.

The case only calls for report on the question of jurisdiction.

E. E. Youds for the defendant corporation.
E. Somerset Jones for the plaintiff.

The only case cited in argument is referred to in the judgment.

Cur. adv. vult.

November 25. The following judgments were read.

LORD EVERSHED M.R. These proceedings arose out of a road accident which occurred at 6 o'clock in the evening on September 13, 1958, that is to say, when it was daylight. As these accidents

go, fortunately this was not serious. It is first to be noted that, according to the agreed medical report, supplemented by the agreement of the counsel in the case, the total damage, including special damage, which the plaintiff suffered is to be taken at the sum of £100. That fact has a bearing upon a question which arose early in the case, namely, whether, according to the terms of the statute, this was a case in which an appeal lay at all to this court on matters of fact. Because we thought this question of some importance, we reserved our judgment, and since the hearing of the case I have had an opportunity of consulting with my brethren presiding in the other Divisions of this court, Hodson and Morris L.JJ.

The relevant terms of the County Courts Act, 1955, are to be found in section 12, which conferred for the first time a right of appeal on matters of fact from a county court to this court; but the right of appeal so conferred was limited by the later terms of the section. So far as is relevant in the present case, section 12 (2) provides that the proceedings in which a right of appeal is conferred by the section are: "(*a*) any action founded on contract "or tort, or for money recoverable by statute, where either (i) "the debt, demand or damage claimed exceeds £200." Subsection (3) of that section, in effect, makes that provision applicable to a counterclaim.

In the present case the action was founded on tort, the tort of negligence. The particulars of claim, having stated the particulars of negligence of the motor driver in what one might call almost common form, proceeded to give particulars of the personal injuries (fractures of the fingers, physical and nervous shock) and special damage £27 0s. 7d. The claim concluded with the words "and the plaintiff claims damages limited to £400." That limitation is inspired by the language of section 40 of the County Courts Act, 1934, as it is now amended by section 1 of the County Courts Act, 1955, giving to a county court jurisdiction in matters of this kind where the claim is limited to £400. It was suggested, however, in the present case that, having regard to the nature of the injuries as specified in the particulars of claim, reinforced by what had since appeared as plainly the upper limit of any monetary damage that could be recovered, the plaintiff here had not brought himself within section 12 (1) and (2) and so had no right of appeal on matters of fact. On a plain use of the English language, it is, of course, manifest that a claim expressed thus, "and the plaintiff claims damages limited to £400," is not the same thing as saying he claims damages exceeding £200, nor does the former, as a matter of English, as far as I can see, include the latter.

In all the circumstances of this case, which include the general nature of the claim (an action for damages for negligence on the part of a bus driver), it has seemed to us that it would not be right to say of this plaintiff that he was not claiming damages, when his proceedings started, exceeding £200, and we have,

C. A.
1959
LESLIE v. LIVERPOOL CORPN.
Lord Evershed M.R.

therefore, treated it as open to the plaintiff to appeal to this court on matters of fact. It was suggested that in truth the appeal was rather upon the inferences to be drawn from the facts found, than upon the facts themselves. But to that aspect of the matter I shall refer again, if at all, only very slightly, because I think, in all the circumstances, it would not be right to say that the plaintiff was not, when he started these proceedings, claiming damages exceeding £200.

But the fact that the question arose and caused some little debate made it desirable that we should consider whether in cases of this kind a plaintiff should not make it clear from the start whether he is or is not claiming damages more than £200 in extent. From the language of the subsection, it is to my mind clear beyond peradventure that the question whether there is or is not a right of appeal depends upon the claim that is made in the case and not upon the award which may later be recovered, and that view is, I think, supported by other language in the relevant section. In many cases—and this is, of course, especially true where the claim is for money recoverable by statute and very often true where the claim is founded on contract—it will be apparent from the language of the particulars of claim whether the amount which the plaintiff seeks to recover does or does not exceed £200. But in other cases, and more especially in actions founded on tort where damages are, as it is said, at large, this very often may not be so.

After speaking to my brethren, we think that as a matter of general practice a prayer in a statement of claim should state whether or not the claim does or does not exceed £200. I have said "as a matter of general practice" because there will be cases where such a result is obvious from the nature of the claim. But where it is not so clear, then I think it would be a proper practice that the prayer should make it clear. There are good reasons, as it seems to me, for such a view. In the first place, I do not think it right that a plaintiff, if he should be the unsuccessful party, should be in the position of getting the best of both possible worlds, so that in matters relating to costs he might say afterwards: "Although I did not say so, obviously my claim was a very small one from the start." On the other hand, whatever the actual sum that the judge might say he would have recovered had he succeeded, he might say: "My claim was always for more than £200." Perhaps even more important, I think it is right that the defendant, in such a case, should know where he stands upon this matter. In the present case, if the plaintiff had recovered say the amount of the £100, it might well have been a hardship to tell the defendant that he had no right of appeal on fact because the claim had not in fact in terms stated a demand for more than £200. Nor do I think that the adoption of such a practice is likely to lead to any kind of abuse. In trivial cases to put in that the plaintiff's claim exceeds £200 obviously might involve him in having to pay, if he lost, on a scale of costs which was

inappropriate to the claim. More than that, I think the defendant would have a remedy if it was reasonably apparent that, in spite of the terms of the prayer, the real claim could not possibly be any figure as large as £200, so that prayer had plainly been inserted solely to confer a right of appeal on fact. In such a case I should have thought a defendant could make the appropriate application to the county court to amend the statement of claim by striking out such part of it as was, as I say, inappropriate to the true nature of the claim and designed merely for the purpose of conferring this right.

We, therefore, are of opinion that in this type of case as a general matter a plaintiff should state whether or not his claim exceeds £200. The present prayer does say that the claim does not exceed £400 in order to confer county court jurisdiction beyond a doubt. Whether that limitation should properly be inserted is a matter that was considered, incidentally, by this court in the case of *Tideway Investment and Property Holdings Ltd.* v. *Wellwood.*[1] I am there reported as declining to express a view whether the limitation ought to be expressed. I take the same view today and do not desire to say that it is necessary for such a limitation expressly to be put in. I understand, however, that as a matter of county court practice it commonly is put in, and if it is the practice, there is obviously no good ground for altering it; but I should not wish to say that it was necessary as a matter of right that such a limitation should expressly be put in in order that the county court might have jurisdiction.

So much for the preliminary question. As I have said, we have regarded the present appeal as open to the plaintiff on questions of fact as well as law, and I must now state how it came about that the collision occurred on this September evening.

[His Lordship proceeded to examine the evidence and held that the plaintiff was 50 per cent. to blame for the accident and was entitled to £50 damages, being half the damages which he had suffered.]

SELLERS L.J. My Lord has expressed the opinion of the court on section 12 of the County Courts Act, 1955, and I have nothing to add to that. [His Lordship then proceeded to consider the evidence.]

HARMAN L.J. I agree and have nothing to add.

Appeal allowed with the costs of the appeal and costs on Scale 3 in the court below. Damages of £50 for the plaintiff. Costs to be taxed at Liverpool.

Solicitors: *Donald A. Kershaw; Thomas Alker, Town Clerk, Liverpool.*

B. A. B.

[1] [1952] Ch. 791, 808; [1952] 2 T.L.R. 365; [1952] 2 All E.R. 514, 520.

[CHANCERY DIVISION.]

1959
Oct. 29.

Vaisey J.

* *In re* ALLEN'S SETTLEMENT TRUSTS. ALLEN *v.* ALLEN.

PRACTICE NOTE.

[1959 A. No. 1215.]

Trust and Trustee—Variation of trusts—Power of investment—Affidavit by stockbroker—Variation of Trusts Act, 1958 (6 *&* 7 *Eliz.* 2, *c.* 53), *s.* 1.

ADJOURNED SUMMONS.

A settlement, executed in 1937 on the marriage of the settlor and his wife, contained an investment clause giving a wide range of investments, but not including power to invest in ordinary shares. At the date of the summons there were two children of the marriage, born respectively on August 18, 1938, and June 9, 1942. At the time the settlement was made neither the settlor nor his wife had devoted any particular thought to the form of investment clause which should be inserted therein, but they were now both of the opinion that a wider power of investment would be to their advantage and also to the advantage of those interested in the capital. The summons, accordingly, was taken out, asking, under section 1 of the Variation of Trusts Act, 1958, for an extension of the powers of investment so as to give power to invest in ordinary shares. The reasons for the view of the settlor and his wife appeared from an affidavit intended to be sworn in the proceedings by a partner in a firm of stockbrokers appointed to advise the trustees.

Michael Browne for the trustees.
T. L. Dewhurst for the tenant for life.
J. D. M. Rennie for consenting adults.
Ian Romer for infant beneficiaries.

VAISEY J., in the course of the hearing, said that in future cases of this kind it would be unnecessary to file evidence by a stockbroker or other expert containing general matters of economic and financial history or argument in general terms as to the wisdom of extending powers of investment. He indicated that the same practice should be followed in applications made by charities for the purpose of obtaining wider investment powers.

His Lordship further indicated that this direction was not intended to preclude the filing of expert evidence relating to matters peculiar to the particular application which an applicant was advised should be brought to the attention of the court.

Solicitors: *Theodore Goddard & Co.*

K. R. A. H.

[COURT OF CRIMINAL APPEAL.]

* REGINA v. MORDANAM.

C. C. A.

1959
Dec. 1.

Lord Parker C.J., Hilbery and Salmon JJ.

Criminal Law—Sentence—Supervision order—Twelve months' or more sentence—Two offences—Consecutive sentences of nine months in respect of each—Whether sentence of twelve months or more—Power of court to make order to notify address on discharge—Criminal Justice Act, 1948 (11 *&* 12 *Geo.* 6, *c.* 58), *s.* 22.

By section 22 (1) of the Criminal Justice Act, 1948 (as amended by the Prison Act, 1952, s. 54 (1), Sch. III): "Where a person "is convicted on indictment of an offence punishable with imprison- "ment for a term of two years or more and that person" has been convicted on two previous occasions of offences for which he was sentenced to Borstal training, or of one offence for which he was sentenced to corrective training, "the court, if it sentences him to a "term of imprisonment for twelve months or more, shall . . . order "that he shall for a period of twelve months from his next dis- "charge from prison be subject to the provisions of section 29 of "the Prison Act, 1952."

A defendant pleaded guilty before justices to two charges of obtaining money by false pretences and, having asked that eleven other offences be taken into consideration, was committed to quarter sessions for sentence under section 29 of the Magistrates' Courts Act, 1952. Quarter sessions imposed a sentence of nine months' imprisonment in respect of each charge, the sentences to run consecutively, and made a supervision order pursuant to section 22 of the Criminal Justice Act, 1948. On appeal against sentence:—

Held, that, although the hearing at quarter sessions was to be treated as a trial on indictment, there was not a sentence of imprisonment of twelve months or more, but two separate sentences, each being sentences of nine months, so that section 22 of the Act of 1948 did not require an order under that section to be made, and that, therefore, that order could not stand.

APPLICATION for leave to appeal against sentence.

The applicant, Rowe Mordanam, pleaded guilty at the West London Magistrates' Court to two charges of obtaining money by false pretences, asking that eleven other offences be taken into consideration, and was committed to quarter sessions for sentence under section 29 of the Magistrates' Courts Act, 1952. Quarter sessions imposed a sentence of nine months' imprisonment in respect of each charge, the sentences to run consecutively, and made an order under section 22 of the Criminal Justice Act, 1948, that for a period of twelve months from his next discharge he should be subject to the provisions of section 29 of the Prison Act, 1952. The applicant applied for leave to appeal against sentence.

The applicant did not appear and was not represented.

HILBERY J. stated the facts set out above and continued: The applicant now asks for leave to appeal against sentence, and a

C. C. A.
1959
REGINA
v.
MORDANAM.
Hilbery J.

point emerges which results in this court, in the circumstances, giving leave to appeal against sentence and treating this application as the hearing of the appeal against sentence.

There were two charges, and the applicant was sentenced to nine months' imprisonment in respect of each charge, that is, in respect of each charge there was a separate sentence of nine months, but these sentences were ordered to run consecutively. The question which emerges is: Had the court imposing those sentences power to make an order under section 22 of the Act of 1948? That section [as amended] is in these terms: "Where a person is convicted on indictment of an offence punishable with imprisonment for a term of two years or more and that person (*a*) has been convicted on at least two previous occasions of offences for which he was sentenced to Borstal training or imprisonment; or (*b*) has been previously convicted of an offence for which he was sentenced to corrective training, the court, if it sentences him to a term of imprisonment of twelve months or more, shall, unless having regard to the circumstances, including the character of the offender, it otherwise determines, order that he shall for a period of twelve months from his next discharge from prison be subject to the provisions of section 29 of the Prison Act, 1952."

In the view of this court the sentence of nine months' imprisonment in respect of each of the two charges does not bring the case within the ambit of section 22 so as to require that the court shall order that for a period of twelve months from his next discharge from prison he shall be subject to the provisions of that section. It is true that when such a case as this is committed by a magistrates' court under section 29 of the Magistrates' Courts Act, 1952, to quarter sessions for sentence, the hearing by quarter sessions is treated as a trial on indictment, and that has been stated in this court. But here, treating it as a trial on indictment, there was not a sentence in respect of an offence charged in the indictment which was one of imprisonment for twelve months or more. Each sentence was one of less than twelve months, and the consequence is that the case did not come within section 22 as a case requiring the order to be made under that section. This court, therefore, varies the sentence in this case by eliminating from it the order under section 22.

Appeal allowed.

J. F. L.

[QUEEN'S BENCH DIVISION.]

* GODLEY *v.* PERRY.

BURTON & SONS (BERMONDSEY) LTD. (THIRD PARTY).

GRAHAM (FOURTH PARTY).

1959
Nov. 23, 25.

Edmund Davies J.

[1958 G. No. 2023.]

Sale of Goods — Implied term — Fitness for purpose — Merchantable quality—Sale of toy by retailer to child—Sale of toys to retailer by wholesaler and by importer to wholesaler—Sales by sample—Defect rendering toy unmerchantable—Whether apparent on reasonable examination—Sale of Goods Act, 1893 (56 & 57 *Vict. c.* 71), *ss.* 14 (1) (2), 15 (2) (*c*).

A boy of six was injured when properly firing a stone from a toy plastic catapult which he had bought from a retail shop. The catapult fractured just below the point where the handle joined the fork and either a piece of the broken catapult or the stone entered the boy's eye, so rupturing it that it had to be removed. Subsequent examination showed that the catapult was made of a cheap brittle material and was indifferently moulded, containing internal voids. It was one of a small quantity bought by the retailer's wife from a wholesaler. Before ordering she had tested a sample by pulling back the elastic, and had similarly tested each catapult before displaying them in her shop-window. The same test of a sample catapult had been made by the wholesaler before he placed an order with the importer of the catapults from Hongkong, where they were manufactured.

In an action for damages against the retailer, the infant plaintiff claimed that in buying the catapult he had relied on the retailer's skill and judgment and had bought the catapult by description, and that in breach of the conditions contained in section 14 (1) and (2) of the Sale of Goods Act, 1893,[1] the catapult was not fit for the purpose for which it was designed, or of merchantable quality. The retailer, who denied liability, brought

[1] Sale of Goods Act, 1893, s. 14: "Subject to the provisions of this "Act . . . there is no implied warranty or condition as to the quality "or fitness for any particular purpose "of goods supplied under a contract "of sale, except as follows:—(1) "Where the buyer, expressly or by "implication, makes known to the "seller the particular purpose for "which the goods are required, so "as to show that the buyer relies on "the seller's skill of judgment and "the goods are of a description which "it is in the course of the seller's "business to supply (whether he be "the manufacturer or not), there is "an implied condition that the goods "shall be reasonably fit for such "purpose . . . (2) Where goods are "bought by description from a seller "who deals in goods of that description (whether he be the manufacturer or not), there is an implied "condition that the goods shall be "of merchantable quality: provided "that if the buyer has examined the "goods, there shall be no implied "condition as regards defects which "such examination ought to have "revealed . . ."

S. 15: "(1) A contract of sale is "a contract for sale by sample where "there is a term in the contract, "express or implied, to that effect. "(2) In the case of a contract for sale "by sample— . . . (*c*) There is an "implied condition that the goods "shall be free from any defect, "rendering them unmerchantable, "which would not be apparent on "reasonable examination of the "sample."

1959

GODLEY
v.
PERRY.

in the wholesaler as third party, who likewise brought in the importer as fourth party, the retailer and the wholesaler claiming respectively that the sales to them were sales by description or by sample, and alleging breaches of sections 14 (1) and 15 (2) (*c*) of the Act. The importer denied liability, and contended that if the sale by him to the wholesaler was a sale by sample, any defect in the catapults was obvious on reasonable examination:—

Held, (1) that the catapult was clearly not fit for the purpose for which it was designed and was not of merchantable quality, and the infant plaintiff was entitled to succeed against the retailer under section 14 (1) and (2) of the Act as an inference of reliance on the retailer's skill and judgment readily and properly arose in a case where the customer was a child of tender years, and a sale over the counter was no less a sale by description than one where an order was placed on the strength of a catalogue.

Grant v. *Australian Knitting Mills Ltd.* [1936] A.C. 85; 52 T.L.R. 38; *Bristol Tramways Carriage Co.* v. *Fiat Motors* [1910] 2 K.B. 831; 26 T.L.R. 629, and *Morelli* v. *Fitch & Gibbons* [1928] 2 K.B. 636; 44 T.L.R. 737 applied.

(2) That the sales by the wholesaler to the retailer, and by the importer to the wholesaler respectively, were sales by sample, and each was subject to the implied term in section 15 (2) (*c*) of the Act; and that, as the catapult which caused the accident was so defective as to be unmerchantable, and the defect was such that it was not apparent on reasonable examination of the sample (as carried out by the retailer's wife and the wholesaler), both the wholesaler and the importer were in breach of the implied term in section 15 (2) (*c*).

Dictum of Lord M'Naghten in *Drummond & Sons* v. *E. H. Van Ingen & Co.* (1887) 12 App.Cas. 284, 296 applied.

ACTION.

On April 10, 1958, the infant plaintiff, Nigel Godley, aged six years and four months, bought for 6d. a plastic toy catapult from a shop where the defendant, James A. Perry (hereinafter referred to as "the retailer"), carried on business as a newsagent, selling in addition the usual side-lines commonly found in such businesses, including children's toys. The boy's parents did not know that he was buying the toy, although he told the retailer's wife who sold it to him that he had their permission to buy it. The retailer's wife was originally reluctant to sell the boy the toy because of the possible damage she thought he might cause to windows, but her reluctance had nothing to do with any distrust she had in the toy itself. The boy's mother threatened to deprive him of the catapult but eventually permitted him to retain it. Having used it for two days without mishap, on April 13 the infant plaintiff put a stone in the catapult which he held in his left hand, pulled back the elastic and stone with his right hand to fire it, when the catapult broke and he was struck in his left eye, either by the stone or by a piece of the catapult itself. Subsequent examination showed that the handle of the catapult had fractured and broken off just below the point where it joined the fork. It was made of cheap brittle polystyrene, indifferently moulded, and contained internal voids. As a result of the accident the boy's left eye was ruptured and had to be removed. According

to agreed medical reports the rupture to the eye was caused by "a catapult injury."

The catapult was one of a consignment of two dozen bought by the retailer's wife on April 7, 1958, from Burton & Sons (Bermondsey) Ltd., wholesalers, with whom the retailer was in the habit of doing business. On that day his wife had ordered them from the wholesaler's traveller who had visited the shop, produced a toy catapult, said that it was a good selling line, and pulled back the elastic by way of demonstrating the toy's worth and attraction. The retailer's wife examined it to judge its value to her youthful patrons, pulling back the elastic herself, and placed her order for two dozen which were delivered three days later. She displayed them in the shop-window after testing each by pulling back the elastic.

The wholesaler had come into possession of the catapults on August 30, 1957, when they placed an order for 30 gross with a traveller for Graham Bros., who had imported the toys from Hong-kong, where they were manufactured. On that occasion the importer's traveller had produced a sample catapult, quoting the wholesale price. There being a rule in the toy trade that the elastic of a catapult ought not to be capable of being pulled back more than two-and-a-half feet because of the danger of serious damage being inflicted on person or property by the propelled missile were a greater pull-back possible, the wholesaler and his manager tested the extent of the pull-back and, concluding that it was likely to prove a successful toy, and it never occurring to the wholesaler that the plastic frame could become fractured while the catapult was being properly used for its designed purpose, placed his order for 30 gross. That consignment arrived on December 6, 1957.

In this action the infant plaintiff, through his father, Reginald Ronald Godley, sued the retailer, claiming damages for the injuries sustained. Relying on section 14 (1) and (2) of the Sale of Goods Act, 1893, he alleged that he had bought the catapult relying on the skill and judgment of the defendant, his servant or agent; that the sale by the retailer's wife to him was a sale by description, and that in breach of the implied conditions in section 14 (1) and (2), the catapult was not reasonably fit for use as a catapult and was not of merchantable quality.

The retailer denied liability and brought in the wholesaler as third party, claiming that the sale by the wholesaler to him of the two dozen catapults was a sale by description, and alleging a breach of the conditions implied in section 14 (1) and (2); further, or alternatively, that the contract for sale between him and the wholesaler was a sale by sample, and that there was a breach of the implied condition in section 15 (2) (*c*) of the Act that each of the catapults should be free from any defect rendering it unmerchantable which would not be apparent on reasonable examination of the sample. He accordingly claimed damages for breach of those conditions. The wholesaler also denied liability

1959

GODLEY v. PERRY.

and brought in Stella H. Graham (widow), executrix of Ernest Martin Graham (deceased), who in his lifetime traded under the name of Graham Bros., the importers. The wholesaler also claimed that the sale to him of the 30 gross of catapults was a sale by description or by sample, and alleged breaches of the implied conditions contained in sections 14 (1) and 15 (2) (*c*), claiming damages amounting to an indemnity against the retailer's claim if liability was established.

The importer denied that the catapult was defective or in breach of condition in any of the respects alleged, but contended that if it suffered from any defect rendering it unmerchantable, the defect was such as would have been apparent on reasonable examination of the sample shown by their traveller to the wholesaler. Further, if the sale was a sale by description as well as by sample, he relied on the examination by the wholesaler as a sufficient examination of the goods for the purposes of the proviso to section 14 (2) to exclude the implied condition of merchantable quality as regards any such defect.

Donald Farquharson for the plaintiff.
Robin Dunn for the retailer (the defendant).
Michael Eastham for the wholesaler (the third party).
Nigel Bridge for the importer (the fourth party).

The cases cited in argument are referred to in the judgment.

Cur. adv. vult.

Nov. 25. EDMUND DAVIES J. stated the facts and continued: The infant plaintiff is a small boy, with the short arms which one would expect in a child of his age and build, and, having seen his demonstration of how he was holding the catapult at the time of the accident, I am satisfied that he was using it as one would expect it to be used, that is to say, pulling back the elastic to an entirely proper extent for the purpose of projecting the stone.

Such an accident should never have happened and could not have happened had the catapult been reasonably suitable for its designed use.

[His Lordship referred to the evidence given by the defendant's wife as to the test she had made when the catapults were delivered and before selling them to her customers, and to a demonstration she had given in the witness-box when, on pulling back the elastic on a catapult, the plastic frame immediately broke in pieces which flew across the court, and said that whether she actually tested all the catapults was immaterial to the claim in contract in view of his finding that the infant plaintiff met with his injury while using the catapult in a perfectly proper manner. His Lordship continued:] From the agreed report of a consulting

chemist, it appears that this consignment of catapults was made by the process known as injection moulding, the material used being polystyrene, which is the cheapest injection moulding material, and which, for the last 10 years, has been the preferred material for making cheap plastic toys. The chemist has long held the view that polystyrene is unsuitable for making toys, since it is brittle, easily broken, and breaks with a sharp dogtooth fracture. He said: "The Hongkong catapult is indifferently "moulded from, I think, low grade reconstituted polystyrene, "but even if it were moulded from virgin polystyrene, I should "still regard it as a dangerous toy for a child, that is, dangerous "because of its fragility and propensity to break with a dogtooth "fracture." Examination of the broken catapult actually used by the plaintiff revealed faults of internal voids, indicative of indifferent moulding conditions.

On this report, on what happened to the plaintiff himself, on what happened when the defendant's wife gave a demonstration in the witness-box, I have no hesitation in concluding that this was a most dangerous toy to be released on the market. As a result, this child of six was grievously injured, and his left eye completely destroyed. The injuries are the subject of agreed medical reports, and the general damages to which, subject to liability, the plaintiff is entitled in respect of pain and suffering, the loss of his eye, and the discomfort of daily removal of the artificial eye, is, in my judgment, the sum of £2,500.

On the issue of liability, the plaintiff seeks to rely upon the Sale of Goods Act, 1893, s. 14 (1) and (2). In my judgment he is entitled to succeed upon both heads. That the catapult was not in fact "reasonably fit for such purpose" as it was designed for, and that it was not "of merchantable quality," are propositions established beyond any sort of doubt.

As to section 14 (1), that the child was relying upon the shopkeeper's skill and judgment is, I think, clear. As Lord Wright said in *Grant* v. *Australian Knitting Mills Ltd.*[1]: "The "reliance will seldom be express; it will usually arise by implica-"tion from the circumstances; thus to take a case like that in "question, of a purchase from a retailer, the reliance will be in "general inferred from the fact that a buyer goes to the shop "in the confidence that the tradesman has selected his stock with "skill and judgment . . ." Furthermore, when the customer is, as here, of extremely tender years, an inference of reliance on the retailer's skill and judgment readily and properly arises.

As to section 14 (2), Mr. Robin Dunn, for the defendant, submitted that there was here no sale "by description"; that the subsection applies only to unseen goods, whereas here the catapults were displayed in the window and the plaintiff then bought one of these over the counter. In support he cited a passage from Farwell L.J.'s judgment in *Bristol Tramways*

[1] [1936] A.C. 85, 99; 52 T.L.R. 38.

1959

GODLEY v. PERRY.

Edmund Davies J.

Carriage Co. v. *Fiat Motors*[2] which reads: "The phrase "'merchantable quality' seems more appropriate to a retail "purchaser buying from a wholesale firm than to private buyers, "and to natural products, such as grain, wool or flour, than "to a complicated machine." But it is to be noted that the Lord Justice went on to add: "But it is clear that it extends to "both."

That a sale over the counter can be a sale "by description" is clear from *Morelli* v. *Fitch & Gibbons*,[3] *per* Branson J.,[4] and where, as here, a child asks for "a catapult," and one is sold to him over the counter, that is no less, in my judgment, a sale "by description" than one where an order is placed on the strength of a catalogue.

I turn to consider the defendant's claim to be indemnified by the third party, and the latter's claim over against the fourth party. The facts are but slightly disputed, if at all. [His Lordship referred to the facts as summarised above and said that he accepted the evidence given by the third party that, although he also sold catapults to other wholesalers, the accident to the infant plaintiff was the only one he had heard of arising out of the use of this toy; and that he had had some two or three dozen catapults returned in a broken condition—apparently not an unusually high figure for plastic toys—and when he first sought legal advice his solicitor broke one into a number of pieces by pulling back the elastic very hard, and there had been about a dozen similar breakages by similar experiments conducted since then. His Lordship continued:]

On the foregoing facts, counsel for the defendant was content to base his claim against the third party on section 15 (2) (*c*) of the Act of 1893. Here, he submitted, was clearly a sale by sample, and there was accordingly an implied condition that the goods would be free from any defect, rendering them unmerchantable, which would not be apparent on reasonable examination of the sample. I hold that this was indeed a sale by sample, and that the implied condition accordingly existed, and it is unnecessary for me to deal with the further suggestion—raised only by counsel for the third party, and promptly sought to be demolished by him—that section 14 (1) might also be invoked by the defendant.

Again, on the facts I hold that as between the third and fourth parties there was a sale by sample, with the like implied condition; that in breach of such condition, what I may call the accident catapult was so defective as to be unmerchantable is

[2] [1910] 2 K.B. 831, 840; 26 T.L.R. 629.

[3] [1928] 2 K.B. 636; 44 T.L.R. 737.

[4] [1928] 2 K.B. 636, 643.

clear. But, nevertheless, counsel for the fourth party submitted that a reasonable examination of the sample would have revealed its defects, and that, accordingly, no such condition could be implied. The fragility of the toy was, he submitted, perfectly obvious, and however widely his clients might have departed from a proper standard of mercantile ethics in placing large supplies of such an object on the market, to be snapped up by juveniles, liability under section 15 (2) (*c*) could not be established as against them.

Counsel for the fourth party demonstrated that by squeezing together the two prongs of the catapult in the hand they could be fractured, and further suggested that by holding the toy down with one's foot and then pulling on the elastic its safety could be tested and, as I understand it, its inherent fragility would thereby inevitably be discovered. True, the potential customer might have done any of these things. He might also, I suppose, have tried biting the catapult, or hitting it with a hammer, or applying a lighted match to ensure its non-inflammability, experiments which, with all respect, are but slightly more bizarre than those suggested by counsel. But, looking at the matter realistically, as one must, in my judgment none of those tests are called for by a process of "reasonable examination," as that phrase would be understood by the common-sense standards of everyday life. All these suggested tests were doubtless practicable, but the Act speaks not of a "practicable," but of a "reasonable," examination. Not extreme ingenuity, but reasonableness, is the statutory yardstick.

In my judgment, to pull back the elastic as the third party and his manager did in August, 1957, and as the defendant's wife did in April, 1958, was all that could be reasonably expected of any potential customer, and such an examination wholly failed to make apparent to them, or even render them alive to the possibility of, such a defect as undoubtedly existed in the accident catapult. Whether the samples displayed to the third party and to the defendant's wife corresponded with the bulk which, of course, included the accident catapult, there is no means of telling, for the chemist's report speaks of "internal voids" in the latter, and these presumably might differ in number and location in different catapults. If the samples did not correspond with the accident catapult, the third and fourth parties were also in breach of section 15 (2) (*a*) but for the present purposes that matters not.

In *Drummond & Sons* v. *E. H. Van Ingen & Co.*,[5] decided before the Act of 1893, but nevertheless authoritative, Lord

[5] (1887) 12 App.Cas. 284; 3 T.L.R. 541.

1959

GODLEY
v.
PERRY.

Edmund Davies J.

M'Naghten said[6]: "Then it was argued, defect or no defect, "the sale was a sale by sample: the goods delivered correspond "with the sample, and there is an end to the matter: the seller "has fulfilled his bargain. I think the sale was strictly a sale "by sample. Certainly the goods corresponded with the "sample only too well. But does this exact correspondence, when "it is found to involve an unforeseen and unsuspected defect, "relieve the seller from his obligation to supply goods fit for the "purpose for which they were intended? After all, the office of a "sample is to present to the eye the real meaning and intention "of the parties with regard to the subject-matter of the contract "which, owing to the imperfection of language, it may be difficult "or impossible to express in words. The sample speaks for itself. "But it cannot be treated as saying more than such a sample "would tell a merchant of the class to which the buyer belongs, "using due care and diligence, and appealing to it in the ordinary "way and with the knowledge possessed by merchants of that "class at the time. No doubt the sample might be made to say "a great deal more. Pulled to pieces and examined by unusual "tests which curiosity or suspicion might suggest, it would "doubtless reveal every secret of its construction. But that is "not the way in which business is done in this country. Some "confidence there must be between merchant and manufacturer. "In matters exclusively within the province of the manufacturer "the merchant relies on the manufacturer's skill, and he does "so all the more readily when, as in this case, he has had the "benefit of that skill before." Lord M'Naghten was there dealing with the position as between the manufacturer and a person dealing with him. In my judgment, his observations apply mutatis mutandis to circumstances such as the present, where there are deals between one wholesaler and another.

Applying that passage to the present case, I hold that the defect which was undoubtedly present in the accident catapult, and which rendered it unmerchantable and, indeed, a most dangerous toy to be let loose on the juvenile market, was not apparent on reasonable examination of the samples shown by the third party's traveller to the defendant's wife, and by the traveller for the fourth party to the third party. The third and fourth parties were, accordingly, each in breach of section 15 (2) (*c*).

In the result, there must be judgment for the plaintiff against the defendant for £2,500 with costs; judgment for the defendant against the third party for the like amount with costs, such costs to include the defendant's costs of his defence as between solicitor and client in addition to his costs of the third party proceedings; and judgment for the third party against the fourth party for the same amount of damages with costs, such costs to include the costs hereby ordered to be paid by the third party to the defendant, the third party's own costs of defence against the defendant

[6] (1887) 12 App.Cas. 284, 296.

as between solicitor and client and the third party's costs of the fourth party proceedings.

Judgment for the plaintiff against the defendant for £2,500 with costs. Judgment for the defendant against the third party for the like amount with costs, such costs to include the defendant's costs of his defence as between solicitor and client in addition to his costs of the third party proceedings. Judgment for the third party against the fourth party for the same amount of damages with costs, such costs to include the costs ordered to be paid by the third party to the defendant, the third party's own costs of defence against the defendant as between solicitor and client and the third party's costs of the fourth party proceedings.

Order that £100 be paid out forthwith to the plaintiff's solicitors and the balance of the £2,500 to be paid into court and transferred to the Bromley County Court.

Solicitors: *Shaen, Roscoe & Co.; Bartlett & Gregory, Bromley; Harveys, Lewisham; Guyer & Co.*

E. M. W.

[COURT OF PROTECTION.]

* PRACTICE DIRECTION (COURT OF PROTECTION).

1959
Dec. 9.

Trust and Trustee—Variation of trusts—Act of 1958—*Mental defective beneficiary—Application to Court of Protection—Procedure—Variation of Trusts Act,* 1958 (6 *&* 7 *Eliz.* 2, *c.* 53), *s.* 1 (3).
Mental Deficiency—Court of Protection—Proceedings under Variation of Trusts Act, 1958—*Procedure.*

For the guidance of those who have reason to apply to the Court of Protection under section 1 (3) of the Variation of Trusts Act, 1958, the master has directed that the following notes on procedure shall be published:

1. As soon as an originating summons under the Act to which a patient is a respondent has been issued in the Chancery Division, the Court of Protection should be notified and an authority sought for leave to enter appearance and to apply for or consent to the appointment of a guardian ad litem for the patient in those proceedings.

2. No formal application should be issued in the Court of Protection for relief under the Act until the originating summons

1959

PRACTICE DIRECTION (COURT OF PROTECTION).

has been issued in the Chancery Division and evidence filed in support thereof, but the master will in suitable cases authorise counsel to be instructed on behalf of the patient to look after the patient's interests during negotiations for an arrangement.

3. The formal application should only be entitled in the matter of the patient and the only respondent should be the patient unless the master otherwise directs. The master will direct whether the patient is to be served or service dispensed with, and where the master considers that the patient should be separately represented he may request the Official Solicitor to act as solicitor for the patient on the application.

4. A copy of the originating summons (or an office copy if the arrangement is to be found in the summons itself) and office copies of the evidence in support thereof, together with the exhibits, should be lodged with the application and an affidavit filed stating how the patient will be affected by the arrangement and whether it is considered to be for or against his benefit.

5. The master's order will make provision for subsequent approval of amendments which may be made to the arrangement after the date of the order.

E. F. ATKINSON,
Chief Clerk and Registrar.

December 9, 1959.

[PROBATE, ETC., DIVISION.]

1959
Oct. 12.

Lord Merriman P. and Phillimore J.

* STIRLAND *v.* STIRLAND.

Husband and Wife—Maintenance—Justices—Wilful neglect to maintain—Burden of proof—Whether husband's delusion of physical disability an excuse.

Burden of Proof—Husband and wife—Wilful neglect to maintain—Justices.

A husband, who had been involved in an accident in 1955, thereafter convinced himself that he had an injury to his knee and his back, which made it dangerous for him to continue his work, and he, in fact, only worked spasmodically. From that date he was in and out of a mental hospital, to which he was admitted for the fourth time in March, 1959. On April 10, 1959, on the husband refusing to accept electro-convulsive therapy as advised, on the ground that it would not help his back, and discharging himself from the hospital, the wife told him that she could not continue to live with him if he persisted in his refusal. She, in fact, ceased to live with the husband and obtained an order on the ground of his wilful neglect to provide reasonable maintenance for her and her infant child from April 10, 1959, and divers dates before. No medical evidence as to the husband's physical or mental condition was adduced at the hearing. On the husband's appeal:—

Held, that, on an application for an order on the ground of

wilful neglect to maintain by a wife living apart from her husband, the onus was on the wife to prove that she was justified in so living, and that the husband had, in fact, wilfully neglected to maintain her; the wife having discharged that onus, the burden shifted to the husband to prove that the failure to maintain was not wilful by reason of his physical or mental illness, and the husband had failed to discharge that burden.

Quaere, whether, if the husband were proved to be under a delusion that he was suffering from a physical disability, the burden would thereby be discharged.

APPEAL from Nottingham justices.

For considerable periods from about 1955, the husband had been in and out of a mental hospital in the neighbourhood of Nottingham as a voluntary patient. He had, in 1955, suffered some accidental injury in the pit in which he was working and had convinced himself that there was an injury to a knee which made it either difficult or even dangerous for him to work regularly in the pit, though it was common ground that he did work spasmodically, on and off. He maintained his opinion about the knee, in spite of some four separate examinations which, according to the wife's evidence, disclosed that there was nothing whatever the matter with the knee. He held a further opinion about himself, that some 11 years before, followed by some other unknown injury 10 years ago, his back was broken, so that he was really completely incapacitated from any laborious work, such as lifting an iron ring, which it was part of his duty to perform. No medical evidence was called to suggest that there was any such injury. On the contrary, the husband had, according to the evidence, been repeatedly told by doctors that there was no such injury. Having on three previous occasions been admitted to a mental hospital as a voluntary patient, he was admitted again on March 26, 1959, for the fourth time. On that occasion electro-convulsive therapy had been prescribed, which the husband positively refused to submit to on the ground, as he professed to say, that he was quite satisfied that there was nothing wrong with his head, and was quite equally satisfied that shock treatment to his brain would not do any good to his broken back.

On April 10, 1959, the wife went to fetch the husband out of hospital, taking him his clothes; he was a voluntary patient and, therefore, entitled to discharge himself. In the course of the next hour or so, as they were on the way, ostensibly, back to the matrimonial home, she handed him the key and told him that she could no longer live with him if he persisted in refusing to undergo the treatment for his ailment which had been prescribed. She, in fact, did not resume living with the husband, and issued a complaint that on April 10, 1959, and divers dates before the husband had wilfully neglected to provide reasonable maintenance for herself and her infant child. At the hearing of the complaint no medical evidence was adduced by the husband as to his physical or mental condition.

1959

STIRLAND v. STIRLAND.

On July 1, 1959, the justices for the County of Nottingham found that the married life to which the husband had reduced the wife before he went into hospital on the last occasion was intolerable, and that it was making her ill, and that she was abundantly justified in not resuming cohabitation when the husband was openly refusing the treatment which was prescribed as likely to put him right. They further held that, as the wife was plainly willing to try a resumption of cohabitation if this treatment had been undergone, she was not a deserter, and made an order in her favour. From that order the husband appealed.

Charles McCullough for the husand.
R. D. Lymbery for the wife.

The following cases were cited in argument: *Leng* v. *Leng* [1]; *Papadopoulos* v. *Papadopoulos* [2]; *Stringer* v. *Stringer* [3]; *Starkie* v. *Starkie (No. 2)* [4]; *Jones* v. *Jones*.[5]

LORD MERRIMAN P. referred to the facts, substantially as set out above, and continued: This matter falls to be resolved in two stages; and it is not a wholly easy case, because, I think, there are two distinct stages in which the onus is one way on the wife and the other way on the husband. The wife had to prove that, notwithstanding her being a separated wife, she was still entitled to maintenance and that the husband had wilfully neglected to provide it. Certainly he had not provided it. That issue the justices have decided in her favour, and I do not think it is possible for this court, in the absence of seeing and hearing the witnesses, and in particular the evidence of the wife, which the justices preferred at every stage where the matter was controversial to the evidence of the husband, to say that, in these rather peculiar circumstances, the wife was not justified in temporarily refusing to resume cohabitation. It is important to bear in mind that there was no evidence whatever that she was taking up the position that she was entitled permanently to refuse to resume cohabitation; quite the contrary. So, up to that point, the wife has plainly discharged the burden which prima facie was upon her. But I am willing to assume—(indeed, I think it is an obvious proposition)—that if a man by some form of disablement is prevented from working and earning a living, that is very much a matter to be borne in mind in considering whether failure in fact to provide maintenance can be described as wilful neglect. I should think that that was perfectly clear in a case, for example, where a man is in hospital with a broken limb, which physically prevents him from working, but again the position might shift

[1] (1946) 62 T.L.R. 722; [1946] 2 All E.R. 590.
[2] [1930] P. 55.
[3] [1952] P. 171; [1952] 1 T.L.R. 415; [1952] 1 All E.R. 373.
[4] [1953] 1 W.L.R. 1396; [1953] 2 All E.R. 1255n.
[5] (1941) 165 L.T. 398.

and the burden change if there was evidence that a perfectly simple operation would mend the limb and enable him to work with perfect safety. Just as that would be true in the case of a physical disablement, so it might properly be held to be true in a case of mental disability. What, in substance, has been argued with great force on behalf of the husband is that this man refused to have this treatment because, in effect, he suffered from the delusion that the electro-convulsive therapy was designed to put his back right, and he was satisfied that it would do no good to his back, and there was nothing whatever wrong with his head. Were that delusion proved to the satisfaction of the justices I am not prepared to say that, so long as that delusion existed, it might not have the same effect as the uncured injury to a limb. But about this I think there is no shadow of doubt that, in order to prove a position like that, the burden plainly would lie upon the husband.

In fact, the justices have found, and this is the highest at which they put it, that although the husband was clearly mentally ill, he did not appear to be so disordered as not to be responsible for his actions. I should be prepared to hold that a man who thought that a proposed shock treatment to his head was designed to put right an imaginary broken back could be said to be suffering from a delusion, which might, in a certain degree, make him irresponsible for his actions, but I am very strongly of the opinion that to prove that state of things would require evidence of a very potent character on the part of the husband, and that evidence, manifestly, ought to come from some responsible witness from the mental hospital. Nobody was called to deal with the matter or to make any such suggestion, and it is suggested that we could spell all that out of the evidence of the wife. I do not think that is possible. I do not think that the evidence of the wife goes anywhere near establishing any such proposition as that, and it must be acknowledged that in the absence of any proper evidence about the husband's state of mind and the purpose for which the electro-convulsive therapy was designed, and the probability of its success, and such matters, there is very plainly the possibility, which, I think, is very much for the husband to rebut, if possible, that the whole thing savours rather of malingering. I do not want to impute any evil to the husband, but this, at any rate, is the fact, that the justices thought it significant that during the seven months of the preceding year, when the husband had been living with his own parents, he had been able to work regularly, and on that basis, and after a very careful review of the evidence, they stated their conclusions.

Their first conclusion was in the following words: "The "husband was capable of working regularly and earning sufficient "wages to maintain his wife and child properly, and had wilfully "failed to do so." Although that finding is challenged, it is a very long way from being challenged on the basis that the

1959

STIRLAND
v.
STIRLAND.

Lord Merriman
P.

husband had even begun to establish that he was prevented from working and earning money by some mental delusion of the kind that I have indicated. Having come to that conclusion, the justices then hold that, although the wife had refused to go back to her husband when he took his discharge from hospital, his previous conduct towards her had been such that she was fully justified in laying down the condition under which she would return. The condition was that he would undergo the treatment which he had been advised to undergo with the object, and the avowed object, of enabling them to settle down happily together. Then the justices say—(and this underlines the point of that aspect of the matter)—"If the husband would show a genuine "desire to change his conduct and maintain his wife and child, "for example, by accepting the medical advice, then the wife "would no longer be justified in refusing to return to him."

In my opinion, the justices were right in saying (at any rate, we have no right to interfere with their saying) that in the circumstances found by them the wife could not be held to be a deserter, and in so far as his case depends on his alleged mental disability, it was for him to prove it, and in my opinion he has not begun to do so. That being so, this appeal is misconceived, and must fail.

PHILLIMORE J. I entirely agree, and I only add a few words in deference to the argument of Mr. McCullough. The case which he sought to make on behalf of the husband was this. First, he said that, while it was no doubt true that the husband had failed to maintain his wife on April 10, 1959, and preceding days, this was due to the fact that he was ill and was unable to do so; and secondly, that, even if that were not the case, the wife, by deserting the husband when he came out of hospital, disentitled herself to claim any maintenance against him.

Taking first the failure to maintain on and before April 10, 1959: it was for the wife to show that her husband had failed to maintain her, and that his failure was wrongful and wilful. But the ordinary assumption that the law makes is that a man is liable to maintain his wife, and if, as here, a husband desires to say: "True, I failed to maintain you," then it is for him to show that he was not responsible at the time for his actions, or was otherwise excused from his ordinary liability.

The case that is put forward here is that this man was mentally ill. In the course of the hearing the wife gave evidence and the husband gave evidence, but no medical evidence was called. If a man in seeking to excuse himself from his normal legal liability on the ground of his mental state it is for him to call proper evidence to satisfy the court that it was due to his mental state that he failed in his obligation. He did not attempt to do so, and the justices, in those circumstances, had to deal with the case on the evidence before them, and they found in terms that the husband had made little effort to provide

his wife with reasonable maintenance after they started to live together again at Christmas, 1958. They said: "We felt that "there was no physical reason why he should not go to work "regularly." Dealing with his mental condition, they found: "Even though he is clearly mentally ill, he did not appear to be "so disordered as not to be responsible for his actions. We think "it is significant that while he was with his parents for some "11 months"—that is a mistake; it should be seven months—"of last year he appeared able to work regularly." Accordingly, they reached this conclusion: "That the husband was capable "of working regularly and earning sufficient wages to maintain "his wife and child properly, and that he had wilfully failed "to do so."

In my judgment, there was evidence before them on which they could properly so find, and, indeed, in the absence of medical evidence it would have been difficult for them to find that this husband was justified owing to his mental state in failing to maintain his wife. Of course, it may be said that the mere fact that this man was in hospital at all should be held to excuse him from maintaining his wife and child since, whilst in hosital, it must be assumed that he was there properly and necessarily. I do not know. Men have before now been guilty of malingering, and, as Lord Merriman P. has said, on the evidence that would be a possible view, though I certainly do not say a necessary view, of this case. But it would be a possible view, and if as a result of malingering a man is removed to hospital when he does not require to be there, clearly he cannot rely upon the fact that he is there to protect him from his obligations. There was no sufficient evidence here to support the defence which this husband put forward that he was mentally unable to work and to support his wife and child.

On the second point, the question of desertion: the justices accepted the wife's evidence. She told them that when the husband came out of hospital he said he would not sign for the treatment in there; she also said: "He told me he was not "going to have the treatment. He never signed for the treat-"ment. He said there was nothing wrong with him. He said "I was silly to take notice of other people and not him." The treatment was electro-convulsive therapy, which the doctors had prescribed. The wife then told him that unless he would take the treatment which the hospital had suggested "so we could "live happily again and try to forget the illness, the same as the "doctors told him, I could not stand living with him again "because it was such a worry." In my judgment, that statement of the wife's is quite inconsistent with an intention to desert her husband and bring their married life permanently to an end. What this wife was saying in effect was this: "I am only too "anxious to preserve the marriage, but if we are going to live "happily together you must accept the advice of the doctors, "because I cannot go on living in the sort of way in which we "were living before."

1959

STIRLAND
v.
STIRLAND.

Phillimore J.

The justices had to consider that evidence against the background that for at least three and a half years this man had been constantly complaining of ailments which, as the doctors found, did not exist in reality. In May, 1958, when he came out of hospital, he failed to rejoin his wife and child. He went and lived with his parents, and then, when his wife took out the summons in August, 1958, charging him with failure to maintain her, he offered to return to her. She took him back in December, 1958, and then, after having worked quite regularly for some seven months whilst living with his parents, he began to behave as he had before, namely, working for a day or so, then taking a few days off on the ground that his back was hurting him, and sitting by the fire smoking, or retiring to bed and allowing his wife to look after him.

The justices found that his conduct had been such as to make life intolerable for the wife, and a misery, and, accordingly, they came to the conclusion that, although the wife had refused to go back to her husband when he took his discharge from the hospital in 1959, his previous conduct towards her had been such that she was fully justified in laying down the conditions under which she would return, and, therefore, they found that she was not in a state of desertion.

That finding, viewed against the background of this case, and the sort of life which this wife had had to endure with this husband, was really unassailable. Her statement to her husband was consistent only with a desire to preserve her marriage rather than destroy it, and it would be stretching language to describe their parting in those circumstances, when he refused her reasonable request, as desertion of her husband. Accordingly, I think that the matters put forward by Mr. McCullough fail, and, in my judgment, the appeal should be dismissed.

Appeal dismissed with costs.

Solicitors: *Sidney C. Elphick for Claytons, Nottingham; Church, Adams, Tatham & Co. for Healey & Smith, Nottingham.*

E. J.

[CHANCERY DIVISION.]

1959
Oct. 20.

Roxburgh J.

* *In re* TREPCA MINES LTD.

[00510 of 1957.]

Practice and Procedure—Interpreter—Plaintiff in person—Summons—Foreign applicant ignorant of English—Whether applicant entitled to open case through interpreter—Discretion of court.

A foreign applicant, a resident of Switzerland, took out a summons for an order reversing the decision of the liquidator of a British company in voluntary liquidation rejecting his claim to be

a creditor of the company. Evidence was filed in the normal way and the summons was adjourned into court for hearing on affidavit evidence, with cross-examination of witnesses. Until the day of the hearing the applicant had been professionally represented, but at the hearing he appeared in person. He was unable to understand English and was incapable of conducting his case except through an interpreter:—

Held, that a case could not be opened through an interpreter without the consent of the court, that the court had a discretion in the matter, and that, since the court was entitled to have a case opened to it, in the exercise of that discretion and in the circumstances, the court would read the summons and the applicant's affidavits for itself, invite counsel for the respondent to read his evidence, and then read any affidavits in reply, for it would then be in a position to see what justice required should be done.

Observations on the function of an interpreter.

ADJOURNED SUMMONS.

A summons was taken out by a solicitor acting for the applicant, Radomir Pasic, a resident of Switzerland and apparently a Serb by birth, for an order that a decision of the respondent, the liquidator of Trepca Mines Ltd., a British mining company in voluntary liquidation, rejecting a claim by the applicant to be a creditor of the company for £2,616,486, be reversed and the proof ordered to be admitted in full. Until the day of the hearing the applicant had been professionally represented; security for costs in the sum of £650 had been ordered and evidence filed as in the normal course. Both parties gave notice of their intention to cross-examine witnesses. The summons was adjourned into court for hearing on affidavit evidence, with cross-examination of witnesses. At the hearing the applicant was not represented but appeared in person.

When the case was called on, the applicant rose and said "Pasic." This he repeated on being asked by his Lordship who he was, thereupon resuming his seat at his Lordship's request.

ROXBURGH J. Serious questions of constitutional law may arise in this case. I have been unable to find any precedent for a person who cannot speak English opening a case in these courts. Mr. Pasic, do you claim the right to address the court and, if so, in what language?

The applicant did not answer.

ROXBURGH J. Did you understand what has been said?

The applicant. No.

L. G. Scarman Q.C., *Philip Sykes* and *Owen Stable* for the liquidator. A question does arise. Addressing the court is quite different from giving evidence by a foreign witness through a sworn interpreter, or from foreigners who are prosecuted by the Crown giving evidence during proceedings. If the applicant can

1959

TREPCA MINES LTD., *In re.*

be heard at all as a litigant in person, it will be only because the court has the right to regulate its own procedure, and to swear an interpreter who must pass on to the court whatever the litigant is saying.

[ROXBURGH J. When the court regulates its own procedure there is the position of counsel and solicitors to be considered. I have been unable to find any case in which a person who cannot speak or understand a single syllable of English has been invited to address the court.]

Certainly the court has power to regulate its own procedure, but in so doing it must not depart from its ancient usage. It is plain that the original language of the law, and the one in which it was originally conducted, was Norman French. Litigants found it difficult to understand what the lawyers said, and as English was gaining ground there was passed in 1362 the Pleadings in English Act, 1362,[1] which enacted that all pleas should be pleaded in the English tongue. If that statute was still in force the operative words were perfectly plain as to the way in which proceedings must be conducted before Her Majesty's judges.

[ROXBURGH J. I shall not require witnesses who are attending for cross-examination to attend today.]

The applicant then tried to address the court in Serbo-Croat. He was ordered by his Lordship to sit down, whereupon he addressed the court in French and sat down after a few moments.

Scarman Q.C. In the present case the question is whether the applicant can address the court through an interpreter.

[ROXBURGH J. The question whether a foreign litigant can address the court through an interpreter does not seem to have been decided.]

Litigants in the courts of Wales have the right to address the

[1] Pleadings in English Act, 1362 [repealed by the Statute Law Revision Act, 1863]: " . . . Item, because it is " often shewed to the King, by the pre- " lates, dukes, earls, barons and all the " commonalty, of the great mischiefs " which have happened to divers of " the realm because the laws, cus- " tome and statutes of the realm be " not commonly known in the same " realm, for that they be pleaded, " shewed and judged in the French " tongue, which is much unknown in " the said realm, so that the people " which do implead, or be impleaded, " in the King's court, and in the " courts of other, have no knowledge " nor understanding of that which is " said for them or against them by " their serjeants and other pleaders " . . . the King . . . hath ordained " . . . that all pleas which shall be " pleaded in any courts whatsoever " . . . shall be pleaded . . . in the " English tongue, and that they be " entered and enrolled in Latin . . ."

Proceedings in Courts of Justice Act, 1731 [repealed by the Civil Procedure Acts Repeal Act, 1879], s. 1: " . . . " from and after March 25, 1733, . . . " all proceedings whatsoever in any " courts of justice within that part " of Great Britain called England, " and in the Court of Exchequer in " Scotland . . . shall be in the Eng- " lish tongue and language only . . ."

Welsh Courts Act, 1942, s. 1: " . . . it is hereby enacted that the " Welsh language may be used in any " court in Wales by any party or " witness who considers that he would " otherwise be at any disadvantage by " reason of his natural language of " communication being Welsh."

court in Welsh. [Reference was made to the Welsh Courts Act, 1942.]

[ROXBURGH J. Quite plainly, if a Welshman came here and sought to conduct proceedings before me through an interpreter I should be bound to refuse to hear him. Were I to give a Serb something which would be denied to a Welshman it might produce a Parliamentary crisis.]

It must be possible for a foreign litigant to conduct his case through an interpreter, provided that the court is satisfied with the interpreter's qualifications. It is, however, a matter for the court's discretion. [Reference was also made to the Proceedings in Courts of Justice Act, 1731; the Statute Law Revision Act, 1863; the Civil Procedure Acts Repeal Act, 1879; *Collier* v. *Hicks* [2]; and *Rex* v. *Lee Kun*.[3]]

ROXBURGH J. referred to the history of the proceedings and continued: There is no doubt that the applicant is wholly incapable of conducting this case at all unless he is permitted to conduct it through an interpreter. There seems to be, strange though it is, no case in any of the books—and the researches of counsel for the respondent have extended back beyond the Middle Ages—in which this question has ever been discussed, and it is one of very far-reaching consequence and importance.

There is, of course, no question but that the proceedings before me must be conducted in English and in no other language. That that is so is plain from the authorities to which counsel has very kindly drawn my attention; in particular, the Welsh Courts Act, 1942, which, in fact, deals with the Welsh language, but has considerable bearing on the problem before me.

In particular, the proceedings must not be conducted in French, which is unfortunate, because, from the point of view of saving costs I think I could get along without any interpreter at all if they were conducted in that language, but I am not allowed to do that.

Then there is the question whether the applicant can have an advocate who is not a member of the Bar. There is no doubt about that either, and certainly he cannot. Had he been able to put any argument before me at all he would surely have said that he wanted to conduct the case himself through the medium of an interpreter, the interpreter being the go-between, and nothing more, between himself and myself, bridging over the difficulty of language. Of course, I know from painful experience that that is not what does happen. Theoretically an interpreter is merely a mouthpiece and not an advocate at all, but, in fact, when an interpreter translates counsel's questions into the language of the witness, what happens is that rules of evidence are broken and, unless counsel or the judge knows the language, they are powerless to prevent it.

[2] (1831) 2 B. & Ad. 663.

[3] [1916] 1 K.B. 337; 32 T.L.R. 665.

1959

TREPCA MINES LTD., *In re.*

ROXBURGH J.

In my view, this question is wholly within the discretion of the judge, and it is for that reason I have been able to deliver an extempore judgment. If this had been an action I doubt if I should have proceeded. The judge is entitled to have the case opened to him, and it is certain that a case cannot be opened by an interpreter without the judge's consent. But these proceedings are not an action; they are proceedings by summons in which the evidence has all been filed, subject only to cross-examination, in English. I have no doubt at all that if I read the evidence I shall be much better able to see what justice requires than if I do not. There is no difficulty over that; I have the summons and the affidavits, settled by professional hands, and, therefore, in the exercise of my discretion in this particular case I propose to proceed by reading the summons and all the affidavits. So far as the respondent is concerned his counsel will, in the ordinary course, read their own evidence; then I shall read to myself the affidavits filed on behalf of the applicant in reply. At the end of that I shall consider what justice requires. I may say that I might well not have taken this course if the respondent had objected, but he is anxious that I should travel thus far.

I foresee that I can probably safeguard the respondent if I do go that far. I do not see myself how the cross-examination of witnesses is going to be conducted if it ever becomes necessary. Proceeding with an interpreter is going to increase the costs very much indeed; but the applicant is a foreigner resident abroad, who has thought fit to bring a claim for 2½ million pounds and upwards, and has not even retained a legal adviser to argue his case, and if it does become necessary to grant any form of adjournment, or to suffer a long period of time through an interpreter, I can deal with the matter by requiring further security for costs.

In those circumstances, believing that I have a discretion so to do, but not wishing to lay down any proposition of law other than that, I propose to proceed as I have said. When I have read the summons I shall myself proceed to read the affidavits in support of it. I shall then invite counsel to read his evidence and I shall then read, if there are any, any affidavits in reply. At the end of that time I will reconsider the position.

[After the court had proceeded accordingly, the applicant produced a document emanating from the Belgrade County Court indicating that proceedings in which he was taking part were still sub judice in that court. Being asked by his Lordship what he wished the court to do, he indicated through an interpreter that he wished the summons to be stood over, apparently to await the outcome of the proceedings in Belgrade, with a view to the enforcement of the judgment there in England against the company, should it be in his favour.]

ROXBURGH J. The applicant, in the year 1954, obtained judgment for a very large sum of damages against Trepca Mines Ltd.,

the company now in liquidation, in a Serbian court in the absence of the company. I do not mean that the company was not served, but that the company, as it was entitled to do under the authorities, to which I shall refer shortly, declined to submit to the jurisdiction of the Serbian court. However, for some reason not material, and notwithstanding the non-appearance of the company, that judgment was set aside by another higher Serbian court, and the position at the moment is that there is no judgment of any Serbian court in favour of the applicant. The applicant, however, has taken steps to endeavour to have his case reheard in the Serbian courts.

The liquidator very properly thinks it is high time this company should be wound up, that is to say, that the winding up should be completed, and, as he is taking no technical points, that enables me to read the document which the applicant has produced and which, though undoubtedly genuine, is not in fact in evidence.

[His Lordship referred to the document and continued:] When I asked the applicant what he wanted me to do he asked me, through an interpreter—I wish to emphasise that the interpreter has been very faithful in the discharge of my instructions to him; he has not attempted to conduct the case, which he has no right whatever to do, and he has done admirably because he has generally, so far as the applicant would allow him, translated the applicant's instructions; the applicant gave about 17 sentences, only one of which the interpreter was allowed to translate—to stand this case over. It was quite obvious to me, if I was going to pay any attention to the judgment of the Serbian court, the company ought to be represented before the judges in Belgrade. Therefore, I thought the best thing that I could do was to see whether or not this court would give effect to the judgment of the Serbian court if it should be in favour of the applicant.

The law on that point is perfectly plain. What is this action? It is not an action to recover immovable property; it is an action in the English terminology for damages; in the Serbian terminology it is an action for indemnification. [His Lordship referred to the affidavits filed on behalf of the applicant and continued:] It is clear on the authority of *Sirdar Gurdyal Singh* v. *Rajah of Faridkote* [1] and *Emanuel and Others* v. *Symon* [2] that, where the action is a claim for damages against a party not resident within the jurisdiction of the court, that respondent is not bound to submit to the jurisdiction, and if he does not no English court will enforce that judgment. Accordingly, in my judgment, I should not give effect to the judgment of the Serbian court, even if it were in the applicant's favour, and, therefore, I should not allow

[1] [1894] A.C. 670; 10 T.L.R. 621. [2] [1908] 1 K.B. 302; 24 T.L.R. 85.

1959

TREFCA MINES LTD., *In re.*

the liquidator to expend assets in defending that case. Therefore, I shall not grant any adjournment on that account.

[The remaining points before the court do not call for report.]

Order accordingly.

Solicitors: *Freshfields.*

K. R. A. H.

[COURT OF APPEAL.]

C. A.

1959 *Nov.* 26, 27.

Lord Evershed M.R., Sellers and Harman L.JJ.

* KEATS *v.* GRAHAM AND ANOTHER.

[Plaint No. O. 4231.]

Landlord and Tenant Act of 1927—*Repairs—Demolition required by planning authority—Whether premises to be demolished "at or "shortly after . . . termination of tenancy"—Meaning—Admissibility of evidence of events after tenancy terminated—Landlord and Tenant Act,* 1927 (17 *&* 18 *Geo.* 5, *c.* 36), *s.* 18 (1).

By section 18 (1) of the Landlord and Tenant Act, 1927: "Damages for a breach of a covenant . . . to leave . . . premises "in repair at the termination of a lease, . . . shall in no case "exceed the amount (if any) by which the value of the reversion ". . . is diminished owing to the breach . . . ; and in particular "no damage shall be recovered . . . if it is shown that the "premises, in whatever state of repair they might be, would at "or shortly after the termination of the tenancy have been or be "pulled down."

A lease in 1952 of premises comprising a building with an extension at the back contained a covenant by the tenants to leave the premises in substantial repair at the termination of the tenancy. The rear extension had been erected on the basis of permission granted by the London County Council under the Town and Country Planning Act, 1947, which had limited the period for which the building could be retained to seven years, and the use to "storage purposes only" (though, in 1953, this was amended to "stove enamelling" after an application had been made by the tenants). The tenants were informed in 1953 that it was unlikely that the period for which permission had been granted would be extended, and an application on behalf of the landlord was, in fact, turned down. When the authorised period expired the council did not take any steps to enforce the condition, but an appeal to the Minister against their refusal to grant any extension was unsuccessful. In December, 1956, the council wrote asking for written assurance that the extension would be removed within 14 days. The letter was sent to the tenants, and soon afterwards they notified the landlord that they would shortly be leaving. They left the premises on March 27, 1957. In defence to a claim by the landlord for damages for breach of the repairing covenant, the tenants said that at the time the tenancy ended the extension was to have been pulled down. This defence was tried as a preliminary issue.

The county court judge admitted as evidence that after the termination of the tenancy the landlord had relet the premises with the extension for a different industrial use and that, subsequently, he had been successful in obtaining permission to use the building for that purpose or for storage until 1962:—

Held, that in the circumstances, the probabilities at the relevant time, that is, when the tenants left the premises, were that the rear extension would shortly be pulled down.

(2) That the evidence as to the events after the tenants left was inadmissible.

Salisbury v. *Gilmore* [1942] 2 K.B. 38; 58 T.L.R. 226; [1942] 1 All E.R. 457 applied.

Per Lord Evershed M.R. and Sellers L.J. Evidence of events occurring after the termination of a tenancy would normally be inadmissible for the purpose of deciding whether section 18 (1) applied, though rarely they might be used to clarify and explain an ambiguity in what had gone before.

APPEAL from Judge Nicholas sitting at Shoreditch County Court.

By a lease dated August 25, 1952, one Yetta Keats granted to Barnett Graham and Richard Chesher (hereinafter called the "defendants") premises known as 30, Oldhill Place, Hackney, to hold for a term of three years expiring August 5, 1955, at a rent of £300 a year. The covenants by the defendants contained in the lease included a covenant "during the term to well and "substantially repair . . . maintain . . . and keep the said "buildings . . . and the said premises so repaired . . . and kept as "aforesaid at the expiration or sooner determination of the said "term unless prevented by destruction . . . to quietly yield "up . . . " (sic).

The premises consisted of a building in the front and a more recent extension at the back. On March 23, 1949, Mrs. Keats had obtained permission from the London County Council to erect and retain this extension for a limited period, and to use it "for storage purposes." The development permission was subject to conditions, including: "(1) The limited period for the "retention of the building and the use being seven years from "April 1, 1949, at the expiration of which period the building "shall be removed, and the use herein shall be discontinued, "without compensation, unless the council shall have previously "approved retention . . . and continuance of the use for a "further period. . . ." Notwithstanding that the permitted use of the rear extension was "for storage purposes only," the lease of 1952 limited the use of the premises to "stove enamel-"ling and spraying and metal finishing," and the premises were so used by the defendants, trading as General Enamelling Co. Ltd.

On April 24, 1953, the architect to the London County Council wrote to the defendants drawing attention to the contravention, to the enforcement powers of the council and to the provisions of section 18 (1) of the Town and Country Planning

C. A.
1959
KEATS
v.
GRAHAM.

Act, 1947, under which application could be made for permission to continue the use. The defendants made an application, and on June 24, 1953, permission was granted to use the premises until April 1, 1956, for stove enamelling but for no other purpose. At the expiration of that period the use was to be discontinued. The architect gave as his reasons for the conditions that the use was "inappropriate and undesirable as "a permanent measure particularly having regard to the "council's development plan for the area, which envisages a "residential use . . . this permission is granted as a temporary "measure to run concurrently with the permission granted "March 23, 1949, for the erection and retention of the building "at rear until April 1, 1956, . . . a renewal of an industrial use "of this latter building is unlikely to be granted."

Some months later a further application was made by a Mr. Keats, a surveyor and brother of the plaintiff, Gerald Keats, on whose behalf he was acting, though it was not clear whether at that time the plaintiff was in fact landlord of the premises. On February 15, 1954, the council's architect replied refusing permission for the "retention of the rear addition and the continued "use of 30, Oldhill Place . . . for stove enamelling or any industrial "use after April 1, 1956."

When April 1, 1956, came, no steps were taken to enforce the planning condition. The defendants appealed to the Minister of Housing and Local Government under section 16 of the Town and Country Planning Act, 1947, but after an inquiry, at which the landlord gave evidence on behalf of the defendants, their appeal was dismissed. In a letter dated October 17, 1956, the Minister pointed out that the special industrial use of stove enamelling was wrongly sited in what was substantially a residential area. On December 12, 1956, the council's architect wrote again referring to the refusal of February 15, 1954, and the Minister's letter of October 17, 1956, and requesting "your "written assurance within the next 14 days that the rear "addition will be removed without delay." It was not clear for whom that letter was intended, because, although it was addressed to the "Secretary of the General Enamelling Co. Ltd.," as was also the Minister's letter, it opened "Dear Madam," and the reference to the letter of February 15, 1954 (which bore the same office reference number), suggested that it might have been intended for the plaintiff or, perhaps, Mrs. Keats. The plaintiff did not see the letter. Soon after, the defendants wrote to the plaintiff saying that they would be leaving in four to six weeks and on March 27, 1957, they handed over the key. There was no evidence whether they replied to the letter of December 12, but, apparently, about a fortnight before they left a representative of the council visited them. There was no evidence of what was said.

On July 8, 1957, solicitors acting for the plaintiff wrote to the

defendants and, after referring to the delivery up of the premises, they required the defendants either to carry out repairs in compliance with the repairing covenant contained in the lease or to pay compensation amounting to £369 15s. The defendants disputed the amount claimed and also their liability in view of the expiry of the planning consent.

In an action on the covenant the defendants raised a special plea denying the alleged breach of covenant, and stating that they would submit that the rear extension was "at the time of the "termination of the defendants' tenancy to have been pulled "down and the plaintiff is not entitled to claim the alleged or any "damage." That plea (as Lord Evershed M.R. pointed out on the appeal) reflected section 18 (1) of the Landlord and Tenant Act, 1927.* The parties agreed that the question raised by that plea should be determined as a preliminary issue.

At the hearing in the county court, at which the second defendant did not appear, evidence was given and accepted of two events which occurred after the defendants had left the premises. In May, 1957, the plaintiff let the premises to another tenant for use for the "manufacture of glazing compounds and "allied products." In October, 1957, the plaintiff applied again to the council for permission to develop and received conditional permission to retain the rear extension until December 1, 1962, and to use the premises, including that extension, for storage and light industrial purposes.

The county court judge decided the preliminary issue in favour of the plaintiff and the defendant appealed.

Aron Owen for the first defendant.
P. A. W. Merriton for the plaintiff.
The second defendant did not appear and was not represented.

In addition to the case referred to in the judgments, the following was cited in argument: *Cunliffe* v. *Goodman*.†

LORD EVERSHED M.R. stated the facts, and read section 18 (1) of the Landlord and Tenant Act, 1927, as set out above. His Lordship continued: Section 18 (1) of the Act of 1927 was subjected to critical consideration in this court in *Salisbury* (*Marquis*) v. *Gilmore*.[1] Lord Greene M.R., for example, deals[2] with the

* Landlord and Tenant Act, 1927, s. 18: "(1) Damages for a breach of "a covenant . . . to leave . . . premises in repair at the termination "of a lease, . . . shall in no case "exceed the amount (if any) by "which the value of the reversion . . . "in the premises is diminished owing "to the breach . . . ; and in particular no damage shall be recovered "for a breach of any such covenant ". . . to leave . . . premises in repair "at the termination of a lease, if it "is shown that the premises, in "whatever state of repair they might "be, would at or shortly after the "termination of the tenancy have "been or be pulled down. . . ."

† [1950] 2 K.B. 237; 66 T.L.R. (Pt. 2) 109; [1950] 1 All E.R. 720.

[1] [1942] 2 K.B. 38; [1942] 1 All E.R. 457; 58 T.L.R. 226.

[2] [1942] 2 K.B. 38, 46.

C. A.
1959
KEATS
v.
GRAHAM.
Lord Evershed M.R.

criticism of the language which had led the judge at first instance to come to the conclusion that really the words could not be given any effective meaning at all. In effect, what Lord Greene M.R. said was that the formula that the premises "would at or shortly "after the termination of the tenancy have been or be pulled "down" comes (at any rate for the purposes of this case) to this, that the premises were going at that date to be pulled down, then or shortly thereafter. I add that *Salisbury* v. *Gilmore* [3] was a case in which no one but the landlords (the plaintiffs) and the tenants were concerned; it was a case, that is to say, in which no local authority had taken any part; but the plaintiffs had indubitably intended, and made plans accordingly for, the pulling down and reconstruction of those premises. The lease terminated on September 29, 1939 (which, as we all know, was a matter of three weeks or a little more after the outbreak of the war), and the point arose because, war having broken out and certain regulations later having come into force, the landlords had had to abandon their intention; so that they sought to say that, whatever might have been their intention prior to the outbreak of war, the fact was—certainly at the date of the action—that they no longer intended to pull the premises down, because, in truth, they could not have done so however much they wanted to. But the court held that for determining the question raised by the formula in the subsection one had to look at the date September 29, 1939, when the tenants went out and the lease determined, and at that date the proper inference was that the original intention of the landlords still subsisted.

One other matter of a little importance also is dealt with in Lord Greene M.R.'s judgment. As he pointed out, the formula which I have read could not be simply expressed by such a formula as, "if it is shown that the landlords intended to pull "down the premises," or some similar form of words, because (as Lord Greene M.R. observed) the formula had to cover the case where the pending destruction or pulling down did not depend upon any intention of the landlord but upon the effect of some local authority activity such as a demolition order, or planning, or the like.

So much for *Salisbury* v. *Gilmore* [3]; and I turn to this case. I venture to put the problem posed by the preliminary issue and the section in this form: What, at the termination of the tenancy, as a matter of fact, is the answer to the question: Were the premises then going to be shortly pulled down? That question can only be answered, of course, by forming a view on all the material that was then available. [His Lordship referred to the letter of March 23, 1949, set out above, and continued:]

The terms of that document reflect the provisions of the Town and Country Planning Act, 1947, by section 12 of which it is provided that after the appointed day (which had then passed)

[3] [1942] 2 K.B. 38.

permission under this Part of the Act "shall be required in "respect of any development of land"—"*any* development of "land"; and the section goes on to indicate that permission may be conditionally granted.

So far it would appear plain enough that the plaintiff's predecessor then got permission to put up what I shall henceforth call the "extension," at the rear of 30, Oldhill Place, but upon terms that it should be removed at the end of seven years, namely, on April 1, 1956; and he also got permission, having erected it, to use the extension for storage purposes. Undeterred, I may say, by the limitation as to user, he granted the lease to the defendants in August, 1952, which contained the covenant that the tenants should use the premises for no other purpose than that of "stove enamelling and spraying and metal finishing," which I understand to be classified as a "special industrial" use, and certainly is not "storage." But that is not, in the present circumstances, particularly relevant, because there is no doubt that permission to use for stove enamelling was subsequently obtained. [His Lordship stated further facts, and went on:]

The fact is, undoubtedly, that, though no assurance had been given, the London County Council took no further steps at all, after their representative called on the defendants early in March, 1957, by way of enforcing the condition which they had attached to the permission to erect the extension. And so we arrive at the date of the termination of the tenancy on March 28, 1957.

[His Lordship referred to the two events which had occurred after the defendants had left the premises, and went on:] It has been debated before us whether these events, occurring after the termination of the tenancy, were really admissible at all. My own inclination, based on *Salisbury* v. *Gilmore*,[4] is that, strictly speaking, they were not admissible. What the court is required by the section to do is to reach a conclusion of fact: Aye or no, were these premises going to be pulled down as things were at the date of the termination of the tenancy? No doubt it may be said that, if some matter of fact is doubtful, later events may by reflection clarify and explain what had gone on before. But there is, to my mind, no such ambiguity in the present case. I will assume for the purposes of the rest of my judgment, however, that it was proper to receive this evidence, though what may be the weight of it is in the present case a very different matter.

The judge came to the conclusion that the tenant had not discharged the onus which the section places upon him. He did, undoubtedly, attach some weight—some considerable weight—to the circumstance that, as these later events showed, the premises had not been pulled down; and he inferred against the tenant that in truth it was not right to say at the termination of the tenancy that they were "shortly going to be pulled down." With great respect to him, I have reached a different conclusion.

[4] [1942] 2 K.B. 38.

C. A.
1959
KEATS
v.
GRAHAM.
Lord Evershed M.R.

It seems to me that, as the section requires, one has to form a conclusion as matters stood on March 28, 1957, and (on the facts as presented) answer as best one can the question: Is it shown that the premises were then going to be pulled down? The most, as it seems to me and as I have said, that these later documents might do would be to reflect something that was apparently doubtful prior to the March date; but on the material and as things stood at the March date, it seems to me that the inevitable inference was that these premises were then "shortly going to be "pulled down."

Let me summarise the reasons for that view. In the first place, the extension had only been erected on the condition that it was pulled down on April 1, 1956; and the landlord, unless he got some further permission, was plainly under obligation to perform that condition imposed. Not only so, but he had tried in 1954 to get a further extension and had failed. He had been told in plain terms in that year by the document of February 15, that permission for further development was refused, and that, therefore, the retention of the extension after April 1, 1956, would not be permitted. Finally, there is the letter which the architect of the London County Council sent to the defendants in which he called attention specifically to the council's refusal of permission in February, 1954, and asked for a written assurance within 14 days that the rear addition would be removed without delay. It is unfortunate, I think (or may be unfortunate, being wise after the event) that somebody from the council was not called who could have stated clearly what the council's then view was as to enforcing the condition. But these documents, particularly the last one, seem to me to have thrown the onus on the plaintiff if he was going to say that this letter of December 12 did not in truth reflect what was going to happen; and, in my judgment what later did happen when the application was made in October is not sufficient to discharge the onus so shifted. It seems to me (in other words) that on this material, anybody who had to answer the question, in March, 1957, "Is this extension shortly "going to be pulled down?", would have had to say, on the evidence, "Well, yes, it is." It is quite true that no steps for enforcement had been taken; but I suppose all the world knows that these matters do not always proceed with the greatest possible speed. Nonetheless, here was a building which could not have been erected without permission in the first instance, and had been erected pursuant to a permission which imposed the condition that it should be taken down in April, 1956.

With all respect to the judge, I venture to think that he did not give the weight he should have done to the two documents to which I attach importance, those of February, 1954, and December, 1956. Thus, he says in his judgment, as regards the February letter, "So in Feburary, 1954, the L.C.C. were "confirming that after April 1, 1956, the retention and use of "the premises for stove enamelling would not be permitted."

But that, as I have indicated, is not a correct interpretation or statement of the effect of the February letter. The February letter refused permission for the retention of the extension at all after April 1; and as regards the user of the premises as a whole, it was not confined solely to stove enamelling but was to cover "any industrial use." I venture to think that the view he had taken of the February letter may have perhaps affected the significance that he gave to the letter of December 12, 1956. He says as regard that letter: "By December 12, 1956, neither "owner nor occupier had any right to retain the extension or to "use it for special industrial purposes." Again, I interpolate that that is not correct. They had no right to use it for *any* industrial purpose. "It was obviously the duty of the L.C.C. to discover "what was the intention of the occupier. The letter of "December 12, 1956, was written to the defendants. If they "went that would have been the end of the matter." Again, with respect, that is not right, and proceeds on the assumption that all that was involved as between either the plaintiff or the defendants on the one hand, and the L.C.C. on the other, was the special industrial user. And so, finally, the judge was led to conclude: "I do not agree that this letter can be taken as "evidence of the intention of the L.C.C. to demolish or of a "decision that the back addition should be demolished. It was "to find out what the occupier intended to do. If the L.C.C. were "of the mind that whatever application be made it had to come "down, I would have expected something like this sent to the "owner and an enforcement notice would have followed. I do "not draw the inference that in December, 1956, the premises "had to be demolished. The L.C.C. had decided that it was "not to be used for the special industrial purpose for which it "was used by the defendants. It seems likely that the defen-"dants would have succeeded in an application for light "industrial user such as existed in the immediate vicinity."

With respect, I am unable to agree with the basis of that part of the judgment. It seems to me that the judge has supposed that the only permission that was required would be for the special industrial use. I have already indicated that the letter of February had made it quite clear that any industrial use was prohibited after April 1; and the letter of December 12, 1956, in the plainest possible terms required the removal of the extension. It seems to me impossible to say that the second letter cannot be taken as any evidence of the intention of the London County Council that the condition as to removal should not be enforced. I quite agree, of course, that no enforcement action had been taken; but still, in light of the terms of that letter and the whole history as I have tried to relate it, I conclude, I must say, without hesitation, that the right answer to the problem posed by the section and incorporated in the last paragraph of the defence is that at the relevant date, March 28, 1957, the tenant has shown

C. A.
1959
KEATS
v.
GRAHAM.
Lord Evershed M.R.

that this extension was going shortly to be removed, or taken down.

The only other point I would add by way of clarification is that the claim of the landlord originally extended to dilapidations both as regards what I have called the main or front portion of 30, Oldhill Place and the extension; but we understand that no issue arises as to the front or main portion, and we are, therefore, confined to the question as it affects the extension.

For the reasons I have given, I think that the defendant has shown that he is under no liability to pay damage for breach of the covenant to deliver up the extension in proper repair; and that the appeal, accordingly, should be allowed.

SELLERS L.J. I agree with my Lord's judgment.

As the defendants relied on section 18 (1), there calls for consideration as a preliminary point, as it chances, the second part of that section, and that gives rise to the question as to whether the extension "would be pulled down shortly after the termination of the tenancy." The termination of the tenancy was March 28, 1957, and the issue of fact was to be adjudged on the evidence as to whether that had been established by the defendants, who were the tenants. The important evidence on that issue, it seems to me, to which the greatest weight should be given, was the fact that the extension itself was erected after March of 1949, on the basis of permission which had then been granted under the Town and Country Planning Act by the London County Council, and the condition of its erection was that it was for a limited period, that period being seven years from April 1, 1949. So that, at the outset, it was erected as a temporary building and it was known that its life—although there was provision for extension if it was thought necessary or reasonable—might be no more than up to April 1, 1956.

In 1954 there was another indication of important evidence I think for consideration on the issue which arises. In their reasons for refusal to grant any use of the premises for "stove enamelling or any industrial use" at all after April 1, 1956, the London County Council, through their appropriate officer, said: "Reasons for refusal: (I) The proposed uses are undesirable and inappropriate as a permanent measure, particularly having regard to the council's development plan for the area, which envisages a residential use. (II) The further extension of a non-conforming use in an area envisaged for residential use in the council's development plan is inappropriate and undesirable."

By the time the tenancy had terminated or the lease was concluded—March, 1957—it is true that the premises had remained up without any order for their demolition some 12 months after the time of the expiration of the seven years. But I do not think that is evidence of the probability that they would continue. I should have thought it was more likely to be

regarded as evidence that they were nearing the time when they would have to be demolished. The complication in this case, I think, which has influenced the judge's mind perhaps unduly and inappropriately is that there was introduced into the case evidence which arose after the material date. I am inclined to think that in the majority of cases evidence of events after the material date for consideration would be immaterial and therefore inadmissible. Perhaps that ought to be qualified to this extent, that it may be that a future event may cast some light on an uncertain state of mind or an intention at a prior date. But that can very rarely happen. It would not be admissible, I think, to adduce evidence that at a later date than the material date for consideration the building was still standing, because that would not affect the issue for consideration: it would really be a statement as to what in fact had developed. I think that is clear from the nature of the inquiry stated in the section, which has been illuminated by two authorities to which we have been referred and on this point particularly by *Salisbury* v. *Gilmore*,[5] where Lord Greene M.R. deals with this particular matter in this way—true, on an admission of counsel. "Mr. "Havers" (then appearing for the plaintiff) "admitted that if "the intention of the plaintiffs to pull down the building still "prevailed at the termination of the lease, the subsection would "apply and that a change of intention at a later date would not "assist him." If one is looking at evidence at a later date it may well be that it indicates a change of intention and does very little, if anything, to assist the inquiry as to what were the probabilities at the time when the lease came to an end. I think this issue has to be decided on the probabilities and in the light of the two matters I have mentioned and in the light of the letter which was sent, perhaps inadvertently, to the tenants saying that the rear addition would have to be removed without delay, with a request for a written assurance within the next 14 days that that would take place, and the fact that the tenants subsequent to that in January gave notice that they were going to leave the premises and eventually went in March. In those circumstances and on the probabilities, balanced with such evidence as could be set on the other side, balanced with the statement of the landlord that he had no intention to demolish the premises—as far as he was concerned he would stay as long as he could, which was of little effect if the authorities thought otherwise—I think that the county court judge took an erroneous view in deciding that the requirements of this limb (*b*) of section 18 (1) of the Act had not been complied with. On the probabilities I think that the evidence goes the other way.

For those reasons, along with the more detailed reasons given by my Lord, I also would allow this appeal.

[5] [1942] 2 K.B. 38, 47.

C. A.
1959
KEATS v. GRAHAM.

HARMAN L.J. I, too, agree. The finding of the judge depended on the inference which he drew from the letter of the county council architect written in December, 1956. His position was quite logical. If the inference that he drew was right, namely, that the only purpose of that letter was to get the defendants out of the premises because their particular use was disliked by the county council, and that if and when that end was achieved there was not any real intention to order the demolition of the building at all, then, of course, the judge's conclusion followed. But I do not see any evidence which entitled the judge so to construe that letter or to draw such an inference in the absence of any oral testimony. I think the proper inference was the other way, and the result would be that which my Lords have agreed it is.

Appeal allowed, with costs of the preliminary hearing and of the appeal on scale 4.

Leave to appeal to the House of Lords refused.

Solicitors: *Saunders, Sobell, Greenbury, Leigh; Stanley de Leon, Lewison & Co.*

E. D.

[QUEEN'S BENCH DIVISION.]

1959
Nov. 10, 11, 13.
Paull J.

* FRENCH AND ANOTHER *v.* ELLIOTT.

[1958 F. No. 55.]

Agriculture—Agricultural holding—Notice to quit—Reasons stated—Failure to remedy breaches of tenancy—Reference to arbitration of one reason under previous notice to quit—Whether second reason premature—Validity of notice to quit—Agricultural Holdings Act, 1948 (11 *&* 12 *Geo.* 6, *c.* 63), *ss.* 24 (2) (*d*), 26 (1) (*a*) (*d*)—*Agriculture (Control of Notices to Quit) Regulations,* 1948 (*S.I.* 1948, *No.* 190), *regs.* 4, 5 *and* 7.

Landlord and Tenant—Holding over—"Wilfully"—Double rent—Meaning of "wilfully"—Landlord and Tenant Act, 1730, *s.* 1.

The landlords of an agricultural holding served the tenant with two notices under section 24 (2) (*d*) of the Agricultural Holdings Act, 1948, requiring him to remedy certain breaches of covenant within two months of service. The first, dealing with thatching and the cutting of weeds, was dated September 8, 1956, and the second, dealing with non-payment of rent, was dated October 5, 1956. The landlords then served a notice to quit dated November 13, 1956, under section 24 (2) (*d*) of the Act, stating as a reason non-compliance with the notice of September 8. The tenant served a counter-notice dated November 24, 1956, under the Agriculture (Control of Notices to Quit) Regulations, 1948, requiring all

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[Reported by A. D. RAWLEY, Esq., Barrister-at-Law.]

questions arising from the reasons stated in the notice to quit to be submitted to arbitration. By virtue of the regulations the operation of the notice to quit was suspended. Nothing further was done by either party with regard to this arbitration.

The landlords served a further notice to quit, dated December 6, 1956, under section 24 (2) (*d*), stating as reasons, non-compliance with the notice of September 8, and non-payment of the rent required to be paid by the notice of October 5 within two months. In a letter accompanying this notice to quit the landlords' agent stated that it was given because the rent had not been received at the end of normal office hours, viz., 5.30 p.m. on December 6. The time for compliance given in the October 5 notice did not expire until midnight on December 6. The tenant received the notice to quit on December 7.

In an action by the landlords for possession, mesne profits and double value, the tenant contended that the December 6 notice to quit was bad in respect of the reason for non-payment of rent because it was given before the time for compliance in the October 5 notice had expired; and that because it contained a reason which had been referred to arbitration, viz., failure to comply with the September 8 notice, it was invalid or suspended pending the arbitration:—

Held, (1) that the date for considering whether the reason in respect of non-payment of rent was good was the date when the December 6 notice to quit was delivered to the tenant, viz., December 7. On that date it was a good reason because the rent had not been paid within the time limited by the October 5 notice (post, p. 47).

(2) That, since the notice to quit was good in respect of one reason it operated at once, and was not suspended until the arbitration under the November 13 notice to quit had been determined; it was clear and unambiguous and was not invalid because a reason was added which could not be pursued until the arbitration was determined. Accordingly, the landlords were entitled to an order for possession (post, p. 51).

(3) That the landlords were not entitled to double value because the tenant might not unreasonably have thought that he could not be disturbed until the arbitration had taken place; such a holding over was not wilful (post, p. 51).

ACTION.

The plaintiffs, Thomas Reginald French and Caroline Ruby French, were landlords of a farm and the defendant, Norman Cyril Elliott, was their tenant under a lease dated October 11, 1944. The landlords served a notice on the tenant dated September 8, 1956, under section 24 (2) (*d*) of the Agricultural Holdings Act, 1948, requiring him to remedy certain alleged breaches of covenant dealing with thatching and the cutting of weeds within a period of two months from the date of the service thereof. By a notice to quit dated November 13, 1956, the landlords required the tenant to deliver up possession of the farm on March 25, 1958. The notice stated that it was given "on and for the following "ground and reason and in pursuance of the paragraph appro- "priate thereto set out in section 24 (2) of the Act, paragraph (*d*), "at the date of the giving of this notice you have failed to comply "with a notice in writing dated September 8, 1956, and served "on you by me requiring you within a reasonable time or within

1959

FRENCH v. ELLIOTT.

"such reasonable time as was specified in the said notice to "remedy all the breaches by you that were capable of being "remedied of the terms or conditions of your tenancy not incon-"sistent with the fulfilment of your responsibilities to farm in "accordance with the rules of good husbandry as set out in the "said notice."

Within one month of the giving of this notice to quit, the tenant gave the landlords a notice, dated November 24, 1956, that he required all questions arising out of the reasons stated in the notice to quit to be determined by arbitration under regulations 4 and 5 of the Agriculture (Control of Notices to Quit) Regulations, 1948. By regulation 7 of the regulations the operation of the notice to quit was suspended pending the termination of the arbitration. Nothing further was done by either party with regard to this arbitration.

By a further notice dated October 5, 1956, which was also given under section 24 (2) (*d*) of the Act, the landlords required the tenant within two months of the service thereof to pay £115, being the rent due in respect of the holding for the quarter ending September 29, 1956. The two months expired at midnight on December 6, 1956.

By a further notice to quit, dated December 6, 1956, the landlords required the tenant to deliver up possession of the farm on March 25, 1958, the notice stating that "it was given on and for "the following grounds and reasons and in pursuance of the para-"graphs appropriate thereto set out in section 24 (2) of the Act: "paragraph (*d*), at the date of the giving of this notice you have "failed to comply with a notice in writing dated the 5th day of "October 1956 and served on you by me requiring you within two "months of the service of such notice to pay rent due in respect "of the holding. Paragraph (*d*), at the date of the giving of this "notice you have failed to comply with a notice in writing dated "the 8th day of September 1956 and served on you by me "requiring you within a reasonable time or within such reason-"able time as was specified in the said notice to remedy all "the breaches by you that were capable of being remedied of the "terms or conditions of your tenancy not inconsistent with the ful-"filment of your responsibilities to farm in accordance with the "rules of good husbandry as set out in the said notice."

Accompanying this notice to quit was a letter of the same date stating that the notice was given by reason of the fact that the rent had not been received at the end of normal office hours, viz.: 5.30 p.m. on that day, December 6. The notice to quit and the letter were delivered to the defendant on December 7, 1956.

The landlords claimed possession of the farm, mesne profits from March 25, 1958 till possession and double value for the same period.

The facts are more fully stated in the judgment.

D. M. Scott and *J. B. S. Edwards* for the landlords.

H. Heathcote-Williams, Q.C. and *T. G. Field-Fisher* for the tenant.

In addition to the cases and enactments referred to in the judgment, the following were cited in argument: *Turton* v. *Turnbull* [1]; *Goldsmiths Co.* v. *West Metropolitan Railway Co.* [2]; *Wright* v. *Smith* [3]; Interpretation Act, 1889, s. 26.

Cur. adv. vult.

November 13. PAULL J. Thomas Reginald French and Caroline Ruby French are landlords of a farm known as Teignharvey, Stoke-in-Teignhead, Devonshire. At all material times Norman Cyril Eugene Elliott was the tenant of that farm under a lease dated the 11th day of October, 1944, made between the defendant and one John C. French, the predecessor in title of Thomas French and Caroline French. Thomas French and Caroline French in this action sue to recover possession of that farm, alleging that the defendant's tenancy was duly determined on March 25, 1958, by a notice to quit served on the defendant on December 7, 1956. In addition to claiming possession, the plaintiffs also claim mesne profits from March 25, 1958, and double value from that date under the Landlord and Tenant Act, 1730; that is to say, they allege that the defendant has wilfully refused to give possession. The tenancy of the farm is a tenancy which comes under the provisions of the Agricultural Holdings Act, 1948 (hereinafter called "the Act"). The Act has now been amended by the Agriculture Act, 1958, but the latter Act does not apply to this case and one has to look at the original provisions of the Act of 1948 and the regulations made thereunder.

The original defence merely stated that the defendant admitted the service of the notice to quit referred to in the statement of claim, but denied that the tenancy was validly determined thereby. The defence added a plea that the defendant would rely on the provisions of the Act. Subsequently this pleading was amended by striking out the paragraph referring to the Act and adding a paragraph alleging that in so far as the notice to quit was given for reasons that the defendant had failed to comply with a notice, those reasons were contained in a notice to quit served by the plaintiffs on the defendant dated November 13, 1956. The defendant then alleges that he gave the plaintiffs notice that he required all questions arising out of those reasons to be determined by arbitration; that he had not waived the notice requiring arbitration and stating that he relied upon section 26 of the Act and the regulations. A further plea was added that the notice to quit was bad, in that it was given before the expiration of the period of two months after the date of a notice given by the plaintiffs and dated October 5, 1956.

[1] [1934] 2 K.B. 197.
[2] [1904] 1 K.B. 1; 20 T.L.R. 7.
[3] (1805) 5 Esp. 203.

1959

FRENCH
v.
ELLIOTT.

Paull J.

The facts leading up to this litigation are as follows: There is no doubt but that for some time before the autumn of 1956 the plaintiffs and the defendant had not been on the best of terms. The plaintiffs had taken up the attitude that the defendant was neither paying his rent promptly nor fulfilling the covenants to repair contained in the lease. The defendant was taking up the attitude that the plaintiffs were requiring matters to be done which were not within the covenants of the lease, and that they were trying to restrain him from doing certain thatching which he considered necessary, and which under the lease he had to do, but for which the plaintiffs were responsible for the payment of the labour. Each side, I have no doubt, were from the beginning prepared to take advantage of every possible technical point under the Act, and I look upon this case as one in which it is unnecessary to have sympathy with the one side or the other, and where I have simply to determine the matter by looking to see whether the provisions of the Act have been fulfilled by the plaintiffs, there being no doubt but that the notice to quit relied upon would, but for the provisions of the Act, have been a perfectly good notice to quit at common law.

The matter is practically wholly contained in the correspondence, the evidence given by Mr. Tomlinson, the plaintiffs' agent, merely proving formally some of the documents contained in the correspondence. In so far as his evidence went beyond that, I do not think it assists me in my task. All through this judgment I shall disregard the fact that some letters were written by the agents for the parties and some by their solicitors, and will refer to the documents all through as though they had been signed personally by the parties.

By a notice dated September 8, 1956, the plaintiffs required the defendant to remedy certain alleged breaches of covenant. Those breaches were alleged to be in respect of covenants dealing with thatching and the cutting of weeds. The words of the notice follow the provisions of section 24 (2) (*d*) of the Act. By subsection (1) of that section the landlord of an agricultural holding may give an ordinary common law notice to quit, in which event the tenant may serve on the landlord a counter-notice requiring that subsection (1) of the Act shall apply to the notice, in which event the notice to quit does not have effect unless the Minister consents. By subsection (2) subsection (1) does not apply in certain circumstances, one of those circumstances, set out in (*d*) of subsection (2), being that at the date when the notice to quit is given the tenant has failed to comply with a notice in writing requiring him within two months from the service of that notice to pay any rent due, or within a reasonable time or within such reasonable period as is specified in the notice to remedy any breach of covenant by the tenant that is capable of being remedied. The notice served, therefore, was clearly a notice intended to be preliminary to a notice to quit. It stated a period of two months as the reasonable period and followed generally

the wording of subsection (2) (*d*). That notice was posted on September 8 and was delivered to the defendant on September 10.

By notice dated October 5, the plaintiffs gave a further notice which clearly was intended to be another notice under the same subsection. That notice required the defendant to pay within two months from the service of the notice the sum of £115 which had become due on September 29. That notice was posted on October 5 and was received by the defendant on October 6. Clearly, by November 13, the period of two months stated in the notice dated September 8 had elapsed, and the plaintiffs took the view that the defendant had not remedied the breaches. In consequence, by a notice to quit dated November 13, the plaintiffs required the defendant to deliver up possession of the farm on March 25, 1958; that is, twelve months after March 25, 1957. Had the notice stopped there it would clearly have been an ordinary common law notice to quit and would come within section 24 (1) of the Act. The notice, however, went on to state that it was given "on and for the following ground and reason "and in pursuance of section 24 (2) (*d*)." The reason given by that notice was that the defendant had failed to comply with the notice of September 8.

The Act itself, curiously enough, does not in section 24 or in another section directly state what shall happen if a landlord serves such a notice to quit. Clearly the tenant cannot serve a counter-notice requiring subsection (1) to apply, because subsection (1) does not and cannot apply to such a notice to quit. That was admitted by both sides in this action. The situation is governed in a rather roundabout way by the fact that under section 26 (1) (*a*) the Minister may make regulations for requiring any question arising under subsection (2) of section 24 of the Act to be determined by arbitration under the Act, and for limiting the time for which any such arbitration may be required or proceedings taken. Clearly, whether the tenant had complied with the original notice would be a question arising under the subsection. The Minister, therefore, has made regulations, and the regulations which applied at the times material in this action were the Agriculture (Control of Notice to Quit) Regulations, 1948. By regulations 4 and 5 of those regulations it is open to the tenant (I stress the words "open") within one month from the giving of a notice to quit specifying that the tenant had failed to comply with a notice in writing under section 24 (2) (*d*) to serve on the landlord a notice in writing requiring any question arising out of the reason stated in the notice to quit to be determined by arbitration under the Agricultural Holdings Act, 1923. The next step, therefore, that took place was that the defendant sent to the plaintiffs a notice stating that he required all the questions arising out of the reasons stated in the November 13 notice to be determined by arbitration under the Act.

By section 26 (1) (*d*) the Minister may make regulations suspending the operation of notices to quit until any arbitration

1959

FRENCH v. ELLIOTT.

Paull J.

such as that mentioned in the notice of November 23 has been heard and determined, and by paragraph 7 of the regulations to which I have referred the Minister made such a regulation. The consequence is that, so far as the notice to quit dated November 13 is concerned, the operation of that notice was suspended until after the arbitration desired by the defendant had been heard and determined.

Nothing further was done by either party with regard to this arbitration. No doubt the defendant was perfectly content that the whole matter should remain in abeyance, and the plaintiffs no doubt had in mind that unless the defendant paid his rent in accordance with their notice dated October 5 they would very shortly have another reason coming within section 24 (2) (*d*); and that, if arbitration was desired with regard to that reason, it could be a short and simple arbitration merely determining whether rent had in fact been paid within the time limited by the notice.

By 5.30 p.m. on December 6, at which time the plaintiffs' agent closed his office in Exeter, no rent had been received by the plaintiffs in respect of the period covered by the plaintiffs' notice of October 5. In consequence, the agent wrote a letter stating that he was sending a further notice to quit by reason of the fact that the rent had not been received by the end of normal office hours, namely, 5.30 p.m. The notice is dated December 6, and states that it is given "on or for the following grounds and "reasons and in pursuance of section 24 (2) of the Act." It then sets out two grounds or reasons, each under paragraph (*d*) of the section. The first is: "At the date of the giving of this notice "you have failed to comply with a notice in writing dated the "5th day of October, 1956 and served on you by me requiring "you within two months of the service of such notice to pay rent "due in respect of the above holding." The second is: "At the "date of the giving of this notice you have failed to comply with "a notice in writing dated the 8th day of September, 1956 and "served on you by me requiring you within a reasonable time or "within such reasonable time as was specified in the said "notice to remedy all the breaches by you," and then follow the words contained in the subsection. That notice to quit, therefore, was based upon two quite separate grounds, one of which had already been covered by the earlier notice to quit, in respect of which there had been a notice requiring arbitration. The letter and the notice were posted on December 6, presumably some time in the evening, and were delivered to the defendant on December 7.

At the time when the notice was delivered the defendant had not paid the rent in question. The rent was sent by the defendant by a letter which is dated December 7, but which bears the postmark 1.30 a.m., December 8. It was received by the agent on the same day, December 8.

One of the points taken by Mr. Heathcote-Williams on behalf of the defendant is that, quite apart from any effect arising from

repeating the reasons contained in the notice to quit dated November 13, the notice is a bad notice to quit because the agent gave, in the accompanying letter, a reason for sending the notice to quit, that reason being that the rent had not been received by 5.30 p.m. on the 6th. Mr. Heathcote-Williams argued that by 5.30 p.m. on the 6th the two months had not elapsed, and that, therefore, the notice is bad. He contended that section 26 (1), together with the regulations of 1948 made by the Minister, did not prevent the defendant from giving no notice of arbitration and then setting up as a defence to the action that the two months had not elapsed in respect of the payment of rent when the notice to quit was given. I was at first somewhat doubtful with regard to this. My attention, however, was drawn to *Budge* v. *Hicks* [1] and *Jones* v. *Gates*.[2] Although the ratio decidendi in the latter case appears to have been based upon the unfairness to the tenant which would have arisen in that particular case if he could not raise the question which arose under section 24 (2) (*b*) in the courts without having given a notice of arbitration, I have come to the conclusion that that case, in any event, would bind me to hold that the effect of section 26 and the regulations made under that section is not such as to shut out the tenant from raising the same point in an action for possession as he could raise under an arbitration by giving notice of a desire to arbitrate. However, that question is one which I feel is of no importance either in this case or generally. It is of no importance generally because after *Jones* v. *Gates* [3] the regulations were altered, and by the Agricultural Land Tribunals and Notices to Quit Order, 1959, paragraph 6, it is made obligatory on the tenant, who wishes to contest any reason under section 24 (2) (*b*), (*d*) or (*e*) given in a notice to quit, to serve on the landlord within one month a notice in writing requiring arbitration. It is of no importance in this case because I hold that if the question of time can be taken before me, the defendant wholly fails to establish his argument. In the first place, the letter written by the agent merely pointed out that he was sending the letter because the rent had not been received by 5.30 p.m. In other words, he was pointing out that it might be that the rent would be received by midnight on the 6th, in which event the notice could be disregarded, at any rate, so far as non-payment of rent was concerned. In any event, I cannot see why the letter should be brought into the matter at all.

The notice itself fully sets out the grounds and the reasons, and the reason given in respect of the non-payment of rent was a perfectly good and proper reason by the time the notice was delivered to the defendant, which is in this case the time which I have got to accept as being the proper time for the purpose of

[1] [1951] 2 K.B. 335; [1951] 2 T.L.R. 349; [1951] 2 All E.R. 245.

[2] [1954] 1 W.L.R. 222; [1954] 1 All E.R. 158.

[3] Ibid.

1959

FRENCH
v.
ELLIOTT.

Paull J.

considering whether the plaintiffs bring themselves within paragraph (*d*). That ground of defence, therefore, disappears, and had the notice to quit only contained one reason and not the two reasons, in my judgment, the plaintiffs would plainly be entitled to succeed in this action.

Continuing the history, on January 4, 1957, the defendant sent to the plaintiffs a counter-notice stating: "I hereby give you notice "that I require subsection (1) of section 24 of the above Act shall "apply to your notice to quit." That notice was based upon a complete misunderstanding of the position under the Act. Such a notice could only have effect if the notice to quit dated December 6 had been an ordinary common law notice to quit. I can, however, sympathise with those responsible for sending the notice, since, on the face of it, section 24 does not contain any provision as to what should happen where the notice is a notice stating reasons given under subsection (2) of that section. Sympathy or no sympathy, that notice was what I may call the first mistake. In my judgment, the notice was null and void and was of no effect.

On January 17 the plaintiffs sent to the Ministry of Agriculture, Fisheries and Food the notice to quit of December 6 and a form of application for the appointment of an arbitrator duly filled in. That form starts with the words: "The landlord and tenant "having failed to agree as to the person to act as arbitrator," and goes on after a few more words: "I hereby apply to the Minister "to appoint an arbitrator for the purpose of settling the claims, "differences or questions set forth below." The only paragraph having any bearing upon the question of the claim is a paragraph which requires the applicant to state the nature of the claim in respect of which arbitration is desired. The answer on the form was: "application by the tenant for arbitration on the reasons "for service of notice to quit under section 24 (2) (*d*)." In my judgment, the form and the letter must be read together, and since the letter sent a copy of the notice to quit of December 6, 1956, it must be taken that the plaintiffs were asking for an arbitrator to decide the question arising under that notice and no other. It is of some importance to decide that, since, on the face of the form itself, the application could be an application to determine the differences arising out of the notice to quit of November 13. Prima facie that would be so, since it was only in respect of that notice to quit that the tenant had served the notice requiring arbitration. The notice served by the defendant in respect of the notice to quit dated December 6, even if it had been valid, would not require arbitration, but would require the Minister to consider the matter and to say whether he consented to the notice to quit being effective.

Here then was the second mistake. The application for an arbitrator was not based on the tenant having fulfilled regulation 4 of the 1948 regulations. That being so, there having been no request for arbitration in respect of the terms of the notice to quit of December 6, and the landlords and the tenant not having

failed to agree as to a person to act as an arbitrator in that matter, nor agreed to ask the Minister to appoint an arbitrator, the act of the plaintiffs in asking for an arbitrator was an act which they were not entitled to do and was based upon a complete misunderstanding of the position. In the same way as I sympathise with the agents of the defendant, so I sympathise with the agents of the plaintiffs. However clear the procedure may appear to be to a lawyer after a careful consideration of all the sections and regulations, nothing can be easier for a busy estate agent than to misunderstand the effect of the documents served on him. Here, however, was the second mistake, and, as I see it, that application for an arbitrator, like the notice given by the defendant, was null and void and was of no effect: although it may well be that if the defendant had subsequently agreed to an arbitrator being appointed under that application, it might be held that the arbitrator had authority to settle the questions in dispute between the parties under the notice to quit dated December 6.

The defendant, however, took up quite a different attitude. Having received a letter from the Ministry dated January 25, 1957, stating that the Minister was proposing to appoint an arbitrator to decide all questions arising out of the reasons stated in the notice to quit dated December 6, 1956, the defendant replied to the effect that, since the landlords had served two notices to quit and the tenant had served a counter-notice under the first of the notices to quit, the reference could only be a reference arising out of the reasons stated in that notice and not arising out of the reasons stated in the notice of December 6. In other words, the defendant was taking up the attitude that he was not prepared to allow an arbitrator to deal with the question whether the rent had been paid within the time limited by the notice dated October 5, 1956. The letter from the defendant (in fact, from his solicitors) says in terms that the tenant had not served a counter-notice in respect of the second notice to quit and, therefore, there was no right on the part of the Minister to appoint an arbitrator. The Minister having replied that, prima facie, the appointment would appear to be valid, and that he was bound to proceed with the appointment, the defendant once more wrote back stating in terms that the application for the appointment of an arbitrator was prima facie invalid and that the Minister had no power to appoint one. Undeterred by this, the Minister, by an appointment dated February 21, 1957, appointed an arbitrator, a Mr. Lawrence, and stated that it would be the duty of Mr. Lawrence to decide all questions arising out of the reasons stated in the notice to quit dated December 6, 1956.

By this time the plaintiffs had awakened to the fact that their application was based on a misunderstanding of the position, and by a letter dated February 22, 1957, they stated that it was their desire to withdraw the application for the appointment of an arbitrator. I am informed that there was a reply from the Ministry to that letter again stating that the Minister had no

BIBL. LONDON UNIV.

1959

FRENCH
v.
ELLIOTT.

Paull J.

power to revoke his appointment. It seems to me that it was not a question of whether the Minister had a power to revoke, but whether he had a power to appoint. As I have already indicated in my judgment, that appointment was null and void and was of no effect.

Apart from the fact that the defendant wrote a letter to Mr. Lawrence to say that he had never made any request for arbitration, there the matter has remained, so far as arbitration is concerned. In my judgment, I am not only entitled to but must entirely disregard all these events which took place after the service of the notice to quit dated December 6. In my judgment, they do not in any way affect the legal rights of the parties. The question which I have to determine, therefore, is whether the fact that the defendant gave a notice requiring arbitration after the notice to quit dated November 13 prevents the notice to quit dated December 6 from being a valid notice to quit operating on March 25, 1958, or alternatively prevents it operating unless the arbitration invoked in respect of the notice to quit dated November 13 had by then been determined in favour of the plaintiffs.

It is admitted by Mr. Heathcote-Williams that if the notice to quit dated December 6 had stopped after the first reason, i.e., the non-payment of rent, that notice would clearly have been a good notice. I am told that there is no authority which throws any light upon the problem whether the notice to quit of December 6 is invalid because it added a bad reason to a good reason, or rather, added a reason which the landlords could not pursue until after the arbitration had taken place with regard to the notice to quit dated November 13. I therefore approach the problem by trying to make a simple analysis of the position. If a notice to quit has to give a good reason, and gives that good reason, I cannot see that it becomes a bad notice to quit because it gives in addition a bad reason. Mr. Heathcote-Williams urged that, at any rate, no notice to quit could be effective until the arbitration under the November 13 notice to quit had been held. I cannot see how that can be. If a new reason arises, I cannot see why the landlords cannot rely upon that new reason and serve an entirely new notice to quit. Mr. Heathcote-Williams relied upon *Cowan* v. *Wrayford*.[4] That case decided that if a landlord in fact chose to give a notice to quit based on section 24 (2) of the Act rather than a common law notice to quit he could not treat such a notice to quit as a common law notice to quit if the reason which he gave under subsection (2) turned out to be a bad reason. It is quite true that in that case expressions were used by the Court of Appeal with regard to a notice having to be clear and unambiguous, which is clearly right, whether the notice to quit is based upon reasons contained in subsection (2) or is simply a common law notice to quit. This notice to quit of December 6 seems to me

[4] [1953] 1 W.L.R. 1340; [1953] 2 All E.R. 1138.

quite clear and quite unambiguous. Its only fault (if it be a fault) is that of two reasons given one was a reason in respect of which there had been a requirement for arbitration and in respect of which, therefore, the notice could not be enforced until the arbitration had been held. It was quite open for the defendant to give a notice requiring arbitration under this notice to quit, and as no arbitrator had been appointed under the first notice to quit, one arbitrator could have been appointed by the Minister to deal with both matters had he been asked to do so by either party.

If I be right, and the notice to quit of December 6 is a good notice, I can see no reason why its operation should be suspended until the arbitration under the November 13 notice has been determined. If two concurrent notices to quit are given for different reasons, and a request for arbitration is only made with regard to one of the notices, I cannot see why the other notice should not be an effective notice. It would be absurd to hold that a tenant could set a notice at nought by challenging quite a different notice, and that, it seems to me, would follow if the defendant's contention is right in this case. That argument also fails. I add that I do not see that *Coates* v. *Diment* [5] which Mr. Heathcote-Williams cited to me has any effect on this point. The plaintiffs, therefore, are entitled to possession.

With regard to the plaintiffs' claim for double value, in my judgment that fails. As I see it, the fact that the defendant was habitually late in paying his rent, or behaved badly while a tenant, has nothing to do with whether the plaintiffs are entitled to double value. The wording of section 1 of the Landlord and Tenant Act, 1730, is: "in case any tenant shall wilfully hold "over any tenement after the determination of his term." It has been held that "wilfully" means "contumaceously," but I can see no reason why the old English word "wilfully" does not exactly express the true meaning of the statute. The statute does not mean that a tenant is a contumaceous tenant. It deals only with the moment of time when the tenancy comes to an end. At that moment of time a tenant may say: "I shall stay on. "I think I have a right to do so." His staying on is not wilful. On the other hand, a tenant may say: "I will stay on, although "I know I have no right to do so." That is wilful, and well illustrates the now sometimes forgotten distinction between "I "shall" and the insistent "I will." In this case there was, in my judgment, a sufficient muddle on both sides to prevent the wilfulness arising, since the defendant may not unreasonably have thought that he could not be disturbed until the arbitration had taken place.

The result is that the plaintiffs are entitled to judgment for

[5] [1951] 1 All E.R. 890.

1959

FRENCH v. ELLIOTT.

possession of Teignharvey with mesne profits from March 25, 1958 to possession and are entitled to the costs of this action.

Judgment for the plaintiffs with costs.

Solicitors: *Ellis, Bickersteth, Aglionby & Hazel for James Mason, Tucker & Son, Newton Abbot; Kinch & Richardson for Carter, Fisher & Co., Torquay.*

[LEEDS ASSIZES.]

1959
Dec. 1, 2, 11.

Wrangham J.

* HALL *v.* HALL.

Husband and Wife—Desertion—Separation agreement—Consensual separation recited in written maintenance agreement—Period of separation indefinite—Subsequent offers by husband to return rejected by wife—Whether wife in desertion.

On June 4, 1952, after a violent scene, the husband left the wife and matrimonial home, and on July 3, 1952, both parties signed an agreement providing for maintenance and other matters, and reciting that it was no longer possible for them to reside together as man and wife, and that they had agreed that they should live separately. By a letter dated April 3, 1953, and on repeated visits to the wife for week-ends and holidays the husband asked her for a reconciliation but she steadfastly refused to live with him again. The husband continued to pay under the agreement as he regarded it as his moral duty to provide for his wife. The husband petitioned for a divorce on the ground of desertion:—

Held, that the agreement to live separately was for an indefinite period, and that it was terminable upon the will of either party. By his letter and subsequent conversations the husband had made it clear that he was putting an end to the agreement and the wife had no legal right to refuse her husband's genuine offer of reconciliation, and from the date of her refusal had been in desertion.

Bosley v. *Bosley* [1958] 1 W.L.R. 645; [1958] 1 All E.R. 167 applied.

Pardy v. *Pardy* [1939] P. 288; 55 T.L.R. 1037; [1939] 3 All E.R. 779 distinguished.

PETITION.

By his petition the husband prayed for dissolution of his marriage on the ground that his wife had treated him with cruelty and deserted him. The wife denied both cruelty and desertion and asserted that her husband had treated her with cruelty and deserted her. At the outset, however, the husband abandoned his case of cruelty and relied on desertion only. In his judgment Wrangham J. held that the wife's case of cruelty failed and the case is reported only on the issue of desertion.

The parties were married on July 15, 1922, and there were four children, Jean, Malcolm, Mollie and Alastair (known as

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[Reported by G. M. SMAILES, Esq., Barrister-at-Law.]

Sandy). On June 4, 1952, occurred a violent scene which ended the marriage, after which the husband left the wife. The subsequent facts are set out in the judgment.

The agreement of July 3, 1952, referred to in the judgment was in the following terms:

"Minute of Agreement, between Harry Richard Hall, "Engineer, 2 Summerfield Villas, Edinburgh (hereinafter referred "to as 'the First Party') and Mrs. Ruth Hall, wife of the said "Harry Richard Hall and residing at 365 Lanark Road, Edinburgh "(hereinafter referred to as 'the Second Party').

"Whereas the First Party and the Second Party are agreed "that it is no longer possible for them to reside together as man "and wife; and Whereas they have agreed that they should live "separately; and Whereas certain matters require to be regulated "between them; Now Therefore the parties agree as follows:

"1. The First Party agrees to pay the Second Party by "monthly instalments a maintenance allowance at the rate of not "less than Three hundred pounds per annum under deduction of "Income Tax at the full standard rate for life or until the "parties are divorced. . . ." Then followed provision for other matters including property and access to one of the children.

Edward Lyons for the husband.
H. G. Bennett for the wife.

The cases cited in argument are referred to in the judgment.

Cur. adv. vult.

Dec. 11. WRANGHAM J., reading his judgment, considered the matrimonial history up to the separation on June 4, 1952, held that the wife's case of cruelty failed, and continued:

Soon after the parting the parties were in contact through solicitors and on July 3, 1952, they signed an agreement providing for maintenance and certain other matters. This agreement recited that the parties were agreed that it was no longer possible for them to reside together as man and wife, and they had agreed that they should live separately. However, by a letter dated April 3, 1953, the husband wrote asking the wife for a reconciliation. The wife replied, not reproaching him for past cruelty or asking for assurances of reform in the future, but saying that "I am me and nothing will alter me." Thereafter, the husband repeatedly visited the wife for week-ends and holidays and asked her for a reconciliation but the wife has steadfastly refused to live with him again. She set out her reasons in a letter on November 1, 1953, in which she said: "I do not honestly think "it would work—we are so incompatible in our natures." I am inclined to think she was right. Moreover, she had tasted independence, as appears in that letter, and was living with Jean

1959

HALL
v.
HALL.

Wrangham J.

and her son-in-law who admired her greatly, Mollie and Sandy in a contented home.

Eventually, by a letter dated February 11, 1958, the husband told the wife that he had decided to start divorce proceedings. The wife, not unreasonably, pointed out that they had, in her words, agreed to be good friends even if they could not be husband and wife, and that she had in no way defaulted on that bargain. The husband's contention before me, however, was that the existence of the oral separation agreement recited in the written maintenance agreement did not prevent his wife's refusal of an offer of reconciliation from constituting desertion. I am satisfied that on many occasions from April, 1953, onwards the husband made genuine offers of reconciliation and that these were refused by the wife. I do not think that there has been proved against the husband any such misconduct as to justify the wife in refusing that offer; the law does not regard mere incompatibility of temperament as good ground for refusing a genuine offer of reconciliation. But the question remains whether, in view of the oral separation agreement, the wife was under any duty to accept the offer of reconciliation.

In paragraph 134 of Rayden on Divorce (7th ed.) it is stated that: "A separation which begins by being consensual may be "changed into desertion without a previous resumption of "cohabitation, but it must lose its consensual element on both "sides." That statement of law is based on a passage in the judgment of Greene M.R. in *Pardy* v. *Pardy*.[1] But in that case the parties had executed a separation deed "couched in the "ordinary terms,"[2] which presumably provided for a separation during the joint lives of the parties. The question was in what circumstances an agreement to separate for a defined period could become ineffective during that period; and it was held that a repudiation of the agreement by one party, acquiesced in by the other, produced that result. In *Bosley* v. *Bosley*[3] the Court of Appeal held that where the agreement to live separately was for an indefinite period it did not prevent the refusal of a genuine offer of reconciliation from constituting desertion. This, I think, implies that an agreement to live separately for an indefinite period is terminable upon the will of either party either immediately (as in the case of tenancy at will) or perhaps upon reasonable notice if the other terms of a particular agreement are such as to lead to the inference that such a term should be implied. To that extent the statement of the law in Rayden is misleading.

In the present case the agreement to live separately recited in the written maintenance agreement was, in my judgment, an agreement for an indefinite period; had it been for the joint lives of the parties, or any other defined period, the recital would have

[1] [1939] P. 288, 303; 55 T.L.R. 1037; [1939] 3 All E.R. 779.

[2] [1939] P. 288, 289.

[3] [1958] 1 W.L.R. 645; [1958] 1 All E.R. 167.

said so. It follows that it was terminable upon the will of either party, there being nothing to show that notice was required. By his letter in April, 1953, and his subsequent conversations the husband made it clear that he was putting an end to the agreement. It is true that he continued to pay under the maintenance agreement which was based upon the separation agreement; but I am satisfied from the evidence that he regarded it as his moral duty to provide as generously for his wife as he could, and it would be unreasonable to hold that his failure to stop payments of maintenance was inconsistent with his termination of the separation agreement. Had there been any benefits under the maintenance agreement which he continued to take the position might have been different. The separation agreement being out of the way the wife had no legal right to refuse her husband's genuine offer of reconciliation, and from the date of her refusal has been in desertion. There must, therefore, be a decree nisi upon the petition and the prayer of the answer for dissolution rejected.

Decree nisi.

Solicitors: *Lionel Altman, Leeds; Morrish & Co., Leeds.*

[COURT OF CRIMINAL APPEAL.]

* REGINA *v.* WILLIS.

C. C. A.
1959
Nov. 23.
Lord Parker C.J., Hilbery and Salmon JJ.

Criminal Law—Evidence—Hearsay—Admissible to show fact that statement was made—Charge of stealing—Defendant's lack of candour with police after commission of offence—Conversation between defendant and co-defendant before defendant's interviews with police—Evidence of conversation sought to be adduced by defendant—Whether admissible as evidence of defendant's state of mind at time of interviews, to explain his conduct.

The appellant, a director of a scrap metal business, was charged jointly with the firm's foreman, one N., with the larceny of a drum of cable from the Atomic Energy Authority at Aldermaston. The cable had been taken from Aldermaston and delivered two days later to one of the firm's customers. The appellant's defence was that he was unaware of the taking and delivery of the cable, and that he was first made suspicious by a telephone conversation with the customer's representative a few hours after its delivery. The prosecution case was largely founded on the appellant's failure candidly to inform the police of these suspicions.

The appellant sought to explain this failure by giving evidence of the content of a conversation with N. which took place shortly before the appellant's interviews with the police. It was contended on his behalf that this evidence was admissible to show his state of mind at the time of his interviews with the police, and so to explain

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[Reported by GROVE HULL, Esq., Barrister-at-Law.]

C. C. A.

1959

REGINA
v.
WILLIS.

his conduct. The evidence was rejected as inadmissible and the appellant was convicted. On appeal:—

Held, that the evidence was admissible since it was evidence of the appellant's state of mind, which was relevant in considering his conduct at the interviews with the police, and that the fact that the conduct to be considered was subsequent to and not contemporaneous with the commission of the offence was irrelevant; but that, having regard to the overwhelming nature of the prosecution evidence, the appeal would be dismissed under the proviso to section 4 (1) of the Criminal Appeal Act, 1907.

Subramaniam v. *Public Prosecutor* [1956] 1 W.L.R. 965 applied.

APPEAL against conviction.

The appellant, George Arthur Willis, was convicted at Berkshire Quarter Sessions (deputy chairman: Judge Duveen Q.C.) on July 3, 1959, of the larceny of a drum of cable from the Atomic Energy Authority's premises at Aldermaston. He was sentenced to 18 months' imprisonment.

The appellant was a director of G. A. Willis Ltd., a firm of scrap metal dealers carrying on business at Southend. The firm employed one Charles Samuel Napper as an "outside foreman" and one David Edmund Boulton as a driver. The firm had a contract with the Atomic Energy Authority to remove scrap weekly from Aldermaston and it was the appellant's practice to go there once a week in his car, accompanying such lorries as were necessary to collect the scrap. At Aldermaston, the appellant concerned himself only with seeing officials and inspecting property which was for sale and left the task of collecting and loading the scrap to Napper.

On January 19, 1959, the appellant accompanied two of his lorries to Aldermaston. Napper and Boulton were in the party. In the appellant's absence, Napper instructed Boulton to load a large and valuable drum of cable on to one of the lorries. The drum was packed round with scrap metal and a tarpaulin was put over it. Later the appellant returned and accompanied the two lorries to an inn, where all the members of the party spent the night. The next morning, January 20, the appellant left the party. The lorry with the drum of cable was driven to Southend, where it was unloaded in G. A. Willis Ltd.'s yard. By the time the appellant returned to the yard it was dark.

On the following day, January 21, a lorry left the yard taking the drum of cable to the premises at Watford of the Brookside Metal Co., customers of G. A. Willis Ltd., who employed one Albert Henry Stock as their buyer. According to the appellant's evidence he arrived at his office after the lorry departed, and was up to this time totally ignorant of the fact that a drum of cable had been brought from Aldermaston.

Later on the same day police visited the appellant at his office and informed him that they were interested in a large drum of cable which had come from Aldermaston on January 19. The appellant replied that no cable had been taken. On the

same day the appellant had one or two telephone conversations with Stock, in which Stock told him that the Brookside Metal Co. had received some cable from G. A. Willis Ltd. The appellant, according to his evidence, then realised that no drum of cable of the type described by Stock could have been sent in an honest way by his firm, and that something was very wrong.

In the evening of the same day, January 21, the appellant was notified by the police that Napper, who had been arrested and was at the police station, wished to see him. The appellant had a conversation with Napper. Later in the same evening, the appellant saw a police officer engaged in the investigation of the theft, but said nothing about his conversation with Stock. On the following day, the appellant was interviewed by two other police officers, who told him that they were investigating the theft. According to the police, the appellant said: "My lorries have not "been used to take any drums of cable out. I know different to "that." According to the appellant, he said: "I do not know "anything about it."

Later, the appellant was arrested, and was charged jointly with Napper and Boulton with stealing the drum of cable. The appellant was also charged separately with receiving the cable. Napper pleaded Guilty to the charge against him and the appellant pleaded Not Guilty to both the charges. Boulton also pleaded Not Guilty.

At the trial, the case for the prosecution was based, first, on the comment that if Napper was acting on his own and not in concert with a fraudulent employer, he was taking a fantastic risk in stealing under his employer's eyes; that he was taking a further great risk in taking the drum of cable to the employer's customer; and that in so doing he stood to gain nothing, for payment would be made to the employer and not to him.

Secondly, the prosecution commented upon the appellant's failure to give candid answers to the police, particularly after the conversations with Stock should have put him on his guard.

The defence sought to adduce evidence by the appellant of his conversation with Napper on the evening of January 21, in order to explain the appellant's state of mind after the conversation and to illuminate his subsequent conduct. The prosecution objected to this evidence, and the deputy chairman ruled that it was inadmissible, on the ground that the appellant's state of mind after the conversation was not relevant, in the sense required to render the evidence admissible. Neither the defence nor the prosecution called Napper and the jury never heard evidence of the content of the conversation.

In his summing-up the deputy chairman commented several times upon the appellant's failure to inform the police of his suspicions aroused by the conversations with Stock, and upon the appellant's answers given to the police after these conversations. The jury convicted both the appellant and Boulton of stealing,

C. C. A.
1959
REGINA
v.
WILLIS.

returning no verdict upon the count of receiving against the appellant.

The appellant appealed against his conviction upon the grounds, inter alia, that the deputy chairman was wrong in ruling that the appellant's evidence of his conversation with Napper on January 21 was inadmissible, that the appellant was prevented thereby from giving a full explanation of his state of mind when subsequently interviewed by the police, and that in consequence the deputy chairman in his summing-up improperly stressed the appellant's failure to inform the police that the drum of cable had been delivered by Napper to the Brookside Metal Co.

The court was informed by counsel for the appellant that in the course of the conversation with Napper the appellant was told by him that he (Napper) was not guilty of any offence, and that he had never taken any cable to Mr. Stock at all.

Edward Clarke for the appellant.
Kenneth Jones for the Crown.

No cases, other than that which is referred to in the judgment, were cited in argument.

LORD PARKER C.J., giving the judgment of the court, stated the facts and referred to the deputy chairman's ruling upon the admissibility of the appellant's conversation with Napper, and continued: This court is of opinion that that ruling was wrong. It is quite clear that evidence of what has been said by a person who is not called as a witness may be perfectly good evidence of the state of mind in which the defendant was. In a recent case in the Privy Council, *Subramaniam* v. *Public Prosecutor*,[1] it was held that the state of mind of a man charged with possessing ammunition contrary to certain regulations could be proved by what had been told him by certain terrorists into whose hands he had come. Mr. de Silva, giving the advice of the Board, said[2]: "In ruling out peremptorily the evidence of con-"versation between the terrorists and the appellant the trial "judge was in error. Evidence of a statement made to a witness "by a person who is not himself called as a witness may or may "not be hearsay. It is hearsay and inadmissible when the object "of the evidence is to establish the truth of what is contained "in the statement. It is not hearsay and is admissible when it "is proposed to establish by the evidence, not the truth of the "statement, but the fact that it was made. The fact that the "statement was made, quite apart from its truth, is frequently "relevant in considering the mental state and conduct thereafter "of the witness or of some other person in whose presence the "statement was made."

In the opinion of this court that statement of the law is

[1] [1956] 1 W.L.R. 965. [2] Ibid. 970.

applicable to the present case. It is true that the Board were there considering the state of mind and conduct of the defendant at the time of the commission of the offence, but provided the evidence as to his state of mind and conduct is relevant, it matters not whether it was in regard to the conduct at the time of the commission of the offence or, as here, at a subsequent time, to explain his answers to the police and his conduct when charged. Accordingly, that evidence in the present case was wrongly excluded.

In those circumstances, Mr. Clarke points to the fact that a great deal of the prosecution case was based on the answers that the appellant gave to the police, and he has drawn attention to a number of passages in which the deputy chairman in his summing-up stressed the matter. It is sufficient to refer only to one of the passages, occurring at the end of the summing-up. It is in these terms: "But it does not end there. He told you "the reason why he did not do it was because he wanted to see "Napper first. He saw Napper that evening, and saw Sergeant "Rickwood immediately after he had seen Napper. You may "ask yourselves, members of the jury, if he had decided not to "tell the police until he had seen Napper, why after he had seen "Napper did he not then tell Rickwood, whom he saw that even-"ing, about the drum. You will have to consider that very "carefully, members of the jury, and ask yourselves what "light that throws on Willis's mentality."

It appears that the evidence which the appellant sought to give was that Napper had said that he, Napper, was not guilty of any offence and had not taken any drum of cable to the Brookside Metal Co. It is said that if that evidence had been given, a comment such as I have referred to—and there are several others—would not have been made. It seems to this court, however, that although the comment would not have taken exactly the same form, a similar comment was inevitable, namely: Was the absence of a true statement to the police consistent with this man's innocence?

This court is sparing in its application of the proviso to section 4 (1) of the Act, but in the present case the evidence is really overwhelming. In the first place, it is almost inconceivable that an honest employer, even though told by his employee that nothing had been stolen, and that nothing had been taken to Stock's yard, should not at once have told the police what he had been told by Stock, namely, that a drum of cable which appeared to have been stolen had come from the appellant's yard. It is almost inconceivable that on the next day, when he was seen by Inspector Moyle, he should have said: "My lorries have not been "used to take any drums of cable out; I know different to "that." Finally, there was the overwhelming case against the appellant on the basis that Napper with an honest employer was taking the most fantastic risk and appeared at the end not to be in a position to obtain any advantage from it. Any jury properly

C. C. A.
1959
REGINA v. WILLIS.

directed would have been bound to return the same verdict even if this evidence had been admitted and, accordingly, this appeal must be dismissed.

Appeal dismissed.

Solicitors: *Nelson, Mitchell & Williams, Southend-on-Sea; Berkshire County Solicitor.*

[CHANCERY DIVISION.]

1959
Nov. 17;
Dec. 1.
Wynn-Parry J.

* COOK *v.* "X" CHAIR PATENTS CO. LTD.

[1959 C. No. 2859.]

Practice and Procedure—Stay of proceedings—Action against company in voluntary liquidation — Action for wrongful dismissal — Application by liquidator to stay action—Substantial dispute as to amount of damages—Whether a matter to be determined in the liquidation—Whether any advantage gained by stay of proceedings —Discretion of court.

The plaintiff in August, 1959, brought an action against a company in voluntary liquidation claiming damages for wrongful dismissal from their employment, the dismissal being due to the liquidation. The company did not dispute the terms of the plaintiff's employment or that he had been wrongfully dismissed, but there was a substantial dispute as to the amount of damages which he should receive. On a summons, dated October 1, 1959, by the liquidator to have all further proceedings in the action stayed on the footing that the plaintiff should prove his claim in the winding up:—

Held, that although the court had a discretion in the matter, as a general principle it would not interfere with the right of an employee, pursuing a claim for damages for wrongful dismissal in a voluntary liquidation, to choose his tribunal unless there were circumstances justifying such interference; that since there was a substantial dispute as to the amount of damages, as to which evidence and cross-examination might be required, it was not a case in which any good would be done or expense saved by staying the action; and that, therefore, the court would not exercise its discretion in the liquidator's favour.

Currie v. *Consolidated Kent Collieries Corporation Ltd.* [1906] 1 K.B. 134 applied.

PROCEDURE SUMMONS.

The plaintiff, George Cook, on or about August 31, 1959, issued a writ claiming £5,685 damages against the defendant company, the "X" Chair Patents Co. Ltd., for wrongful dismissal from their employment as works manager. The company was in course of a voluntary liquidation pursuant to a special resolution of the members passed on May 12, 1958, and the dismissal was due to the winding up: the company did not at any time dispute the

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[Reported by Miss MARGARET THOMAS, Barrister-at-Law.]

terms of the plaintiff's employment or that he had been wrongfully dismissed, but solely the amount of damages he should receive, and the correspondence between the parties' solicitors showed that there was a substantial dispute as to the amount. The liquidator took out a summons on October 1, 1959, asking that all further proceedings in the action be stayed, it being contended that the plaintiff should prove his claim in the winding up of the company, which would be both more convenient and expeditious, and less expensive.

G. B. Parker for the defendant company.
D. A. Thomas for the plaintiff.

The following cases, in addition to those referred to in the judgment, were cited in the course of argument: *Freeman* v. *General Publishing Co.**; *Gerard* v. *Worth of Paris Ltd.*†

Wynn-Parry J. stated the facts and continued:

So far as the law is concerned, I think that for all practical purposes it is contained in one case, namely, *Currie* v. *Consolidated Kent Collieries Corporation Ltd.*[1] That was a strong case upon the facts because the liquidator denied any liability at all on the part of the company, and, in view of that denial, the employee concerned put in an alternative plea that he was entitled to damages on the basis of a quantum meruit. In the course of his judgment Collins M.R. enunciated the clearly established principle that in the case of a voluntary liquidation prima facie the employee pursuing his claim for damages for wrongful dismissal has a right to choose his tribunal; he can either prove in the liquidation, or he can bring a separate action, and the court ought not to interfere with the employee's decision in the exercise of his undoubted discretion unless it is satisfied that circumstances exist which justify such interference and the taking away from the employee of his choice of tribunal. The Master of the Rolls said[2]: "The court had no doubt stayed the "action in cases where the liquidator could show some sufficient "reason for its not being decided in the ordinary way"—that is, by an ordinary action. "Where, for instance, the existence "of a debt or liability was substantially admitted, though there "might be some question of the exact amount due, the ordinary "practice seems to have been that, liability not being really "contested, but only the exact amount due, the matter was "treated as one which might properly, and ought to, be deter-"mined in the liquidation." Romer L.J. in a concurring judgment said[3]: "On an application of this kind the court un-"doubtedly has a discretion, and I think that it ought to exercise "that discretion, even although the judge below did not exercise

* [1894] 2 Q.B. 380.
† [1936] 2 All E.R. 905.
[1] [1906] 1 K.B. 134.
[2] Ibid. 139.
[3] Ibid.

1959

COOK
v.
"X" CHAIR
PATENTS
CO. LTD.

Wynn-Parry J.

"any discretion. Now, what are the circumstances of this case? "Is it a case in which any good would be done, or expense "saved, by staying an action which has been properly brought, "and in effect sending the claim to be determined in the Chan-"cery Division?"; and he held that in the particular circumstances no advantage would be gained by so doing.

I take those observations as my guide in deciding what I ought to do in this case and, bearing them in mind, I refer to the correspondence. It is quite clear. Merely taking the correspondence by itself is that it is impossible to postulate in this case that there is only some question of the exact amount due. Although the existence of the debt or liability has been admitted, the parties on a reading of the correspondence will be found to be miles apart. It is true that certain deductions may well have to be made from the amount of £5,685 claimed by the plaintiff in his action; it may well be that some deduction may have to be made in respect of the likelihood of his getting further employment; but Mr. Parker, in a most ingenious argument went too far. His clients in the letter of December 18, 1958, said with regard to the plaintiff's application: "we think it "cannot seriously be contested but that he"—that is, the plaintiff—"will be able to obtain other suitable work. We appreciate "that it may not be at the same salary, but over the remaining "period of his contract it is felt that he should earn between "£800 and £1,000 per annum." Taking the middle figure of £900 per annum, Mr. Parker sought to satisfy me that I should proceed upon the basis that there should be a deduction at least of £5,400 from the amount claimed by the plaintiff. The plaintiff has made a deduction in respect of income tax. It is true that there may be a case for saying that there should be some further reduction because the payment will be a payment of a lump sum, and no doubt it is true, on the authority of *In re R. S. Newman Ltd., Raphael's Claim*[4] that nothing is payable in respect of future commission; but the figure of £900 when examined is an entirely arbitrary figure. The whole of Mr. Parker's argument really depends on introducing that figure of £900 multiplied by six years, the amount of the period to run, and thus asking me to deduct £5,400 from the claim which is put forward in the action. Indeed, he goes so far as to say that when the other matters to which I have referred which he introduced are taken into consideration, the plaintiff is in all probability likely to get less than the amount of £1,300 which the liquidator has offered him.

In those circumstances, I am not prepared to say that this case is within that exception to which I have referred in the judgment of the Master of the Rolls in *Currie* v. *Consolidated Kent Collieries Corporation Ltd.*[5] But further than that, I think there is great force in what Mr. Thomas said, namely, that on

[4] [1916] 2 Ch. 309. [5] [1906] 1 K.B. 134, 139.

such an issue as to where a man of sixty years of age is likely to get further employment he is entitled to give oral evidence. Mr. Parker said he could equally well do that by way of affidavit evidence. Whichever way it is done, it is more than likely that there will have to be cross-examination. Further, the plaintiff is entitled, if he so desires, to bring the evidence of other people skilled in the matter to say what chance he has in the particular trade, or, having regard to what his accomplishments are, is likely to get by way of further employment and at what rate. The correspondence shows perfectly clearly that there is a really substantial dispute between the parties. The matter having proceeded as far as it has by action, it seems to me that I should not properly be exercising my discretion in this case if I were to stop the action now and put the plaintiff to what will be new expense, namely, of putting in a proof which I am satisfied on the basis of the correspondence is in all likelihood (I put it no higher) to be rejected by the liquidator, in which case the matter will, in the first place, have to go before the registrar in the companies' winding up, and is quite likely from him to be brought to this court.

In those circumstances it appears to me that I must pose to myself the question which was asked by Romer L.J.[6]: "Is it "a case in which any good would be done, or expense saved, "by staying an action which has been properly brought, and in "effect sending the claim to be determined in the Chancery "Division?" Further, in my view, I must answer it in the words which Romer L.J. used in answering his own question[7]: "In my opinion, no advantage would be gained by so doing." For those reasons, this application must fail.

Order accordingly.

Solicitors: *George & George*; *Bond & Banbury*.

[6] [1906] 1 K.B. 134, 139. [7] Ibid.

[RESTRICTIVE PRACTICES COURT.]

R. P. Ct.† (E. & W.)

1959 *May* 29

* *In re* NATIONAL ASSOCIATION OF BRITISH AND IRISH MILLERS LTD.'S SCHEME.

[1957 No. 19 (E. & W.).]

Restrictive Practices — Practice — Parties — Non-appearance of parties to agreement—Refusal by six respondents to be represented by trade association—Submission by association to agreed order declaring

† Upjohn J., Sir Stanford Cooper, Mr. W. L. Heywood, Mr. W. Wallace and Mr. W. G. Campbell.

R. P. Ct.
(E. & W.)

1959

NATIONAL ASSOCIATION OF BRITISH AND IRISH MILLERS LTD.'S SCHEME, *In re.*

restrictions contrary to public interest—Undertaking by association not to revive or reintroduce similar scheme without giving notice to registrar—Whether registrar entitled to injunction against non-appearing respondents—Form of order—Restrictive Trade Practices Act, 1956 (4 & 5 *Eliz.* 2, *c.* 68), *s.* 20 (3) (*a*) (*b*)—*Restrictive Practices Court Rules,* 1957 (*S.I.* 1957, *No.* 603), *r.* 11.

The majority of the parties to an agreement, the subject of a reference to the court, consented to be represented by their trade association, and the court so ordered. Six of the parties refused to be represented and neither delivered a statement of case nor entered an appearance. The registrar did not apply for an order under rule 23 of the Restrictive Practices Court Rules, 1957, against the six parties debarring them from taking any further part in the proceedings, and they were properly served with notice of the proceedings and with notice of the hearing of the reference, but they did not appear. At the hearing the trade association offered no evidence but submitted to an order declaring that the restrictions in the agreement were contrary to the public interest, and the registrar, on the association giving an undertaking not to enforce the agreement or to introduce a similar one without giving 28 days' notice to the registrar, did not pursue, as against the association, a formal application for an order in the terms of section 20 (3) (*a*) and (*b*) of the Restrictive Trade Practices Act, 1956. As against the six parties to the agreement who were not represented by the association:—

Held, that the registrar was entitled to a declaration in a form binding on the six parties that the restrictions were contrary to the public interest.

Semble. The registrar was also entitled to an order against the six parties restraining them from giving effect to or enforcing the agreement in respect of the restrictions or making any other agreement to the like effect in the terms of section 20 (3) (*a*) and (*b*).

REFERENCE.

By notice of reference, dated July 22, 1957, the registrar referred to the court an agreement between all the participants in the Scheme of Deferred Rebates for Big Buyers of Home Milled Flour sponsored by the Incorporated National Association of British and Irish Flour Millers Ltd. (hereinafter called the "association"), an agreement whereby aggregated deferred rebates were paid to buyers in respect of all their purchases from participants in accordance with a scale, claims being submitted for verification by buyers to a firm of chartered accountants to whom participants paid the total amount of rebate due from them to all their customers for division and transmission to the buyers. The participants were either millers who were members of the association or factors approved by the association who had joined the scheme by completing an application form.

On October 17, 1957, the registrar applied to the court for a representation order under rule 11 of the Restrictive Practices Court Rules, 1957.[1] Notice of the proposal to apply for a representation order was given to all the participants and the majority

[1] Restrictive Practices Court Rules, 1957 (S.I. 1957, No. 603), r. 11: "Where a numerous class of persons "have a common interest in the proceedings by reason they are all "parties to the same agreement . . .

gave actual consent to be represented by the association for the purposes of all proceedings under the Act in respect of the agreement. Four participating companies did not give actual consent, but did not dissent; six companies dissented, and at the hearing of the application the court ordered that all parties to the agreement other than the six dissenting companies be represented by the association. The association duly delivered a statement of case but no statement of case was filed on behalf of the six dissenting companies and no appearance was entered by them.

Before the hearing the association intimated that it was prepared to submit to an order and to give certain undertakings not to enforce the scheme or to introduce a similar scheme without giving 28 days' notice to the registrar. When the reference came on for hearing the registrar asked the court to make an agreed order in similar form to that made in *In re British Constructional Steelwork Association's Agreement*,[2] reciting, inter alia, that the association admitted that the agreement contained restrictions set out in the schedule to the order within the meaning of section 6 (1) of the Act and had not offered any evidence in justification of them, and declaring the restrictions to be contrary to the public interest: the restriction as set out in the schedule was not to sell qualifying flour except on terms that the rebate scheme would operate. In view of the undertaking given by the association the registrar did not pursue his application for an order pursuant to and in the terms of section 20 (3) (*a*) and (*b*).

The report is solely concerned with the position of the six companies who refused to be represented by the association.

W. A. Bagnall for the registrar. The six dissenting companies were properly joined as parties; the proceedings and notice of today's hearing have been served upon them, but they are not before the court. They have not delivered a statement of case and, therefore, it would have been open to the registrar at any time after the expiry of the time for delivery of a statement of

"the court may, on an application "made by the registrar after the issue "of the notice of reference but before "the service thereof, make an order "(hereinafter referred to as 'a repre-"'sentation order') that the class, "or any members thereof, shall be "represented by such representative "respondents as the court may direct, "who may be individual members of "the class or a trade association or "associations to which all or some of "the members belong . . ."

R. 12: "Before making a representation order, the court may direct "that notice of the application for "the order shall be served on such "persons . . . as the court may think "fit, and may give such persons as "aforesaid an opportunity of objecting "to the making of the order . . ."

R. 13: "Where the court makes a "representation order, then, unless "the court otherwise directs . . . (ii) a "copy of the notice of reference shall "be served on any member of the "class to whom the representation "order does not extend;"

R. 23: "If a respondent fails to "deliver a statement of his case . . . "within the time limited for doing so, "the court may, on the application of "the registrar, direct that the respondent be debarred from taking any "further part in the proceedings . . ."

[2] (1959) L.R. 1 R.P. 199; [1959] 1 W.L.R. 306; [1959] 1 All E.R. 428.

R. P. Ct. (E. & W.)

1959

NATIONAL ASSOCIATION OF BRITISH AND IRISH MILLERS LTD.'S SCHEME, *In re.*

case to apply for an order under rule 23 of the Restrictive Practices Court Rules, 1957, debarring them from taking any further part in the proceedings: such an application would have prevented them from making any last minute application, which might even have been made today. Proceedings under the Act of 1956 are instituted by the registrar but the Act puts the onus of justification upon the respondents, and it is not easy to find a parallel for the present position, but perhaps the closest analogy is with that when a plaintiff institutes proceedings and does not appear at the trial. The effect of the court's judgment by this agreed order is like that of a judgment in rem, for, no matter how many of the parties to the agreement are before the court, it is a declaration that its operation is contrary to the public interest.

There is a formal application before the court for an order in the terms of section 20 (3) (*a*) and (*b*), which is only not proceeded with against the association because of the undertaking. The six dissenting companies who are not before the court cannot give an undertaking and it seems that it would be open to the registrar to press the court to make an order against them. In this case the matter is of little practical importance, since this particular scheme cannot be effective unless it is operated by the association, but the registrar is anxious that it should not be thought that a respondent in this type of case who flatly refuses to be represented by his association should find himself in a better position when the matter comes for trial than those respondents who have acted reasonably and have agreed to be represented. The registrar has been advised that in the majority of such cases it would be proper to ask the court to grant an immediate injunction against non-appearing respondents on the footing that they have shown a disposition to "go it "alone" and would be likely to continue to operate restrictions in an agreement.

UPJOHN J. I think that the registrar is entitled to a general order against the six dissentients. The question is whether, having regard to the practical aspect of this case, he is entitled to an immediate injunction against them or merely liberty to apply for an injunction.

Bagnall. That part of the order declaring that the restriction is contrary to the public interest presents no difficulty, since it is not made by consent and the dissentients have been properly served, and general liberty to apply would include liberty to apply for an injunction against all the parties to the agreement. There might be difficulty in including in the order an injunction against the dissenting companies in the terms of the proposed undertaking because the undertaking has been worked out as a matter of convenience and practice between the parties, and an injunction in its precise terms might not be authorised by section 20 (3).

UPJOHN J. I share your doubts.

H. A. P. Fisher for the association. The other participants are in contractual relationship with the six dissentients, but such

an order would safeguard their position. The declaration that the restriction is contrary to the public interest has the effect of making the agreement void in respect of the restriction, so that the dissentients could not sue them for breach of contract. There is, therefore, no need for the other participants to be protected by an injunction in the terms of the undertaking, although it would seem right that by order of the court they should be made subject to the same obligations as the respondents represented by the association. Since in practice it makes no difference, the association does not press for an injunction against them; it assents to the proposed order.

UPJOHN J. The registrar is plainly entitled to a declaration that the restriction is contrary to the public interest in a form which binds the dissenting companies. But the order needs to distinguish them from the other participants and it might do so by defining the represented respondents and reciting their admission and continuing as against the other six respondents, "and it "appearing that the agreement contains restrictions"—not using the word "admitting"—"and upon those respondents not having "entered appearance" declare that the restriction is contrary to the public interest. There will be general liberty to apply.

Order accordingly.

Solicitors: *Treasury Solicitor; Coward, Chance & Co.*

J. F. L.

[NEWCASTLE-UPON-TYNE ASSIZES.]

* BROWN *v.* NATIONAL COAL BOARD.

1959
Oct. 15, 16, 30.

Thesiger J.

Mines and Minerals — Coal — Breach of statutory duty — Roof and sides—Fall of stone from roof following fall of girder—Injury to electrician working on fitting on fallen girder—Duty to keep road or working place secure—Whether impracticable to avoid or prevent contravention—Whether electrician "workman employed in that "part of the mine"—Whether fitting was "debris"—Work "necessary for the setting of the supports"—Mines and Quarries Act, 1954 (2 *&* 3 *Eliz.* 2, *c.* 70), *ss.* 48 (1), 51 (3) (*b*), 157—*Coal and Other Mines* (*Support*) *Order,* 1956 (*S.I.* 1956, *No.* 1763), *Sch. I, reg.* 12.

The plaintiff was employed by the defendants as an electrician in one of their coal mines. A tub knocked away a prop holding up a girder which fell down at one end and at once a stone fell from the roof. An electric light fitting was attached to the girder and it would have been difficult to insert a prop to support the girder

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[Reported by G. M. SMAILES, Esq., Barrister-at-Law.]

1959

BROWN
v.
NATIONAL
COAL BOARD.

unless the fitting was removed. The overman sent a message to recall the plaintiff, who had finished what he had to do on that shift and was making his way towards the shaft bottom. The plaintiff returned unknown to the overman, saw the girder down and, knowing why he was wanted, started work on the light fitting, when another stone fell from about the same part of the roof and injured him.

The plaintiff claimed damages for breach of statutory duty relying, inter alia, on the Mines and Quarries Act, 1954,[1] alleging that the defendants, in breach of section 48 (1) of the Act, had failed to take such steps by way of supporting the roof of his working place as were necessary for keeping the working place secure, and that in breach of section 51 (3) (*b*) of the Act the overman had failed to withdraw the plaintiff from the working place. The plaintiff also alleged a breach of regulation 12 in Schedule I of the Coal and Other Mines (Support) Order, 1956,[2]

[1] Mines and Quarries Act, 1954, s. 48 (1): "It shall be the duty of "the manager of every mine to take, "with respect to every road and "working place in the mine, such "steps by way of controlling move- "ment of the strata in the mine and "supporting the roof and sides of the "road or working place as may be "necessary for keeping the road or "working place secure."

S. 51 (3): "It shall be the duty "of the manager of every mine to "secure that a sufficient supply of "suitable materials for support is at "all times readily available, for use "at the place where he is actually "working, to each workman who "needs them, and—(*a*) where a suffi- "cient supply of such materials is not "readily available, for use at the "place where he is actually working, "to a workman who needs them, he "shall withdraw to a place of safety "and forthwith report to an official "of the mine that, by reason of the "premises, he has done so; and— "(*b*) where it appears to the person "for the time being in charge of a "part of a mine that such a supply is "not available as aforesaid to a "workman employed in that part of "the mine, the said person shall "cause the workman to withdraw as "aforesaid; and where, on any "occasion, a workman has, in pursu- "ance of either of the foregoing "paragraphs, withdrawn from the "place where he was actually work- "ing, the person for the time being "in charge of the part of the mine in "which that place is situate shall not "permit the workman to return to it "thereafter until that person is satis- "fied that such a supply of materials "as aforesaid will be readily avail- "able, for use at that place, to that "workman when he needs them."

S. 53: "It shall be the duty of "every person employed at a mine "who is appointed for the purpose of "fulfilling any requirements imposed "with respect to the mine by virtue "of paragraph (*a*) of subsection (1) "of section twelve of this Act to "ensure to the best of his ability that "all such rules made under or by "virtue of any of the foregoing pro- "visions of this Act relating to sup- "port as have effect with respect to "the mine are executed and enforced "and that there are duly set any "supports which appear to him to be "necessary in addition to those set "in pursuance of the requirements "imposed by or by virtue of the said "provisions."

S. 157: "It shall be a defence in "any legal proceedings to recover "damages and in any prosecution, in "so far as the proceedings or prosecu- "tion are or is based on an allegation "of a contravention, in relation to a "mine . . . to prove that it was "impracticable to avoid or prevent "the contravention."

[2] Coal and Other Mines (Support) Regulations, 1956, reg. 12: "If any "fall of roof or side involving the "displacement or breakage of any sup- "port has occurred at a place where "any person has to work or pass, it "shall be the duty of the person for "the time being in charge of that "part of the mine forthwith to ensure "that any roof or side exposed there- "by is, if necessary, dressed and is "secured by supports, and that any "such dressing and securing is done "before any work of clearing debris "is begun, other than such work of "clearing debris as is necessary for "the setting of the supports."

in that the overman failed forthwith to ensure that the roof was secured by supports before any work of clearing debris was begun. The defendants, in addition to denying the alleged breaches, relied on the provisions of section 157 of the Act, saying that it was impracticable to avoid or prevent any contravention:—

Held, (1) that sections 48 and 157 of the Act must be construed together and, on the facts, the defendants at the time of the plaintiff's injury were taking such steps as were necessary for keeping the roof secure and the plaintiff, unknown to them, tried to assist in the work; therefore, there was no evidence of a contravention by the manager of section 48 (1), or it was impracticable to avoid or prevent the contravention (post, p. 77).

(2) That the words of section 51 (3) (*b*) of the Act were not apt to cover the case of the plaintiff who was not, until he went into the danger zone, "employed in that part of the mine," and therefore there was no question of withdrawing him until materials arrived for his use (post, p. 71).

(3) That the light fitting did not constitute "debris" within the meaning of regulation 12 and, even if it did, its removal was "work necessary for the setting of the supports" within the regulation (post, p. 72).

ACTION.

The plaintiff was employed by the defendants as an electrician at their Crofton Mill Colliery at Blyth in Northumberland. On April 8, 1958, he was injured by a stone falling from the roof. He sustained a mild compression fracture of one of his upper lumbar vertebral bodies and after examination at hospital he went home. He was in a plaster cast for six weeks after being in bed for a week, and started light work on September 8, 1958, but remained slightly partially incapacitated in September, 1959, and made an excellent recovery.

On April 8, 1958, a tub came up a drift at the mine and knocked away a concrete prop, whereupon a girder which had been held up by the prop fell down at that end and a piece of stone at once fell from the roof. In the centre of the partly fallen girder was a light fitting. The overman in charge of that part of the mine, James Simpson, wished to insert a prop to support the leaning girder. Just before the fall the plaintiff had finished what he had to do on that shift and was making his way towards the shaft bottom. The overman sent a boy to tell the plaintiff that he wanted the fitting removed. If it had remained in position it would have been difficult to put in the prop as proposed and then force it upright. The plaintiff received the message and returned and saw the girder down and some stone on the floor. He was looking for a spanner to start undoing the bracket of the light fitting in order to detach it from the fallen girder when another stone fell from about the same part of the roof and inflicted the injury described. It was held on the evidence that the overman was not aware that the plaintiff had turned up, but that the plaintiff knew from the message why he was wanted and went forward to the girder and the fitting because, like everyone else, he was anxious to get the coal moving and the clearance job done. It was also held that the overman told the men present

1959

BROWN
v.
NATIONAL
COAL BOARD.

to stand back but the plaintiff was not present when this order was given.

By paragraph 3 of the statement of claim the plaintiff alleged negligence and/or breach of statutory duty by the defendants and their servants. The allegations of breach of statutory duty were: (a) In breach of section 48 (1) of the Mines and Quarries Act, 1954, the defendants failed to take such steps by way of controlling movement of the strata in the mine and supporting the roof and sides of the plaintiff's working place as were necessary for keeping the said working place secure. (b) In breach of section 51 (3) of the said Act they failed to ensure that a sufficient supply of suitable material for support was readily available for use at the place where the plaintiff was working, in that the only props at the working place were too long. In breach of section 51 (3) (*b*), the defendants' servant Simpson, the overman, failed to withdraw the plaintiff from the working place when no suitable supports as aforesaid were available. (c) In breach of section 53 of the said Act the said overman failed to set necessary supports in addition to those set in pursuance of the support requirements and the provisions of the Act. (d) In breach of paragraph 12 of the Coal and Other Mines (Support) Regulations, 1956, after a fall of roof and/or side involving the displacement and/or breakage of supports the overman failed forthwith to ensure that all roof and side exposed thereby was dressed and secured by supports before any work of clearing debris was begun.

An allegation by the defendants of contributory negligence on the part of the plaintiff was held not to be established.

G. S. Waller Q.C. and *J. A. Baldwin* for the plaintiff.
Geoffrey Veale Q.C. and *D. B. B. Fenwick* for the defendants.

The cases cited in argument are all referred to in the judgment.

Cur. adv. vult.

Oct. 30. At Durham Assizes THESIGER J. read the following judgment, in which he considered the evidence, stated his findings of fact summarised above and continued: On my findings of fact, the plaintiff could not succeed at common law. The question is whether his injuries were caused by breach of some statutory duty owed to him. The plaintiff relies on various provisions of the Mines and Quarries Act, 1954, which I shall call "the Act of 1954." I start with paragraph 3 (b) of the statement of claim. Though the plaintiff does not now rely on a breach of section 51 (3) (*a*), he does rely on an alleged breach of section 51 (3) (*b*) of the Act of 1954. [His Lordship read subsection (3) and continued:]

Mr. Veale, for the defendants, argued: (i) that if paragraph (*a*) of the subsection does not apply, then paragraph (*b*) could not apply, for paragraph (*b*) assumed that it appeared to the person

in charge that a sufficient supply of suitable materials was not available; (ii) that, if a person did not know that the workman was there, he could not cause him to withdraw to a place of safety. Mr. Veale also relied, in answer to this part of the claim, on the provisions of section 157 of the Act of 1954.

Mr. Waller, for the plaintiff, contended that there were no such materials, to wit, props of the right length, readily available; therefore, it was the duty of the overman, Mr. Simpson, as "the "person for the time being in charge of a part of the mine" (which Mr. Simpson was in fact) "to cause the workman to "withdraw," and, says Mr. Waller, he did not do so, and, as he did not give the order "Stand back" at that time, the defendants have not proved that it was impracticable to comply with section 51 (3) (*b*). In my judgment, the words of section 51 (3) are not apt to cover the case of the plaintiff, who was summoned to come and who was not, until he came and then went into the danger zone, "employed in that part of the mine"; therefore, there was no question of withdrawing him until materials arrived for his use.

The plaintiff next, by paragraph 3 (c) of the statement of claim, relies on section 53 of the Act of 1954. [His Lordship read it.] Mr. Veale, for the defendants, submitted that this provision is the normal support provision with which deputies and overseers must comply, and that Mr. Simpson was in the course of complying with this provision (if, indeed, the substitution of the broken support by a new one could properly be described as "addition"). Mr. Waller argued that if (but I think only if) Mr. Simpson was not doing his best to get supports but was trying to shift the girder first to expedite the flow of coal, the plaintiff could say that there was a breach of section 53. I hold that Mr. Simpson had sent for supports and was not moving or intending to move the girder until supports arrived and were put under it. I hold that Mr. Simpson was not in breach of his duty under section 53.

The plaintiff next, by paragraph 3 (d) of the statement of claim, relies upon regulation 12 of the Coal and Other Mines (Support) Regulations, 1956, [which his Lordship read].

Mr. Waller submitted: (i) that a fall of roof or side involving displacement or breakage of support had occurred at a place where a workman had to "work or pass," and (ii) that Mr. Simpson was a "person for the time being in charge of that part of "the mine." So far, I agree. Then, says Mr. Waller, Mr. Simpson had a duty forthwith to ensure that any roof exposed by the breakage of support was, if necessary, secured by supports, and that any such securing was done before any work of clearing debris was begun, other than such work of clearing debris as was necessary for the setting of the supports. Mr. Waller says that one should do the necessary clearing of the ground only and then should wait for supports. The light fitting was, says Mr. Waller, "debris" because it was something that had fallen. Mr. Waller then relied on the testimony of Mr. Hindson (an expert

1959

BROWN
v.
NATIONAL
COAL BOARD.

Thesiger J.

called for the plaintiff) who said that it was not necessary to remove the light fitting. Mr. Veale submitted that, if one looked at the regulations as a whole, they were dealing with support; that "debris" really meant stone from the roof; that Mr. Simpson was complying with the first part of the duty imposed by regulation 12, and that, if someone were moving or breaking up a stone which was part of the "debris" properly so called, that someone was not the plaintiff, and any breach of the regulation in connection with that person did not contribute to the plaintiff's injury. I was not at all convinced by Mr. Hindson's evidence. In my opinion, the light fitting did not, on the facts of this case, constitute "debris" within the meaning of regulation 12. More important is the fact that I hold that if it did, it was necessary to move it to set the supports. In this regulation, at least, the word "necessary" must be construed so as to allow some latitude to the man directing the work.

I now come to the main problem in this case. Mr. Waller relied chiefly on the provisions of section 48 of the Act of 1954, which Mr. Veale contended did not impose an absolute liability, and, if they did impose such liability, Mr. Veale relied on the provisions of section 157 of the same Act. Those provisions replace the provisions of sections 49 and 102 (8) of the Coal Mines Act, 1911. [His Lordship read sections 48 (1) and 157 of the Act of 1954.]

The case for the plaintiff is set out in paragraph 3 (a) of the statement of claim and is, that in breach of section 48 (1) of the Act of 1954 the defendants failed to take such steps by way of controlling movement of the strata in the mine and supporting the roof and sides of the plaintiff's working place as were necessary for keeping the working place secure. The plaintiff's argument is that: (i) the two falls, or at least the second fall, established the failure to take such steps as were necessary for keeping secure the place to which the plaintiff went in order to work, and at which he was working; (ii) that place was, therefore, not secure; and (iii) it was a working place and a road. The plaintiff then says that the defendants have not proved that it was impracticable to avoid or prevent the contravention, therefore, the plaintiff must succeed. Such was the way in which the case for the plaintiff was put on this part of his claim in opening. I will now set out the argument for the defendants and then the reply on behalf of the plaintiff.

For the defendants Mr. Veale admitted that the former section 49 of the Act of 1911 had been held to impose an absolute duty and that defendants bound by it could only escape liability if section 102 (8) of the Act of 1911 applied. He submitted that "not reasonably practicable" in subsection (8) of section 102 of the Act of 1911 meant the same thing as "impracticable" in subsection (3) thereof, for otherwise it would be easier to defend a civil claim than a criminal prosecution. I am not much impressed by this argument because, if Parliament wants to

induce caution, it is apt to impose absolute liability when constituting these summary offences in which small maximum penalties only are involved, and for which magistrates may impose only a small part of that maximum penalty. Mr. Veale went on to argue that section 48 of the Act of 1954 makes a clear change in form in that subsection (1) thereof merely says: "It shall be the duty of the manager . . . to take such steps . . . as "may be necessary." The former section, section 49 of the Act of 1911, used the phrase: "The . . . sides . . . shall be made "secure." Moreover, in the Act of 1954, the legislature, when it wishes to impose absolute liability, says "he shall" in sections 79 and 80, and "shall be" in section 81 (which corresponds to a section in the Factories Act, 1937). Section 82 (1) of the Act of 1954 also uses the phrase "shall be," and in section 82 (2) where it refers to the manager (as does section 48, which is under discussion) the wording is different from that of section 48. Section 55 also deals with the manager and subsection (1) thereof says "such steps as are necessary," not "such "steps as may be necessary." The former section 49 of the Act of 1911 (so runs the argument) used words which were held to impose an absolute duty. The new section 48 in the Act of 1954 uses different phrases from those which had been held to impose absolute duty, and it now imposed some duty on the manager personally, using different phrases from those used in other sections of the Act of 1954, when it desired to impose absolute duty. Mr. Veale further argued that section 48 of the Act of 1954 introduced for the first time reference to controlling movement of the strata, and, since strata must move, one would expect Parliament to be requiring the greatest efficiency rather than absolute success in controlling such movement; therefore one would expect the requirement to be to take the best steps taken by the most competent managers in practice in the coal fields. Indeed, as Mr. Veale pointed out, subsection (2) of section 48 uses the phrase "discharge efficiently the duty imposed . . . by "the foregoing subsection." I am a little impressed by this part of the argument. If a member of Parliament says that it is the duty of a motorist to take such steps for controlling the movement of his motor-car on the roads and applying his brakes as may be necessary for avoiding accidents, one would, I believe, think he was uttering a platitude rather than suggesting imposing liability for every accident.

Mr. Veale next argued that certain decisions under the Act of 1911, which was held to impose an absolute duty, nevertheless held the defendants to be not liable. These decisions, he said, must apply, a fortiori, to the new phrases in section 48 of the Act of 1954. He referred to two decisions of Hallett J. on this circuit. The first, on April 29, 1952, in *Hayes* v. *National Coal Board*,[1] is unreported, and the second is *Jackson* v. *National Coal Board*,[2]

[1] Unreported, Leeds Assizes, April 29, 1952.

[2] [1955] 1 W.L.R. 132; [1955] 1 All E.R. 145.

1959

BROWN v. NATIONAL COAL BOARD.

Thesiger J.

which refers to the earlier decision. The legislature, urged Mr. Veale, would not put an absolute duty on a manager to control strata—unless, perhaps, the legislature thought that the words "keep secure" merely meant "keep reasonably safe"—and the words "as may be necessary" must import judgment and foreseeability. Mr. Veale adopted as part of his argument the only reported decision on this new section 48 in the Act of 1954; that is the decision of a quarter sessions court in *Wright* v. *Jenkins*.[3] He urged that some guilty mind is assumed to be required when a breach of duty is, as this one is, subject to enforcement by criminal prosecution.

In considering the construction of section 48 of the Act of 1954, Mr. Veale mentioned two technical points. Section 48 puts a personal duty on the manager (who also has a duty of seeing that others discharge their duty: see section 2 (2) of the Act of 1954). The statement of claim, so he pointed out, puts the duty on the defendants, and the whole of the evidence was directed to the activities of an overman in an emergency. Then, again, the point at which the accident took place was really a road, and not a working place. Passing to the facts of the case in relation to section 48, Mr. Veale argued that the work which was being done was the operation of complying with the provisions of section 48, and, on reasoning parallel to that which appealed to Romer L.J. and other members of the Court of Appeal in *Walsh* v. *National Coal Board*,[4] the defendants could not be under an absolute duty to do something, and an absolute liability for doing it. So far as those two technical points are concerned, Mr. Veale was, I think, really emphasising that this new section, in contrast to the old section, imposed a duty on the manager; that any alleged contravention was that of the manager; and that the operation of section 157 with its test of "impracticability" must be considered in relation to the position of the manager. The statement of claim, in using the phrase "the defendants," is presumably assuming that there is vicarious responsibility, and I hold that the omission to add the words "by their servant and "agent the manager" cannot in itself be fatal. As Mr. Veale did not expressly argue the point (which, indeed, is masked by the omission of those words) I will assume that, having regard to section 159 of the Act of 1954, an employer is vicariously liable for a breach of statutory duty imposed, not on him, but expressly on someone else who merely happens to be acting as his servant or agent. On the other technical point, Mr. Veale was willing that paragraph 3 (a) of the statement of claim should be amended by adding or substituting an allegation that the defendants failed to take such steps as were necessary, by way of controlling the movement of the strata in the mine and supporting the roof of the road, for making the road (as opposed to a working place) secure.

[3] (1958) 43 Cr.App.R. 17.

[4] [1956] 1 Q.B. 511; [1955] 3 W.L.R. 829; [1955] 3 All E.R. 632.

Finally, Mr. Veale argued for the defendants that it was impracticable to avoid or to prevent the alleged contravention, and he emphasised that section 157 of the Act of 1954, which provided a defence in those circumstances, referred to "contravention" and not to the fall of stone or the injury. He urged that, while it was the manager who had the duty, the overman was doing all that was necessary for keeping the roof secure by getting a temporary prop. There were, said Mr. Veale, possibly three concepts: (i) physically possible; (ii) practicable; (iii) reasonably practicable. He referred me to two cases. In the first, *Marshall* v. *Gotham Co. Ltd.*[5] he drew attention to passages in Lord Oaksey's speech[6] and in Lord Reid's speech.[7] He also referred to *Atkinson* v. *Shaw*.[8] Mr. Veale submitted that "practicable" implies some element of reasonableness, and the word "reasonably" inserted before "practicable" might be regarded as redundant, like the first word in the common phrase "surrounding circumstances." I am interested by the recognition that even in an Act of Parliament one may sometimes attempt to express an idea more shortly than was done in older Acts without intending to alter the meaning. I notice also that Mr. Veale's argument, which attaches importance to the qualifying word "efficiently" in one place (section 48 (2) of the Act of 1954), attaches little to the omission of a qualifying word in another.

I will now summarise the reply for the plaintiff. Mr. Waller, for the plaintiff, submitted that so far as sections 48 and 157 of the Act of 1954 were concerned, it was useful to trace the history of the liability through the successive Acts of 1872, 1887 and 1911. The duty seems to have been imposed in similar words each time. It was unthinkable, he argued, that Parliament would lighten the burden that had been imposed on employers for so long. The Act of 1954 only used altered phraseology in order to set out the same duties in greater detail and to impose them on particular people. I am not sure that, with the changes in arrangements for compensation for industrial injuries and in the ownership of the mines, it is safe to assert that Parliament cannot be supposed to intend to alter burdens if the language used is different and tends to show such intention. Mr. Waller emphasised that section 48 did not mention "making," but only "keeping," the road or working place secure; thus it was assumed that to start with they would be secure. The phrase "as may be" was, so he argued, used to deal with situations which changed physically from time to time, but the obligation was still absolute. The different phraseology in section 55 (1), to wit, "such steps as are necessary," was used to deal with a changing physical situation. Mr. Waller submitted that the test cannot be subjective to the manager because the words are not "such

[5] [1954] A.C. 360; [1954] 2 W.L.R. 812; [1954] 1 All E.R. 937.
[6] [1954] A.C. 360, 370.
[7] Ibid. 372.
[8] [1915] 2 K.B. 768; 31 T.L.R. 421.

1959

BROWN v. NATIONAL COAL BOARD.

Thesiger J.

"steps as appear to the manager to be necessary." "May be "necessary," he argued, is equivalent to "may prove to be neces- "sary." The necessary steps have not been taken, says Mr. Waller, if the roof and sides are not secure. The qualification, if any, would be in the meaning of the word "secure." A fall, however, from natural causes means, so he argued, that the steps necessary for keeping secure have not been taken. I interpolate at this point my feeling that any fallacy lurking in Mr. Waller's argument is probably to be found here. Mr. Waller went on to submit that the omission by a deputy to insert a support required to implement the manager's duty would not absolve the defendants. I again interpolate that I agree; but that may be because the defendants are vicariously liable for the deputy's negligence. Mr. Waller went on to contend that the only reasonable approach was to take Parliament as rephrasing the duty which had always been absolute, and not as removing the duty from everyone except the manager and then relieving him of an absolute obligation. After dealing with the three reasons relied on in *Wright* v. *Jenkins*,[9] Mr. Waller said that *Walsh* v. *National Coal Board*[10] was wrongly decided in the Court of Appeal, the fallacy being that a man can, and does in practice, make the place secure ahead of him before he actually goes under the roof and between the sides. That case, said Mr. Waller, though binding on me as regards the exact point, was decided on a different section, and the fallacious argument, even if it were sound, depended on the obligation to "make secure." Here the obligation is to take steps to "keep secure." Moreover, argued Mr. Waller, Walsh was a road-head man and the decision should not be extended to any person who for one minute was helping indirectly to make a roof secure by the work of removing a light fitting.

Finally, on section 157 of the Act of 1954, Mr. Waller submitted that the elimination of the qualification "reasonably" made it more difficult for the defendants to bring themselves within the section. He relied on the judgment of Asquith L.J. in *Edwards* v. *National Coal Board*,[11] and on the speech of Lord Reid in *Marshall* v. *Gotham Co. Ltd.*[12] "Practicable," so he argues, means "capable of being carried out," and the defendants had called no evidence on the point. So much for the reply for the plaintiff.

I will now state my own view of sections 48 and 157 of the Act of 1954 in the light of those arguments, and in so far as those sections have to be applied to the facts of this case in which the fall and injury followed on the knocking away of a support.

First, it is important to remember that a short phrase like "absolute liability" is apt to mislead, because one is tempted to add to it some words to describe the direct physical cause of the injury such as "for the fall of the stone," and to say the

[9] (1958) 43 Cr.App.R. 17.
[10] [1956] 1 Q.B. 511.
[11] [1949] 1 K.B. 704; 65 T.L.R. 430; [1949] 1 All E.R. 743.
[12] [1954] A.C. 360, 372.

section imposes "absolute liability for damage done by the fall "of a stone." Strictly, however, the imposition of a specific statutory duty merely relieves a jury of the burden of considering whether a reasonably careful man would have done that which the statute directs. It is in that respect that a statutory duty differs from common law duty to exercise reasonable care. Next, it is important to remember that Parliament when debating the form of the clause imposing the duty, and any proposed amendments to the original form of the clause, would undoubtedly be invited to consider the effect of clause 157 of the same Bill. Therefore, I must construe the two sections together because Parliament intended them to have effect in combination.

Now section 48 places a duty on the manager of the mine. That duty is to deal with controlling the movement of the strata in the mine. That duty is imposed in relation to roadways and working places. All this points to somewhat long-term strategic planning as opposed to short-term tactical measures of repair. The latter measures might have to be taken by the men on the spot immediately upon the occurrence of an emergency; the emergency might be due to the knocking away of an effective support by a third party. It is a defence to prove that it was impracticable for the manager to avoid or prevent a contravention of that long-term though continuing duty. I do not believe Parliament intended that the fall of a stone in the circumstances of this case should be held to prove a contravention of the duty imposed by section 48, and that section 157 should then be practically useless by way of defence in such circumstances. In other words, I do not believe Parliament intended to impose liability on a manager to pay damages for injury caused almost immediately after the knocking away of a support, by the fall of a stone from the roof of a temporarily blocked roadway, on someone who (without the knowledge of anyone on the spot who mattered) went under the roof while such steps as were necessary were being taken to keep the roof secure. One may hold either, in those circumstances, that the fall of the stone was not sufficient evidence of a contravention of his duty by the absent manager, or that it was impracticable for him to avoid or prevent any contravention of the statutory duty that could fairly be inferred from that fall. When the roadway that had been effectively supported was deprived of its support, I think that one must ask oneself what step the manager then failed to take that was practicable for him to take, and that was necessary to make the roof secure in the sense of preventing the fall of the stone that hit the plaintiff. I cannot see on the evidence that the manager omitted any step that was practicable. It was, indeed, impracticable for him to act to avoid the fall. The plaintiff went into a a place where the roadway was blocked, and I reject the evidence that he was specifically set to work at that place. At the time he was injured, the defendants, by their servants or agents, were taking such steps as were necessary for keeping the roof secure.

1959

Brown v. National Coal Board.

Thesiger J.

The plaintiff was injured because he, unknown to the defendants, tried to assist in that work.

I hold that the defendants have not been proved to be negligent, and I hold that the plaintiff's action must fail also on the allegations of breach of statutory duty.

[His Lordship assessed the total damages, if liability had been established, at £1,137 11s. 7d., which included the agreed sum of £537 11s. 7d. as special damages.]

Judgment for the defendants.

Solicitors: *Watson, Burton, Booth & Robinson, Newcastle-upon-Tyne; W. M. Burnside, Newcastle-upon-Tyne.*

[CHANCERY DIVISION.]

1959 *Dec.* 14.

Roxburgh J.

* *In re* GREAT UNIVERSAL STORES LTD. AND OTHERS.

PRACTICE NOTE.

Company—Capital—Reduction—Practice—Scheme of arrangement and reduction of capital—Petition for sanction of court—Whether necessary to aver that company carrying on business—Companies Act, 1948 (11 *&* 12 *Geo.* 6, *c.* 38), *s.* 206.

Dicta of Kekewich J. in *In re Wallasey Brick and Land Co.* [1894] W.N. 20 explained.

PETITIONS to sanction schemes of arrangement and confirm reductions of capital.

A company, Great Universal Stores Ltd., and subsidiary companies, applied to the court to obtain its sanction under section 206 of the Companies Act, 1948, to schemes of arrangement and the subsidiaries also applied for orders confirming reductions of capital.

T. D. D. Divine and *R. B. S. Instone* for the petitioners.

ROXBURGH J. This is a complicated scheme involving a large number of subsidiary companies as well as the parent company, and there is one small matter which I think might now be settled. There is not, in fact, in any of the petitions the allegation that the relevant company is carrying on business. It might appear from a report of a decision of Kekewich J. in *In re Wallasey Brick and Land Co.*,[1] that such an averment was necessary in order to obtain the sanction of the court to a reduction of capital. On looking at the report I am not at all sure that Kekewich J. intended to say anything of that sort. The court, of course,

[1] [1894] W.N. 20.

always has a discretion as regards reductions of capital, and it may be that all that he was saying was that, in the exercise of his discretion, he refused to sanction a reduction in that particular case. If so, that has no relevance to any other case. But if he intended to go further than that, it seems to me that any such view is now completed out-dated and has so been since the decision of the House of Lords in *British and American Trustee and Finance Corporation Ltd.* v. *Couper*,[2] which was given on April 16, 1894, within a few months of the decision of Kekewich J. There is no ground for suggesting that such an averment is a sine qua non of the success of a petition. The facts in this case are entirely different, and the only reason why I have dealt with the point is because of the possibility that a different view might still be lingering in the textbooks or elsewhere.

I sanction the scheme with regard to the companies and confirm the reductions as regards all the subsidiaries.

Solicitors: *Linklaters & Paines.*

M. G. T.

[2] [1894] A.C. 399; 10 T.L.R. 415.

[COURT OF CRIMINAL APPEAL.]

* REGINA *v.* STALLY.

C. C. A.

1959 *Oct.* 2.

Barry, Diplock and Salmon JJ.

Road Traffic—Taking and driving away motor-vehicle—Accessory—Appellant not present at taking—Whether entry into vehicle subsequently knowing it to have been taken and driven away without owner's consent sufficient to constitute offence—Road Traffic Act, 1930 (20 *&* 21 *Geo.* 5, *c.* 43), *s.* 28 (1).

Criminal Law—Aiding and abetting—Continuing offence—Taking and driving away motor-vehicle—Accessory to driving away only.

During the night of February 14, 1959, a motor-van was taken from outside a house without the owner's permission. In the early hours of the following morning the van was found; it had been used by the appellant and another man to make several journeys within the London district. Both men were charged on indictment with taking and driving away a motor-vehicle without lawful authority, contrary to section 28 (1) of the Road Traffic Act, 1930. The other man pleaded guilty; the appellant pleaded not guilty, his defence being that he was not present when the other man had taken the motor-van. In the summing-up the jury were directed that they were entitled to find the appellant guilty of taking and driving away the vehicle without the owner's consent if they found that he had entered the vehicle some time after it had been taken, knowing that the driver had in fact taken it and driven it away without the owner's consent. The appellant was convicted. On appeal:—

Held, allowing the appeal, that the summing-up amounted to a misdirection; the jury should have been told that on the evidence

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[Reported by Miss EIRA CARYL-THOMAS, Barrister-at-Law.]

C. C. A.

1959

REGINA
v.
STALLY.

they must be satisfied that the appellant was in fact a party to the taking in the sense that the taking had been a joint enterprise even though he was not present when the vehicle was actually removed.

APPEAL against conviction.

The following facts are taken from the judgment: During the night of February 14, 1959, a Bedford motor-van was taken from outside a house in Neville Road. That van belonged to one Day, who had given permission neither to the appellant, Ronald James Stally, nor to another man named Wise to take or drive away the vehicle. In the early hours of the following morning the van was found in a street in the East End of London, and the appellant and Wise were either in it at the time when the police officers discovered it, or had on their own showing been in it for some time; it had been used by the appellant and Wise to make several journeys within the London district that night.

The appellant was convicted at the County of London Sessions of taking and driving away a motor-vehicle, contrary to section 28 (1) of the Road Traffic Act, 1930. He was sentenced by the deputy chairman to nine months' imprisonment. He appealed against conviction, alleging misdirection of the jury by the deputy chairman.

Kevin Winstain for the appellant.
R. D. Harman for the Crown.

The following cases were cited in argument: *Shimmell* v. *Fisher* [1]; *Moynes* v. *Coopper* [2]; *Russell* v. *Smith* [3]; *Du Cros* v. *Lambourne* [4]; *Johnson* v. *Youden* [5]; *Reg.* v. *Richardson.* [6]

BARRY J., delivering the judgment of the court, stated the facts, which he said were extremely simple and need only be set out in the broadest outline, and continued: The appellant's case was that on the evening of February 14 he met Wise at a dance hall. They left there together and met two girls who invited them to a party. They went to the party and, thereafter, at about 1.30 a.m. they attempted to obtain a taxi to drive the girls and themselves home. Unfortunately one at least of the girls had drunk too much at the party and was ill and the taxi driver refused to take them as fares. The appellant says that he then went off to try to find another taxi but he was unsuccessful and ultimately returned. On his return he found Wise and the two girls in a van not in Neville Road but in another street very close to it. According to the evidence, the engine of the van at that time had been running and it does seem clear that Wise, who

[1] [1951] 2 T.L.R. 753; [1951] 2 All E.R. 672, P.C.
[2] [1956] 1 Q.B. 439; [1956] 2 W.L.R. 562; [1956] 1 All E.R. 450.
[3] [1958] 1 Q.B. 27; [1957] 3 W.L.R. 515; [1957] 2 All E.R. 796.
[4] [1907] 1 K.B. 40; 76 L.J.K.B. 50; 23 T.L.R. 3.
[5] [1950] 1 K.B. 544; 66 T.L.R. (Pt. 1) 395; [1950] 1 All E.R. 300.
[6] [1958] Crim.L.R. 480.

pleaded guilty, had driven the car from Neville Road to the place where it was entered by the appellant, the appellant not being present at that period. Indeed, Wise, who gave evidence at the trial, stated specifically that the appellant was not present when he, Wise, took the van from Neville Road. Whether or not that was proved, there was no evidence adduced by the prosecution to indicate that the appellant had in fact been present when the van was first removed.

In directing the jury the learned chairman indicated to them very clearly and with complete accuracy that in order to find the appellant guilty of taking and driving away this car without the consent of the owner, it was quite unnecessary for the appellant to have been actually in the driving seat at any time and in control of the motor-car. It would be quite sufficient, as the learned deputy chairman very clearly pointed out, if the two men, the appellant and Wise, had been acting in concert in relation to the taking of this motor-car without the owner's consent. Unfortunately, as it appears to us, after giving this extremely clear direction, the learned deputy chairman proceeded to say: "There is another way in which Stally can be guilty of taking "and driving away this motor-vehicle. The law puts it in this "way. If one person originally removes a motor-vehicle without "the consent of the owner and drives it away, subsequently any-"body else getting into that motor-vehicle, if they know perfectly "well the driver has taken it without the consent of the owner, is "guilty of the offence. So if you came to the conclusion that "Wise originally removed the van from Neville Road, and subse-"quently picked up Stally, and Stally knew perfectly well Wise "had taken the vehicle without the permission of the owner, "Stally would still be guilty of the offence. Taking and driving "away is a continuing offence. It goes on all the time the "vehicle is being driven, so Stally could be guilty in those "circumstances."

Again, at a later stage in the summing-up, the learned deputy chairman posed this question to the jury: "Was Stally a party "to that"—that is to say, the taking of the motor-van by Wise and the driving of it away—"either present and taking part in "the commission of the offence at the time when the van was "removed, or subsequently joining that van, knowing perfectly "well Wise had no permission to be driving it. If you are satis-"fied that either of these positions is the correct one you should "convict Stally."

In the opinion of this court the two passages to which I have referred state the law in very much too broad a way and, in fact, amount to a misdirection. If the learned deputy chairman had made it clear that once the jury were satisfied that the appellant was a party to the taking in the sense that the taking had been a joint enterprise, even though he himself was not present when the vehicle was actually removed, no complaint could possibly have been made. The difficulty, as we see it, is that the learned

C. C. A.
1959
REGINA
v.
STALLY.

deputy chairman indicated to the jury that they would be entitled to find the appellant guilty of this offence on the mere ground, and the sole ground, that he entered the vehicle some time after it had been taken, knowing that the driver of that vehicle had in fact taken it and driven it away without the consent of the owner. In very many cases the fact that a man entered a car which he knew had been stolen and then drove in it, might well lead the jury to the conclusion that that man had been a party to the original taking, in the sense that the taking had been a joint enterprise between him and the driver of the car. In the passages to which I have referred the learned deputy chairman does not direct the jury that on the evidence they must be satisfied that the appellant was in fact a party to the taking. It might well have been on this evidence that the jury would have so found if so directed, but it is also possible that the jury took the view here that Stally played no part at all in the taking of the van, and that although when he came up to the van, which had already been taken by Wise, he was aware that Wise had taken it without the owner's consent, but nonetheless he had been quite unaware that Wise was going to take it, then, in those circumstances, to say that the mere fact of entering the van and being driven in it would constitute a taking and driving away, seems to this court to be an inaccurate statement of the law.

In those circumstances, in our view, the only possible course is to quash this conviction.

Appeal allowed.

Solicitors: *Registrar, Court of Criminal Appeal; Solicitor, Metropolitan Police.*

[CHANCERY DIVISION.]

1959
Dec. 15.
Wynn-Parry J.

* *In re* HAMBLEDEN'S WILL TRUSTS.

[1959 H. No. 1632.]

Trust and Trustee—Variation of trusts—Act of 1958—*Form of order—Effect of court's approval of arrangement—Whether direction to trustees necessary—Variation of Trusts Act,* 1958 (6 & 7 *Eliz.* 2, *c.* 53), *s.* 1.

On an application under section 1 of the Variation of Trusts Act, 1958, the court approved an arrangement varying the residuary trusts of a will. Draft minutes of order were then produced which, after reciting that the adult respondents to the summons consented to the order and providing that the court approved the arrangement on behalf of the infant respondents and unborn persons entitled under protective trusts, also contained the words: "And doth "authorise and direct the trustees of the said will to carry the "said arrangement with effect." No instrument had been executed

by any of the adult parties and the court was told that it was not intended that this should be done:—

Held, that the court had no jurisdiction to make an order which included words directing the trustees to carry the arrangement into effect because, once the court's approval of the arrangement was given, the trusts were ipso facto altered and the trustees bound to give effect to the arrangement. The direction to the trustees contained in the draft minutes should, therefore, be deleted and no document was necessary.

In re Joseph's Will Trusts [1959] 1 W.L.R. 1019; [1959] 3 All E.R. 474 not followed.

ADJOURNED SUMMONS.

By his will dated June 6, 1946, the testator, the Right Honourable William Henry Viscount Hambleden, directed that one share of his residuary estate should be held upon trusts under which, in the events which happened, the income thereof was to be held upon protective trusts for his son, the present Viscount Hambleden during his life and after his death, and subject to any appointment that such son should make for the benefit of any wife who might survive him for her life, in trust for his children or remoter issue as he should appoint and in default of appointment in trust for his children who being male should attain the age of twenty-one or being female should attain that age or marry and if more than one in equal shares and in default of such children in trust for other members of the family. The present Lord Hambleden, in exercise of that power, had appointed on his marriage with the present Lady Hambleden, an annuity of £2,500 to be payable to her during the period of her life after his death and during which any child of the intended marriage should be living or after a child of the intended marriage should attain a vested interest in certain other funds such annuity to be payable out of such share.

By an originating summons dated July 10, 1959, the present Lord Hambleden applied to the court under section 1 of the Variation of Trusts Act, 1958, that the court might approve an arrangement, intended to be exhibited to an affidavit to be filed in the proceedings on behalf of the applicant, on behalf of (a) infant respondents to the summons; (b) persons unborn who might thereafter become entitled (otherwise than under the protective trusts thereinafter mentioned) to a beneficial interest in Lord Hambleden's share and (c) any person who was or might thereafter become entitled to any discretionary interest under the protective trust upon which the life interest of the applicant was held. The scheme of arrangement exhibited to the affidavit provided that the trusts of Lord Hambleden's share should be varied as follows, namely "(a) the whole of Lord Hambleden's "share is released from the appointed annuity and no part of "Lord Hambleden's share should henceforth at any time be "subject thereto (b) the annuity fund [being certain specific "investments forming part of Lord Hambleden's share scheduled

1959

HAMBLEDEN'S WILL TRUSTS, *In re.*

"to the scheme] shall henceforth be held upon trust to pay the "income thereof to Lady Hambleden during her life and subject "thereto upon the trusts of the children's fund (c) the children's "fund [being certain other investments forming part of Lord "Hambleden's share scheduled to the said scheme] together "with the intermediate income thereof shall henceforth be held "on the following trusts." Such trusts provided immediate interests for Lord Hambleden's children and in default for other members of the family being trusts identical with those in the will after the death of Lord Hambleden. It was further provided in the scheme that nothing thereinbefore contained should operate any forfeiture of Lord Hambleden's protective life interest in the remainder of Lord Hambleden's share. The effect of the scheme therefore was that Lady Hambleden's annuity was released and in substitution therefor she obtained an immediate life interest in the annuity fund and Lord Hambleden's protected life interest was released in respect of the annuity fund and the children's fund. At the date of the summons Lord Hambleden had three infant children.

After the court had considered and approved the scheme in principle with minor amendments, draft minutes of order were produced which, after reciting that the adult respondents by their counsel consented to the order, provided that the court approved the arrangement set forth in the schedule thereto (being the document referred to in the summons) on behalf of the infant respondents and unborn persons and persons entitled under protective trusts as indicated in the summons and also contained the words "And doth authorise and direct the trustees of the "said will to carry the said arrangement into effect." It was pointed out to the court that no instrument had been executed by any of the adult parties and it was not intended that this should be done. At this point some discussion arose.

Geoffrey Cross Q.C. and *D. H. McMullen* for Lord Hambleden. The question has been raised whether, when the court makes an order under the Variation of Trusts Act, 1958, the trusts are ipso facto varied or some document is necessary. Apart from the Act, the court would have no power to vary the trusts in a case such as this, where no question of any compromise arises. Although the Act is not perhaps very happily worded, its scheme seems to be that all the beneficiaries in existence must be before the court. All persons of full age consent to the proposed variation in the trusts, which the court then approves, if it sees its way to doing so, on behalf of the infants and unborn persons beneficially interested, thereby ipso facto varying the trusts. Having regard, however, to the decision of Vaisey J. in *In re Joseph's Will Trusts* [1] the words "and doth authorise and direct the trustees of the said will to "carry the said arrangement into effect" have been inserted in the draft minutes of order.

[1] [1959] 1 W.L.R. 1019; [1959] 3 All E.R. 474.

[WYNN-PARRY J. I do not agree with that decision. I take the view that I have no jurisdiction to make an order including words directing the trustees to carry the arrangement into effect, and those words should be deleted from the draft minutes.

Nothing is required except the approval of the court to the arrangement. If that approval is given the trusts are ipso facto altered, and the trustees are bound thereafter to give effect to the arrangement. I would, however, like to hear counsel for the infants.]

W. T. Elverston for the infant children of Lord Hambleden. It is apprehended that those who have raised this point have in mind the decision of the House of Lords in *Grey* v. *Inland Revenue Commissioners* [2] where it was held that a verbal direction to trustees to hold property upon certain trusts was not enforceable, since section 53 (1) (*c*) of the Law of Property Act, 1925, requires a disposition of an equitable interest to be in writing. It is, of course, essential from the point of view of the infants in the present case that there should be a valid determination of Lord Hambleden's protected life interest in the annuity fund and the children's fund. It is agreed that nothing further is needed than that the court should approve the arrangement, thereby ipso facto varying the trusts, but perhaps it might be so stated.

[WYNN-PARRY J. I will so state, subject to anything counsel for other parties may say. If I approve an arrangement, I alter the trusts. Res ipsa loquitur.]

The only enforceable trust will then be the trusts of the will as varied. If, after the order of the court, anybody should at any time apply to the court for an order for the execution of the trusts, it is submitted that the trusts ordered to be executed would be the trusts as varied by the arrangement and not the original trusts.

[WYNN-PARRY J. Yes. The trusts will take effect according to the arrangement.]

F. E. Skone-James for the trustees of the will other than the applicant and Lady Hambleden. The court is not asked to decide the matter otherwise than in accordance with the view just expressed, but, having regard to *Grey* v. *Inland Revenue Commissioners* [2] it seemed to those who took this point that the effect of section 53 (1) (*c*) of the Law of Property Act, 1925, might be that an agreement was required, which the adult parties would execute, and the court would be asked to approve on behalf of infants and unborn persons to give effect to the proposed variation of the trusts.

[WYNN-PARRY J. I do not think that that Act has any application to this case. If I approve an arrangement, I vary the trusts.]

[2] [1959] 3 W.L.R. 759; [1959] 3 All E.R. 603.

1959

HAMBLEDEN'S WILL TRUSTS, *In re.*

E. G. Wright for other adult persons interested in the trusts of the shares. This point was taken for the reasons just indicated, but if the court has formed the view that no document is necessary, and will so state, that will dispose of any doubts.

D. H. Mervyn Davies for Lady Hambleden.

V. G. H. Hallett for infants other than the children of Lord Hambleden interested under the trusts.

WYNN-PARRY J. Very well. I hold that the effect of my approval is effective for all purposes to vary the trusts. Thereafter, the trusts are the trusts as varied.

I approve the minutes of order, with the slight alterations which have been referred to, and the arrangement in the schedule.

Order accordingly.

Solicitors: *Bircham & Co.*

P. P.

[PRIVY COUNCIL.]

J. C.†

1960 *Jan.* 19.

* EDWARD RAMIA LTD. . . . . APPELLANT;

AND

AFRICAN WOODS LTD. . . . . RESPONDENT.

ON APPEAL FROM THE WEST AFRICAN COURT OF APPEAL.

West Africa—Gold Coast—Concession, application for—Timber lands—Failure to comply with imperative statutory requirements for protection of grantor—Concession invalid—Laws of the Gold Coast (1951 *Ed., c.* 136), *ss.* 12 (2) (3) (4), 13 (11).

Statute — Construction — Directory or obligatory — Privilege or power conferred—Regulative provisions or acquisition or exercise—Timber concession.

Section 12 of the Concessions Ordinance of the Gold Coast provides that any person desiring to obtain a concession in respect of an area of land in Ashanti shall make application to the chief or chiefs concerned, and "(2) . . . shall give notice in writing to "the Chief Commissioner of Ashanti of such application" who "(3) . . . shall instruct the chief or chiefs concerned to appear "before him . . . and . . . shall ascertain from them, in the "presence of the applicant or his agent, whether they are willing "to grant the concession . . . and shall make such other inquiries "touching the grant of the concession as he shall consider necessary . . . (4) The terms of the agreement reached between the "applicant and the chief or chiefs . . . shall be embodied by "the applicant in a concession which shall contain full particulars "of the boundaries and which shall be executed by the interested "parties in the presence of the Chief Commissioner . . ."

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† *Present*: LORD TUCKER, LORD DENNING, the RT. HON. L. M. D. DE SILVA.

Section 13 provides that "No concession shall be certified as "valid . . . (11) unless . . . the concession has been obtained in "accordance with the provisions of section 12":—

Held, that sections 12 and 13 (11) were clearly imperative and their provisions were to be strictly observed; they were designed to protect the grantor in the public interest and no waiver was possible of any of the conditions of section 12.

Where, therefore, the appellant company, which had applied for and been granted a concession by the Stool of Bekwai relating to timber rights in land in Ashanti, had admittedly failed to comply with the provisions of subsections (2), (3) and (4) of section 12 of the Concessions Ordinance, the concession was invalid.

Principles stated by Denman J. in *Caldow* v. *Pixell* (1877) 36 L.T. 469 at 470 applied.

Judgment of the West African Court of Appeal affirmed.

APPEAL (No. 33 of 1958) from a judgment and order of the West African Court of Appeal (March 19, 1956) setting aside a judgment and order of the Supreme Court of the Gold Coast, Concessions Division Land Court, Kumasi, Ashanti (January 13, 1955) whereby the Land Court dismissed the opposition in Concession Inquiry No. 447.

The following facts and statutory provisions are taken from the judgment of the Judicial Committee: This appeal concerned two Concession Inquiries numbered 447 and 450 in the Concessions Division Land Court, Kumasi, Ashanti. In Concession Inquiry No. 447 the present appellant, Edward Ramia Ltd., was the claimant, and in Concession Inquiry No. 450 the present respondent, African Woods Ltd., was claimant. On January 13, 1955, the Land Court dismissed the opposition of African Woods Ltd. as opposer in Inquiry No. 447 to the grant of a certificate of validity to Edward Ramia Ltd. in respect of a concession, notice of which was filed on July 20, 1953. The claim of African Woods Ltd. to a concession in Inquiry No. 450 in respect of land, part of which was the same as that claimed by Edward Ramia Ltd. in Inquiry No. 447, was not dealt with by the court having regard to the view it took adverse to African Woods Ltd. as to the rights of the parties under their competing concessions.

The parties will be referred to hereafter as "Ramia" and "African Woods."

The claimant Ramia in Inquiry No. 447 on July 20, 1953, filed notice of a concession dated May 26, 1953, granted to it by the Stool of Bekwai. On March 30, 1954, Ramia filed a supplementary document dated February 26, 1954, between the same parties in support of the said concession. By notice dated November 20, 1953, African Woods gave notice of a concession dated October 3, 1953, granted to it by the same Stool of Bekwai covering a large part of the land comprised in the concession claimed by Ramia. By notice filed on June 4, 1954, African Woods entered opposition to the grant of a certificate of validity to Ramia in respect of the concession the subject-matter of Inquiry No. 447 in so far as it purported to coincide with the grant

J. C.
1960
EDWARD RAMIA LTD.
v.
AFRICAN WOODS LTD.

claimed by it by virtue of the concession the subject-matter of Inquiry No. 450. The principal ground of opposition was that the provisions of section 11 (now section 12) of the Concessions Ordinance (c. 136) had not been complied with.

The material sections of the Ordinance were: " 2. In this Ordinance—' Concession ' means any instrument whereby any right, title or interest in or to land, or in or to minerals, timber, rubber, or other products of the soil in or growing on any land or the option of acquiring any such right, title or interest purports to be granted or demised by a native . . .

" 3.—(1) Any agreement whereby any right, interest, or property in, to or over land, in or to minerals, metals, precious stones, timber, rubber or other products of the soil in or growing on any land, or the option of acquiring any such right, interest or property, purports to be granted by a native to a person who is not a native, shall be void unless it is in writing.

" 4.—(1) Every concession shall be held to be under and subject to the operation of this Ordinance.

" 6. The court shall have power, jurisdiction and authority to inquire into and certify as valid or invalid any concession, except so far as otherwise provided in this Ordinance, and shall exercise such power, jurisdiction and authority subject to and in accordance with the provisions of this Ordinance . . .

" 8.—(1) Notice of very concession shall within two months of the date thereof be filed in the court having jurisdiction to inquire into the concession by the person claiming to be entitled to the benefit thereof (hereinafter called the ' claimant ').

" 8.—(3) The notice shall be in Form A of the Schedule and shall contain the particulars specified in the said form and together with the said notice there shall be delivered a plan of the land comprised in such concession which shall be prepared in accordance with any regulations from time to time made under section 5.

"8.—(4) The claimant shall also file within the said period of two months such other documents (including a copy of the concession) or duly certified copies thereof as he relies upon in respect of his right to the concession and together with any such documents there shall be filed a list of such documents in such form as may be provided by rule: Provided that the filing of any such copies shall not be deemed to render unnecessary the due production at the inquiry into any concession or at the trial of any questions relating thereto of the original document so relied upon.

" 8.—(5) Every concession, in respect of which compliance has not been made with the provisions of this section, shall on the expiration of two months after the date of the concession, become null and void and all rights of the claimant with respect to the concession shall thereupon determine absolutely: Provided that the court may in its discretion for good cause shown, and upon such terms as to it seem fit, extend the said period

" of two months for one or more terms not exceeding in all four " months.

" 12.—(1) Any person desiring to obtain a concession in respect " of an area of land of which either the whole or the greater part " is situate in Ashanti shall make application to the chief or chiefs " concerned for the grant of such concession and the chief or " chiefs concerned may grant such concession.

" (2) Any person who has made application as aforesaid " (hereinafter called the ' applicant ') shall give notice in writing " to the Chief Regional Officer of Ashanti of such application.

" (3) Upon receipt of any such notice the Chief Regional " Officer of Ashanti shall instruct the chief or chiefs concerned to " appear before him or before a Government Agent, and the Chief " Regional Officer or Government Agent shall ascertain from " them, in the presence of the applicant or his agent, whether " they are willing to grant the concession applied for, and shall " make such other inquiries touching the grant of the concession " as he shall consider necessary, and shall arrange with the " applicant or his agent in the presence of the chief or chiefs " concerned the sum which should be paid annually in considera- " tion of the concession.

" (4) The terms of the agreement reached between the appli- " cant and the chief or chiefs concerned after the aforesaid " appearance before the Chief Regional Officer or Government " Agent shall be embodied by the applicant in a concession which " shall contain full particulars of the boundaries and which shall " be executed by the interested parties in the presence of the " Chief Regional Officer or a Government Agent, and the Chief " Regional Officer or the Government Agent before whom any " such interested party executes such concession shall certify to " the due execution of such concession by such party.

" 13. No concession shall be certified as valid . . . (11) Unless, " in the case of a concession granted in respect of an area of land " of which either the whole or the greater part is situate in " Ashanti, the concession has been obtained in accordance with " the provisions of section 12.

" 32.—(1) A certificate of validity shall be good and valid from " the date of such certificate as against any person claiming " adversely thereto, and shall be effective in respect of the whole " area of land contained by the boundaries stated in such certi- " ficates, whether or not any discrepancy exists between such " area and the area indicated by the notice and plan of the " concession referred to respectively in subsections (1) and (3) of " section 8.

" (2) A certificate of validity . . . shall be conclusive evidence " that all the requirements of the Ordinance . . . and all matters " precedent and incidental thereto have been complied with . . ."

The concessions in question related to timber rights in land in Ashanti. Section 12 of the Ordinance laid down the procedure to be adopted in such cases. It was common ground that Ramia

J. C.
1960

EDWARD RAMIA LTD.
v.
AFRICAN WOODS LTD.

failed to comply with the provisions of subsections (2), (3) and (4) of this section in respect of the concession dated May 26, 1953.

The supplementary document dated February 26, 1954, was executed before the Government Agent, but subsections (2) and (3) of section 12 had not been complied with, nor was there compliance with section 8 (4). Furthermore, the document, although expressed to be supplementary to the lease of May 26, 1953, contained a demise from its date, viz., February 26, 1954, and related to an area of land of 64 square miles whereas the lease of May 26, 1953, related to 82 square miles.

The trial judge (Quashie-Idun J.) held that the intention of the legislature was purely to protect the grantors of concessions in Ashanti from exploitation, and that, where the grantors raised no objection to the terms contained in a lease, as in the present case, it would be inequitable to hold that such lease was null and void. He considered that the court had a discretion in the matter and dismissed African Woods' opposition to the validity of Ramia's concession. He made no finding with regard to Inquiry No. 450.

On appeal, the West African Court of Appeal (Coussey P., Korsan J.A. and Baker Ag.J.A.) allowed African Woods' appeal and declared Ramia's concession invalid. They remitted the case of Inquiry No. 450 to the Supreme Court of the Gold Coast for adjudication, and on May 19, 1956, Benson J. declared African Woods' concession invalid on the ground that in granting it the Bekwai chiefs had not understood the nature and terms of the grant, and were under the impression that the land already leased to Ramia did not include the land leased to African Woods.

This judgment was not appealed, and the hearing before their Lordships was confined to Inquiry No. 447.

1959. Dec. 10. *Anthony Cripps Q.C.* and *Mark Smith* for the appellant.

Dingle Foot Q.C. and *T. O. Kellock* for the respondent.

The following cases, in addition to the case referred to in the judgment, were cited in argument: *Wassaw Exploring Syndicate Ltd.* v. *African Rubber Co. Ltd.*[1]; *In re Concession Inquiry No. 939 (Accra). Came, Ofori Atta, African Selection Trust Ltd.*[2]

1960. Jan. 19. The judgment of their Lordships was delivered by LORD TUCKER, who stated the facts as set out above and continued: It will be convenient first to dispose of the supplementary grant of February 26, 1954. As already stated, this lease related to a smaller area of land than that comprised in the original grant, and the requirements of subsections (2) and (3) of section 12 and of section 8 (4) were not complied with. It is therefore clear that if the original grant was invalid for non-compliance with section 12 the supplementary grant will not avail Ramia, whose case must stand or fall on the validity of the original concession.

[1] [1914] A.C. 626. [2] (1933) 9 W.A.C.A. 305, 317.

As to this, the President of the West African Court of Appeal (the late Sir Henley Coussey) in his judgment allowing the appeal of African Woods, after quoting from the judgment of Denman J. in *Caldow* v. *Pixell* [1] said: "Applying these principles, the words "of sections 12 and 13 (11) are, to my mind, clearly imperative. "The respondent could only take a concession under the Ordin- "ance and in compliance with section 12. It is true that there "are no negative words in the sections referred to, but the "affirmative words are absolute, explicit and peremptory, and "when you find in an Ordinance only one particular mode of "effecting the object, one train of formalities to be observed, the "regulative provisions which the section prescribes are essential "and imperative. To render the purpose of section 12 unmis- "takable, subsection (4) provides that the terms of the agreement "can only be embodied in a concession after they have been "agreed upon before the official named. The policy of the law "clearly insists upon strict observance of the steps already alluded "to before there can be a concession. Sections 12 and 13 (11) "are so clearly designed to protect the grantor in the public "interest that in my opinion the learned judge erred in holding "that a waiver is possible of any of the conditions of section 12 "and that the grantors had waived them. To accede to this "proposition would be to entirely ignore the intention of the "legislature for the public good and to defeat one of the main "purposes of the Concessions Ordinance."

With these words their Lordships are in complete agreement and do not desire to add anything thereto.

Later in his judgment the President, referring to the lease of May 26, 1953, used these words: "That deed may be good as a "demise of land and the covenants therein no doubt are binding "on the parties, but it never came into existence as a concession "owing to non-observance by the parties of the imperative "provisions of section 12." Relying on these words counsel for Ramia invited their Lordships, if against him on the main issue, to vary the order of the West African Court of Appeal by making no order instead of declaring the concession invalid.

Their Lordships express no view with regard to the first sentence in the above quoted passage, which may raise issues which are not germane to the present proceedings and were not canvassed in the courts below. They find no ground for varying the judgment pronounced by the West African Court of Appeal and will, for the reasons indicated above, humbly advise Her Majesty that the appeal be dismissed. The appellant must pay the costs of the appeal.

Solicitors: *Knapp-Fishers & Blake and Redden; Birkbeck, Julius, Coburn & Broad.*

C. C.

[1] (1877) 36 L.T. 469, 470.

[COURT OF PROTECTION.]

1960
Jan. 18.

Danckwerts J.

* *In re* C., 1958, No. 1950.

Mental Deficiency—Discretion of court—Settlement of patient's property—Possibility that patient might squander property on recovery—Mental Health Act, 1959 (7 & 8 *Eliz.* 2, *c.* 72), *s.* 103—*Law of Property Act,* 1925 (15 & 16 *Geo.* 5, *c.* 20), s. 171 (1) (5).

A patient was subject to the control of a receiver of income from March, 1953, until November, 1955, during which time he became entitled to considerable funds under a will. On the receiver's discharge the patient dealt very extravagantly with his money. In October, 1958, it again became necessary to appoint a receiver. The prospect of the patient's recovery was small and there was a possibility that if he recovered he might again deal recklessly with his money. On a summons for an order under section 171 of the Law of Property Act, 1925,[1] authorising the receiver to execute on behalf of the patient a settlement whereby substantially the whole of his property should be held by the Public Trustee as sole trustee on trust as the patient with the consent of the trustee should appoint, and subject thereto, while the patient was subject to a disability, to hold the capital and income for his benefit as the master of the Court of Protection should direct, with power, while he was not subject to a disability, to advance of capital with his consent, the patient to have a protected life interest and a general power of appointment by will:—

Held, that the court had a general discretion under section 171; and that, although it was the general practice that a patient discharged from the control of a receiver should be given control of his property free from any restriction, in the circumstances it was proper and desirable and in the patient's own interests that if he should come out into the world again he should be prevented from squandering his property but that it might be preserved for his maintenance, and the court, in the exercise of that discretion, would authorise the execution of the settlement.

[1] Law of Property Act, 1925, s. 171: "(1) The court may direct a "settlement to be made of the property of a lunatic or defective, or "any part thereof or any interest "therein, on such trusts and subject "to such powers and provisions as "the court may deem expedient, and "in particular may give such directions— . . . (*b*) where the property "has been acquired under a settlement, a will or an intestacy or "represents property so acquired . . .

"(3) This section applies whether "or not the lunatic or defective has "executed a testamentary disposition "and notwithstanding that it is not "known whether he has executed "such a disposition or not, but does "not apply when he is an infant. . . .

"(5) Subject to making due provision for the maintenance of the "lunatic or defective in accordance "with his station in life, whether out "of the capital or income of the "property settled or other property "or partly in one way and partly in "another, and to providing, by means "of a power of appointment or "revocation, or otherwise, for the "possibility of the lunatic or defective "recovering full capacity, the court "may, in making any order under "this section, have regard to" certain matters.

"(7) At any time before the death "of the lunatic or defective, the "court may, as respects any property "remaining subject to the trusts of a "settlement made under this section, "on being satisfied that any material "fact was not disclosed to the court "when the settlement was made, or "on account of any substantial change "in circumstances, by order vary the "settlement in such manner as it "thinks fit, and give any consequential directions."

In re C. W. M., 1941 *No.* 2396 [1951] 2 K.B. 714; [1951] 2 All E.R. 707 considered.

Application by summons to the judge for an order under section 171 of the Law of Property Act, 1925, directing a settlement of the patient's property.

The following statement of the facts is taken substantially from the judgment: The patient, a man of 43 years of age, was the subject of an order under section 116 of the Lunacy Act, 1890, from March 27, 1953, until November 22, 1955, during which time his mother had been the receiver of his income. At that time he became entitled to considerable funds under a will, a substantial part of the funds being acquired as a result of the settlement of proceedings arising on the construction of the will in the Court of Appeal, and in May, 1955, his mother applied for an order authorising her to execute a settlement of the funds. These proceedings had to be abandoned since the patient was released from a mental hospital as relieved in September, 1955, when he procured his mother's discharge. He thus became able to deal freely with his property and he spent more than £14,000, purchasing among other things five motor-cars and a caravan. The cars were kept in the street in central London and the patient had several summonses for motoring offences but there was third party insurance cover. His Lordship found that when the patient was free to deal with his property he was irresponsible; further, that he was liable to be violent.

In October, 1958, it again became necessary for the patient to have a receiver and his solicitor was appointed. The receiver sold the cars and the caravan for the total sum of £823. The evidence showed that the prospect of the patient's recovery was small and that, if he did recover it seemed, having regard to his previous record, that he might again deal recklessly with his property.

By this summons the receiver and the mother and brother of the patient applied for an order under section 171 of the Law of Property Act, 1925, authorising the receiver to execute in the name and on behalf of the patient a settlement of substantially the whole of his property, and yielding a net income of about £637. By the settlement, the patient as settlor, acting by the receiver, transferred the investments to the Public Trustee as sole trustee to hold the trust fund upon trust as the patient, with the consent of the trustee, should appoint, subject thereto, while the patient was subject to the jurisdiction of the master of the Court of Protection to hold the capital and income available for the patient's benefit as the master should direct and with power, while he was not under such disability, to advance capital to him with his consent; subject thereto the patient to have a protected life interest and a general power of appointment by will.

W. S. Wigglesworth for the applicants.

J. A. Wolfe for the Official Solicitor.

1960

C., 1958, No. 1950, *In re.*

The case cited in argument is referred to in the judgment.

DANCKWERTS J. This is an application by the receiver of income of a patient who is in a mental hospital for a settlement to be approved under section 171 of the Law of Property Act, 1925. In passing, it may be noted that this section is repealed by the Mental Health Act, 1959, which has not yet come into force; but section 103 of that Act contains provisions which are extremely similar to those of section 171 of the Law of Property Act, 1925.

It should first be stated that the general principle followed by the court as a matter of practice hitherto has been that, when a patient is discharged from the control of the receiver of his income, he is usually given his property free from any restriction, so that he is able to deal with it completely as he wishes. But the facts of this case are very unusual. [His Lordship stated the facts and continued:] It is to be noted that the fund produces a fair income which is sufficient for the patient's maintenance at the present time, but if the capital were to be squandered again the situation might become extremely unfortunate. Consequently, on the grounds of common sense and prudence, it seems proper to prevent the patient from having the opportunity to deal with his property in a reckless manner if he should recover.

The powers under which I am asked to act are contained in section 171 of the Law of Property Act, 1925. [His Lordship read section 171 (1) (*b*), (3), (5) and (7), and continued:] The power contained in subsection (1) is perfectly general and the directions therein seem to be intended only to deal with particular cases and do not restrict the generality of the court's powers. The property which the patient has was acquired under a will, the larger part as a result of a settlement in the Court of Appeal of disputed questions arising on the construction of the will. So that section 1 (1) (*b*) would seem to cover the present case. Another subsection to which I have been referred is subsection (3), which I do not think has much effect in the present case. A suggestion was also made that the Variation of Trusts Act, 1958, might be relevant because now the proposed settlement could be approved under it, but I do not think that that is of much assistance to me in the present case. The patient has now made a will and whether it will be effective when he dies depends upon whether it is opposed and whether he was capable of making a will at the relevant time.

Subsection (5) requires provision to be made by way of a power of appointment or revocation for the possibility of recovery of full capacity and under subsection (7) a patient who has fully recovered may secure full dominion over property which his trustee has not handed over as he should, by an application to the court for variation. The main provisions of that subsection are preserved by section 103 of the Mental Health Act, 1959.

In the present case there is no power of revocation in the

settlement but there is a general power of appointment which would enable the property to be appointed to the patient himself if the power were exercised with the consent of the trustee of the proposed settlement. It was held by the Lords Justices sitting as judges in lunacy in *In re C. W. M.*, 1941 *No.* 2396,[1] that the court in its discretion is not bound to insist upon a power of revocation. It would appear, therefore, that the insertion of a power of revocation is by no means essential. Reliance has also been placed on the practice as set out in Heywood & Massey, 7th ed. (1954), at p. 45, relating to the provisions in the case of a lunatic so found. Powers which were derived from section 105 of the Lunacy Act, 1890, in the case set out in that book, allowed the court to direct a conditional supersedeas in the case of the recovery of a lunatic so found so that there might be restraint exercised on his property if the court should think that advisable. An order was made for supersedeas under section 105 "on the "recovered patient undertaking by his solicitor to execute a "settlement in the form of a draft initialled by the judge." Then the authors continue: "such a settlement should be "framed so as to prevent the recovered patient from obtaining "control of the settled fund for his own benefit as the sole object "of the trust; the power of appointment of new trustees should "be vested in him alone, and any power of revocation should be "vested in him (and some reliable person) so that if incapacity "recurs recourse must be had to the court for the exercise of "those powers." That jurisdiction does not apply in the present case, but in exercising the jurisdiction conferred upon the court by section 171 of the Law of Property Act, 1925, the court is entitled, I think, to have regard to the spirit of the exercise of the jurisdiction in cases which come within section 105 of the Lunacy Act, 1890. There is a close analogy between the two cases, that is to say, a case under section 105 and the jurisdiction which I have to consider now.

It seems to me, therefore, that I have a general discretion under section 171 of the Law of Property Act, 1925, and the question remains whether I should exercise that discretion in the manner which is suggested by the present application. I have come to the conclusion that in the interests of the patient himself it is quite plain that an order should be made by which the settlement in the terms suggested should be executed. It appears he may recover physically, but his powers of concentration and appreciation apparently are likely to be impaired. This is a case where it is proper and desirable that the court should restrain the patient if he comes out into the world again so that he is not able to squander his property to his own detriment. This settlement is for the purpose of preserving his property so that it shall be available for his maintenance, and to secure him against want and misfortune in his financial circumstances: consequently, I am

[1] [1951] 2 K.B. 714; [1951] 2 All E.R. 707.

1960

C., 1958, No. 1950, *In re.*

prepared to exercise my jurisdiction under the section by authorising the settlement on the terms of the draft which has been put before me.

Order accordingly.

Solicitors: *Longhurst & Butler; Official Solicitor.*

M. G. T.

[MANCHESTER ASSIZES.]

1959 *July* 22.

Ashworth J.

* RUSHTON *v.* TURNER BROTHERS ASBESTOS CO. LTD.

[1958 R. No. 38.]

Factory—Dangerous machinery (fencing)—Duty to guard against acts reasonably forseable—Hand deliberately placed in position of danger—Effective cause of accident—Factories Act, 1937 (1 *Edw.* 8 *&* 1 *Geo.* 6, *c.* 67), *s.* 14 (1).

Causation—Breach of statutory duty—Contributory negligence—Dangerous machinery—Deliberate act of folly by plaintiff—Personal injury.

The plaintiff suffered an injury to his hand whilst operating a crushing machine in the course of his employment in the defendants' factory. The relevant part of the machine was a pan round which rotated two stones for the purpose of crushing asbestos fibre placed therein through a chute. At the end of the process the product was collected from an outlet chute which was opened by operating a trap-door which slid on two side grooves. The grooves, which were normally separated from the pan by a protective layer of metal, required cleaning from time to time during each shift, and a knife was provided for the purpose. The plaintiff had been operating this machine for some eight months at the time of the accident, having received full instructions, in particular a clear instruction that he was on no account to clean the grooves when the machine was in motion. During the day of the accident, when the plaintiff was working the machine, part of the top of a groove broke away, leaving the upper barrier to that extent incomplete. The plaintiff reported this to the foreman, who decided that the repair should be carried out the next day, and that the machine was safe to run for the rest of that shift. The plaintiff then resumed work, being fully aware of the condition of the groove. When the time came to clean the grooves, he attempted to clean them with his fingers without stopping the machine, and his fingers were crushed by the rotating stones:—

Held, that the defendants were in breach of section 14 (1) of the Factories Act, 1937, but that since the plaintiff's deliberate act of folly was the operative and effective cause of his injury, the defendants were not liable therefor.

Williams v. *Sykes & Harrison* [1955] 1 W.L.R. 1180; [1955] 3 All E.R. 225; and *Admiralty Commissioners* v. *S.S. Volute* [1922] 1 A.C. 129; 38 T.L.R. 225 applied.

[Reported by DONALD HART, Esq., Barrister-at-Law.]

ACTION.

The plaintiff, William Davies Rushton, was employed by the defendants as a fibre packer in their factory at Rochdale. He had originally been employed as a trucker, but some eight months prior to September 9, 1958, when he suffered the injury with which this claim is concerned, he had been transferred at his own request to the more highly paid task of operating a crushing machine, and had been fully instructed in this task. The relevant part of the machine consisted of a pan, round the edge of which two stones rotated for the purpose of crushing asbestos fibre. It was part of the plaintiff's duties to fetch a sack of this fibre, empty it into a chute in the machine, and collect the resulting product from the outlet chute when the process was completed some eight minutes later. In order to permit the crushed fibre to leave the pan there was a trapdoor or slide, which was operated by turning a handle. This door slid in two grooves, one on each side, which were 13/16th inch by $\frac{3}{4}$ inch, and separated from the pan at the top by a protective layer of metal 13/16th inch thick. Parts of the fibre discharged into the chute tended to collect in the two grooves and to harden thereon, making it difficult to close the trap-door effectively. It was therefore the operator's task to clean these grooves from time to time during the shift. This was normally done by stopping the machine and cleaning the grooves with the knife provided for the purpose.

At some time during September 9, 1958, while the plaintiff was operating the machine, the top part of one of the grooves became broken off, leaving a gap in the top protective barrier. The plaintiff reported this to his superiors, and it was decided, in his presence, that the machine was safe to run for the rest of the shift. The plaintiff then resumed work, with full knowledge of the state of the groove. When the time for cleaning the grooves arrived the plaintiff attempted to do so with his fingers and without stopping the machine. The tips of the fingers of his left hand came into contact with the stones and were crushed.

The plaintiff alleged that the defendants were in breach of section 14 (1) of the Factories Act, 1937,[1] in that the discharge hole, stones, sliding door and grooves of the machine were not securely fenced; and were negligent in allowing him to work the machine with the piece of metal missing, in failing to give him sufficient warning of danger, and in causing or allowing him to clean the machine while it was in motion. The defendants denied these allegations and alleged contributory negligence on the part of the plaintiff in attempting to clear asbestos from the grooves when the machine was in motion, in failing to immobilise the machine before so doing, contrary to express instructions, and in

[1] Factories Act, 1937, s. 14 (1): "Every dangerous part of any "machinery, other than prime movers "and transmission machinery, shall "be securely fenced unless it is in "such a position or of such construc-"tion as to be as safe to every per-"son employed or working on the "premises as it would be if securely "fenced."

1959

RUSHTON v. TURNER BROTHERS ASBESTOS CO. LTD.

increasing the risk to himself by attempting to clear out the grooves with his hand instead of using the knife provided for the purpose.

C. T. B. Leigh for the plaintiff.
Fenton Atkinson Q.C. and *J. M. Collins* for the defendants.

The cases cited in argument on the question of contributory negligence are referred to in the judgment.

ASHWORTH J. described the machine and the injuries to the plaintiff and continued: As the fibre was discharged from out of the trap-door into the chute parts of it tended to collect in the two grooves on either side of the trap-door. As the process went on the material which collected in the grooves tended to harden or become impacted on the sides of the grooves. If sufficient material had collected it was clearly difficult to close the trap-door effectively, and therefore it was necessary from time to time during a shift to clean the grooves. That was the operator's task, and bearing in mind that the stones were rotating round the pan, and that in between the stones there were scrapers cleaning the surface of the pan, I should have thought it was elementary to say that for a man to place his hand into the trapdoor while the machine was in motion was about as foolish a piece of negligence as anyone could conceive.

The defendants were fully alive to the importance of safety precautions amongst their operatives, and among the documents produced was a small card entitled: "Safety in the Factory," at the bottom of which there was a place for a signature, and the plaintiff acknowledged that he had received such a document. It states that it is a breach to attempt to touch any part of the machine when it is in motion, "except those parts that form part "of your normal job and which you have been instructed to do by "the foreman, charge-hand or duly appointed teacher-operative."

The plaintiff was put on this machine at his own request, and the defendants were fortunately able to call before me two witnesses who were responsible for his instruction. I have seldom met witnesses who gave more clearly an impression of reliability and truthfulness. One of them, Mr. Southworth, is a safety man himself, and he said that he put the other, Mr. Butler, in charge of the plaintiff and told him to instruct him about the machine. He said: "After Butler said that Rushton "was sufficiently trained, I examined him for a good hour, and "then unbeknown to him I watched him for three days because "it was my job to be in that particular department and I saw "that he was doing the work properly." I accept that evidence fully, and I am satisfied that in the course of the instructions it was made abundantly plain to the plaintiff that on no account should he attempt to clean the grooves while the machine was in motion. It was obviously necessary while he was being trained

for him to operate the machine, and in the course of the day to clean the grooves, and it was for that reason that I asked Mr. Southworth if he had seen him do it. He said that he had, and that the plaintiff cleaned it with the machine stopped, and used for the purpose a knife which was provided by the defendants. The reason why the knife was provided was because the impacted material tended to stick in the grooves and some form of sharp instrument was needed to flick it out of the corners of the grooves—the bare fingers would not be suitable or efficient for that purpose.

Before this accident, probably for eight months, the plaintiff had been allowed to operate the machine, fully instructed as to the proper way of doing so, and with clear instructions that on no account had he to clean the grooves when the machine was in motion. The method of cleaning could be one of two. It was possible to lift the cover of the pan and approach the grooves from above. If that course were taken the machine was stopped, for the rotation of the stones would be stopped automatically. The other method of approach to the grooves was from underneath. It was possible to open the trap-door and then insert the hand into the opening, and I was told by more than one witness that that was the normal method of cleaning the grooves adopted by those operating the machine. But the witnesses for the defendants who gave those answers were careful to add that in all circumstances the machine was stopped before any attempt was made to clean the grooves. None of them had ever seen a man indulge in the appallingly dangerous manoeuvre of attempting to clean the grooves while the machine was in motion; and, indeed, Mr. Southworth's view of it was that if he saw a man doing so he would tell him off in round terms, and if he saw him do it a second time he would be finished. I believe that, too.

I am quite satisfied on all the evidence that the idea of cleaning the grooves when the machine was in motion was something which the defendants, from the common-sense angle, had barely any reason to contemplate as being likely to occur; but one must remember that it is not only the sensible workman but the fool who is within the scope of the Factory Acts' protection.

I take the view that because the defendants knew that the normal method of cleaning the groves was from below by opening the trap-door and inserting the knife, they should have contemplated as a matter of law that one day one man would be foolish enough to do that without stopping the machine, and it is against that sort of risk, as I find, that the Factories Act was passed. I confess that I should have been very willing, if the decided cases allowed it, to hold the defendants free of any breach of the Factories Act at all. It seems to me that this case only just falls over the line into the realm of a risk through lack of fencing which the ordinary employer ought to contemplate and guard against, but I do so find that this particular part was dangerous, and it was not fenced at all. Fencing clearly could have been

1959

RUSHTON v. TURNER BROTHERS ASBESTOS CO. LTD.

Ashworth J.

applied to the opening, because since the accident a form of wire guard or barrier has been installed. That is, I need hardly say, not conclusive, but counsel for the plaintiff quite properly relies on it as indicating that the provision of the guard was a relatively simple matter.

The strength of the defendants' case is the folly of the plaintiff. [His Lordship referred to the plaintiff's testimony, finding him not to be an impressive witness and at times untruthful, and continued:] What happened on September 9, was this: At some time during that day when the plaintiff was working the machine, some part of the top groove broke away, and at about four o'clock the plaintiff produced the piece of metal that had broken away and took it to Mr. Butler, asking: "Where has this come from?" It was then passed up the stages of rank in the factory, and not long afterwards there was, so to speak, a little conference round the machine. [His Lordship referred to the evidence, and continued:] As a result of this little conference it was decided that the repair should be carried out on the Wednesday, but that the machine was safe to run for the rest of that shift. Mr. Butler, as it were in response to the plaintiff's original question, "Where "did this come from?" showed the plaintiff where the piece of metal came from, namely, the top edge of the groove. The plaintiff, therefore, was fully aware when he started to work again at about 5.15 that evening that the top edge of the groove was in a condition where part of it had disappeared. The result of the disappearance was that this slight barrier, 13/16th inch in depth, was incomplete to the extent of the metal that had gone. There was, therefore, nothing to prevent the hand or finger coming into contact, if it were lifted past the level of the groove, with the stones. That is what happened. The time came to clean the grooves. The plaintiff put in his finger, cleaned the right-hand groove and managed to do it without injury; and then he did the same with the left and was crushed. He told me that he had done it many times before, and I understood him to say that he done it even hundreds of times. Once again, I do not believe him.

This was one of two machines in the room, which was compact—about eight men working in it—and with a man like Mr. Southworth about I am convinced that it would have been utterly impossible for the plaintiff to risk this highly dangerous method without coming under Mr. Southworth's notice and censure. He might well have done it once or twice when people were missing, but I do not think that he made a practice of it or lulled himself into the belief that that was the proper way of doing it at all. I need hardly say that when he put his finger in he had failed to stop the machine. There would have been no accident if he had stopped it. The method by which he could have stopped it was within one-pace distance of it. Indeed I doubt whether it was even necessary to step that one pace. If he had reached out his right hand he could have operated the lever with ease; but he

chose not to do so. In those circumstances he says that the defendants are liable to pay him compensation for an accident which was entirely his own folly.

I have been pressed, and rightly pressed, by counsel for the plaintiff, with the submission that this accident does not differ in kind from many other accidents reported in the books in which the defendant employers have been found guilty of a breach of the Factories Act, and none the less the plaintiff has succeeded in spite of considerable contributory negligence on his own part. It seems to me that in each case it is a question of degree. It is a question of degree, looking at the whole of the circumstances, fairly and broadly, to see whether a breach of the Factories Act is of itself an operative cause of the accident or is more truly in a sense the circumstances in which the accident happened. Singleton L.J., in *Williams* v. *Sykes and Harrison*,[1] quoted from a speech by Lord Birkenhead in *Admiralty Commissioners* v. *S.S. Volute*,[2] where he says: "... the question of contributory negligence must "be dealt with somewhat broadly and upon common-sense prin-"ciples as a jury would probably deal with it. And while no doubt, "where a clear line can be drawn, the subsequent negligence is "the only one to look to, there are cases in which the two acts "come so closely together, and the second act of negligence is so "much mixed up with the state of things brought about by "the first act, that the party secondly negligent ... might, on the "other hand, invoke the prior negligence as being part of the "cause of the collision so as to make it a case of contribution." That was a case decided in 1922, but the principle there laid down which was appropriate in those days in Admiralty cases, and is now appropriate in common law, was adopted by Singleton L.J. in the *Williams* case,[3] and I would respectfully endeavour to apply it here, as Lord Birkenhead said: "somewhat broadly "and upon common-sense principles."

It seems to me in this case that, first of all, the plaintiff was not injured by reason of some accidental omission on his part to take due care, nor was it a case of momentary inadvertence and failing to remember the safety rules. This was a case in which he must have known that the machine was in motion. He must have known that the limited safety permitted by the top of the groove had been greatly reduced by the breakage; and he must have known that he was placing his hand in a position of grave danger when he deliberately inserted it into the left-hand groove. I know that the word came from me, but it was accepted by the plaintiff and I repeat it: it was a crazy thing to do. He admits himself that he would not do it again. What reason he had for doing it then, unless it be that his intelligence is less than I estimate, I do not know. What I do find is that he did it quite

[1] [1955] 1 W.L.R. 1180, 1189.
[2] [1922] 1 A.C. 129, 144; 38 T.L.R. 225.
[3] [1955] 1 W.L.R. 1180.

1959

Rushton v. Turner Brothers Asbestos Co. Ltd.

Ashworth J.

deliberately, and that the cause, in the sense of the operative and effective cause of this accident, is wholly to be attributed to him.

I fully appreciate that the occasions on which a court is able to permit defendants to escape in a case of this sort must be rare. Generally, when they have been in breach of the Factories Act they must be expected to bear some portion of the responsibility and to pay some proportion of compensation. But this will not be the first case on record in which a court has come to the conclusion that the defendants can escape altogether because their breach of the statutory provisions was not in a true sense of the word an effective cause of this accident. The present Lord Chief Justice gave a decision to the same effect in *Johnson* v. *Tennant Bros. Ltd*,[4] which was upheld in the Court of Appeal; and there have been other cases in which the degree of responsibility of the plaintiff has been placed as high as 90 per cent. I think that the only proportion which it would be possible or fair to impose on the defendants would be absolutely minimal in this case, and I am not prepared to give the plaintiff something, for example, as little as 5 per cent. for damages which he could recover. I do not decide it on the ground that 5 per cent. is the same as nought because others might have a different view. I take the view that in this case, looked at fairly, the plaintiff is the sole author of his own misfortune.

Judgment for the defendants.

Solicitors: *J. Bright, Clegg & Son, Rochdale; James Chapman & Co., Manchester.*

[4] Unreported. Parker J., Leeds Assizes, July 9, 1954; affirmed C.A., Nov. 19, 1954.

[QUEEN'S BENCH DIVISION.]

1959 *Dec.* 11.

Lord Parker C.J., Hilbery and Pearson JJ.

* REGINA *v.* BENNETT. *Ex parte* RADBURN.

Justices—Election to go for trial—Indictable offence triable summarily—Consent to summary trial—Magistrate's right to allow accused to withdraw consent—Whether he had "begun to try" information—Prosecution witness heard—Magistrates' Courts Act, 1952 (15 *&* 16 *Geo.* 6 *&* 1 *Eliz.* 2, *c.* 55), *ss.* 19 (5), 24.

The applicant was charged with attempted suicide and, it appearing to the magistrate that the circumstances were such that the offence did not require trial on indictment, and the provisions of section 19 (3) and (4) of the Magistrates' Courts Act, 1952,[1] having

[1] Magistrates' Courts Act, 1952, s. 19: "(2) If at any time during the "inquiry into the offence it appears "to the court, having regard to any "representations made in the presence "of the accused by the prosecutor or "made by the accused, and to the "nature of the case, that the punish- "ment that the court has power to "inflict under this section would be "adequate and that the circumstances "do not make the offence one of

been complied with, she elected to be tried summarily and pleaded not guilty. Evidence of arrest was given by a police constable, after which the applicant was remanded for seven days for a medical report. At the adjourned hearing the applicant asked for leave to change her election so that she could go for trial. The magistrate, deciding that in the circumstances he had no power to allow the applicant to change her election, refused the request. On an application for mandamus and prohibition:—

Held, that a court of summary jurisdiction had "begun to try" an information within section 24 of the Magistrates' Courts Act, 1952, when it began to hear the evidence and the magistrate, having heard the evidence of the police constable, had begun to try the case summarily and therefore was precluded by section 24 from thereafter proceeding to inquire into the information as an examining justice.

Reg. v. *Craske, Ex parte Metropolitan Police Commissioner* [1957] 2 Q.B. 591; [1957] 3 W.L.R. 308; [1957] 2 All E.R. 772 considered.

APPLICATION for prohibition and mandamus.

The applicant, Eileen or Anna Radburn, having elected to be tried summarily before a metropolitan magistrate (Paul Bennett, Esq., V.C.), on a charge of attempted suicide, subsequently wished to change her election and to go for trial. The magistrate being of the opinion that he had begun to try the information summarily refused to allow the applicant to change her election. The applicant thereupon moved for orders prohibiting the magistrate from continuing the trial summarily and directing him to hold a preliminary inquiry. The facts are stated in the judgment.

Peter Sheridan for the applicant.
Paul Wrightson for the Commissioner of Police.

Cases cited in argument are referred to in the judgment.

LORD PARKER C.J. In this case Mr. Sheridan moves for an order of mandamus and prohibition directed to the stipendiary

"serious character and do not for "other reasons require trial on indictment, the court may proceed with a "view to summary trial. (3) For the "purpose of proceeding as aforesaid, "the court shall cause the charge to "be written down, if this has not "already been done, and read to the "accused and shall tell him that he "may, if he consents, be tried summarily instead of being tried by a "jury and, if the court thinks it desirable for his information, shall tell "him before what court he would be "tried if tried by a jury and explain "what is meant by being tried summarily. (4) Where the offence with "which the accused is charged is "triable by quarter sessions, the court "shall also explain to him that if he "consents to be tried summarily "and is convicted by the court "he may be committed to quarter "sessions under section 29 of this Act "if the court, on obtaining information of his character and antecedents, is of opinion that they are "such that greater punishment should "be inflicted than the court has power "to inflict. (5) After informing the "accused as provided by the last two "preceding subsections the court shall "ask him whether he wishes to be "tried by a jury or consents to be "tried summarily, and, if he consents, "shall proceed to the summary trial "of the information."

S. 24: "Except as provided in subsection (5) of section 18 of this Act, "a magistrates' court, having begun "to try an information for any indictable offence summarily, shall not "thereafter proceed to inquire into "the information as examining "justices."

1959

REGINA
v.
BENNETT.
Ex parte
RADBURN.

Lord Parker C.J.

magistrate sitting at the Marlborough Street Magistrates' Court. The application is made on behalf of one Eileen or Anna Radburn, and the short facts are these: On November 16, 1959, the applicant appeared before the magistrate charged with attempted suicide. It appeared to be a matter which the magistrate could properly deal with summarily, and, accordingly, the provisions of section 19 of the Magistrates' Courts Act, 1952, were invoked. I entirely accept the magistrate's affidavit that that section was fully complied with; in other words, the court ordered the charge to be written down and read to the accused, and she was told that she was at liberty to be tried summarily instead of being tried by a jury. She did elect to be tried summarily, and thereupon she was asked to plead, and she pleaded not guilty.

Thereafter, a woman police constable was called, who said: "At 11.45 today at St. George's Hospital I saw the defendant. "I told her I should take her to Gerald Road Police Station "where she would be charged with attempted suicide. When "charged and cautioned she said: 'It was not an attempt to "'commit suicide.'" Thereafter, she was remanded for seven days, and the magistrate directed that there should be a medical report.

On the adjourned hearing on November 23 she was represented by counsel, who asked the magistrate for leave to change her election so that she should go for trial. The magistrates decided that he had no power to allow her to change her election, and it is in those circumstances that this court was moved to prohibit him from continuing with the trial in a summary way.

The whole matter depends upon sections 19 and 24 of the Magistrates' Courts Act, 1952. By section 19 (5) it is provided: "After informing the accused as provided by the last two pre-"ceding subsections the court shall ask him whether he wishes "to be tried by a jury or consents to be tried summarily, and, "if he consents, shall proceed to the summary trial of the "information." Pausing there, there is nothing in the Act which deals in any way with the possibility of a change in the election but, by section 24 it is provided: "Except as provided in sub-"section (5) of section 18 of this Act"—which has no relevance in this case—"a magistrates' court, having begun to try an "information for any indictable offence summarily, shall not "thereafter proceed to inquire into the information as examining "justices." Accordingly, the short question here is whether on the facts this magistrate had begun to try an information summarily within the meaning of that section.

There have been two authorities at least on this matter. In *Reg.* v. *Craske, Ex parte Metropolitan Police Commissioner*[1] it was held by this court that a magistrate who has merely taken the plea has not begun to try an information summarily, and that he does not so begin until he begins to take evidence. Again, in

[1] [1957] 2 Q.B. 591; [1957] 3 W.L.R. 308; [1957] 2 All E.R. 772.

Reg. v. *Ibrahim*,[2] it was held by the Court of Criminal Appeal that a magistrate has not begun to try an information summarily within section 24 by hearing the opening by the prosecution. Again, it is said that he does not so begin until he begins to hear evidence.

In the present case a policewoman did give the evidence to which I have referred. Mr. Sheridan, however, says, if I understand him aright, that that evidence was merely formal evidence, the sort of evidence you would have given in connection with bail. He says that this was formal evidence in connection with remand and was not, as he puts it, evidence in the case. He seeks to support that by reference to *Reg.* v. *Craske*, where he maintains that a similar evidence of arrest and charge had been given albeit in the form of depositions. I am satisfied that no help can be obtained from *Craske's* case. It is true that there is a reference [3] to evidence being taken in deposition form of the arrest and charge of one Rees, but if one looks at the passage closely it is quite clear that that evidence in deposition form was referring to a period after the magistrate had decided in that case to allow the prisoner to change his election, and had begun to take evidence as an examining justice. Without deciding whether there can be what is called formal evidence as opposed to evidence in the case, I am clear, accepting the magistrate's affidavit as I do, that the evidence of this police officer was evidence in the case. In his affidavit the magistrate says: "The witness concerned was a "witness in the trial and fully gave her evidence, though I believe "the police officer in charge of the case had first intimated to me "that he had only one witness ready to give evidence and would "ask for a remand after she had so given evidence. The police "officer in charge did so ask for a remand thereafter."

The court has been supplied with a transcript of a shorthand note taken from which it appears that after the plea, Police Inspector Francis Woods said: "I will ask for a remand, Your "Worship," and then the evidence was given. It seems to me that that largely supports the magistrate's affidavit, and it seems to me, accepting that evidence as I do, that this woman police officer was the first witness in the case, was the only witness for the prosecution who was present, and she gave her evidence in the trial, and the prisoner was thereafter remanded. Accordingly, I think these applications fail and should be dismissed.

HILBERY J. I agree.

PEARSON J. I agree.

Application dismissed.

Solicitors: *Barry Ziff; Solicitor, Metropolitan Police.*

J. D. P.

[2] (1957) 122 J.P. 119; 42 Cr.App.R. 38.

[3] [1957] 2 Q.B. 591, 594.

[QUEEN'S BENCH DIVISION.]

1960
Jan. 20.

Lord Parker C.J., Cassels and Ashworth JJ.

* VICTORY (EX-SERVICES) ASSOCIATION LTD. *v.* PADDINGTON BOROUGH COUNCIL.

Rates and Rating — "Social welfare" — Ex-services club — "Main "objects" contained in written constitution—"To promote com- "radeship between and improve the condition and welfare of all "ranks, both past and present" of the forces—Whether main objects of organisation "concerned with the advancement of . . . "social welfare"—Rating and Valuation (Miscellaneous Provisions) Act, 1955 (4 *&* 5 *Eliz.* 2, *c.* 9), *s.* 8.

The Victory (Ex-Services) Association Ltd., a company limited by guarantee, was incorporated in 1947 to administer a fund of £300,000 raised by a public appeal, organised in 1944, for money to form a fund to commemorate members of His Majesty's forces who had died in the last war, such memorial to take the form of a residential club in London which would be open to all ex-service members of such forces. The objects for which the association was established, as set out in clause 3 of the memorandum of association were: "(A) To promote comradeship between and "improve the condition and welfare of all ranks, both past and "present, of the Navy, Army and Air Force of the United King- "dom, British Dominions, Colonies, India, and such allied Nations "as the Council shall from time to time determine, together with "all ranks of the W.R.N.S., A.T.S., W.A.A.F. and the correspond- "ing services of the British Dominions, Colonies, India and Allied "Nations. (B) With a view to the furtherance of the last "mentioned object, to undertake all or any of the following "activities, namely, (i) to conduct a welfare and advice bureau; "(ii) to conduct an employment agency; (iii) to establish, own, "maintain and conduct a residential club or clubs for such persons "as are mentioned in object (A), and for the wives or husbands "of such persons . . . and to provide a club or club-houses and all "suitable conveniences and amenities in connection therewith," and a number of other objects were set out in paragraphs (C) to (I).

The association acquired premises which it opened in 1948 under the style of The Victory Ex-Services Club, a club which it had caused to be formed, where it provided residential and other facilities for members. Membership of the club was restricted to ex-service men and women, irrespective of former rank, on payment of an annual subscription of 10s. a year, and there were about 23,000 members. The association also provided on the premises a welfare advice bureau and an employment agency open to all ex-service men and women without charge: the area of the premises made available for the club considerably exceeded that used for the welfare advice bureau and the employment agency. On an appeal by the association from the dismissal by quarter sessions of its appeal against a rate made and demanded in respect of the premises, in which the association claimed to be entitled to relief under section 8 of the Rating and Valuation (Miscellaneous Provisions) Act, 1955, on the ground that it was an organisation "whose main "objects are . . . concerned . . . with the advancement of social "welfare" within the meaning of section 1 (*a*):—

Held, that where an organisation had a written constitution setting out its objects, it was that which had to be looked to in order to determine what were its main objects, and it was only in

the case of ambiguity or a possible change of objects that regard should be had to its activities; that, as a matter of construction, the main objects of the association were the single composite object set out in clause 3 (A) of the memorandum of association, "to "promote comradeship between and improve the condition of all "ranks" of the forces, which object was concerned with "the "advancement of social welfare" within the meaning of section 8 (1) (*a*); and that, therefore, the association was entitled to the relief claimed.

Dictum of Lord Denning in *National Deposit Friendly Society Trustees* v. *Skegness Urban District Council* [1959] A.C. 293, 320; [1958] 3 W.L.R. 172; [1958] 2 All E.R. 601 considered.

Working Men's Club and Institute Union Ltd. v. *Swansea Corporation* [1959] 1 W.L.R. 1197; [1959] 3 All E.R. 769 distinguished.

CASE STATED by London Quarter Sessions Appeals Committee.

The appellants, the Victory (Ex-Services) Association Ltd., appealed to quarter sessions against a rate made and demanded by the respondent rating authority, the Paddington Borough Council, in respect of premises at 73–79, Seymour Street, London, W.2, for the year beginning April 1, 1956, in the sum of £5,372 17s., on the ground that the premises were occupied for the purposes of the association, an organisation which satisfied the requirements of section 8 (1) (*a*) of the Rating and Valuation (Miscellaneous Provisions) Act, 1955,[1] and that by virtue of section 8 (2) the demand should not have exceeded £3,127 7s. 6d., the rate paid in respect of the premises in the year beginning April 1, 1955.

The following were among the facts found by quarter sessions: The association was a company limited by guarantee incorporated on February 7, 1947. In 1944, a public appeal was organised by Field-Marshal Sir Philip Chetwode with the support of the Duke of Gloucester, the Prime Minister, the Lord Mayor of London, and numerous well-known public figures, to raise a fund which should commemorate the members of His Majesty's forces who had died in the war in which the country was then engaged, such memorial to take the form of a residential club in London which would be open to all ex-service members of such forces. Between the years 1944 and 1950 over £344,000 was raised by public subscription in response to such appeal, and the association was incorporated to administer such moneys. In 1947 the association acquired premises known at Nos. 73–79, Seymour Street, and opened them under the style of The Victory Ex-Services Club in 1948. Those premises constituted the

[1] Rating and Valuation (Miscellaneous Provisions) Act, 1955, s. 8: "(1) This section applies to the "following hereditaments, that is to "say—(*a*) any hereditament occupied "for the purposes of an organisation "(whether corporate or unincorporate) "which is not established or con-"ducted for profit and whose main "objects are charitable or are other-"wise concerned with the advance-"ment of religion, education or social "welfare . . . (2) For the purposes of "the making and levying of rates . . . "the amount of rates chargeable in "respect of a hereditament to which "this section applies shall . . . be "limited as follows, . . ."

1960

Victory (Ex-Services) Association Ltd. v. Paddington Borough Council.

hereditament under appeal, and it was occupied for the purposes of the association as hereinafter set out.

The association had caused to be formed a club known as the Victory Ex-Services Club, the terms and conditions governing the enrolment of members being such as might be published from time to time. The form of application for membership called for a proposer and seconder who should be members, but potential members, if they had no friends who were members, were invited to fill up the application form, leaving the proposer and seconder lines blank, and to return the form with their service discharge papers. With a few minor exceptions membership of the club was restricted to ex-service men and ex-service women (irrespective of former rank) on payment of an annual subscription of 10s. per head. There were approximately 23,000 such members.

The club provided residential and other facilities for members and the charges made for meals and accommodation were less than those which would be charged for comparable services elsewhere in London.

The association also encouraged the use of the premises for reunions of ex-service men and women with a view to maintaining the spirit of comradeship formed during their service. The residential and other facilities were extensively used by ex-service men and women passing through London, seeking work in London, or on holiday in London, who might otherwise have difficulty in obtaining accommodation of a comparable standard.

The association also provided upon the premises a welfare advice bureau and employment agency which was open to all ex-service men and women without charge, whether members of the club or not. The area of the premises made available for the club considerably exceeded that used for the advice bureau and employment agency.

The association was not established or conducted for profit.

By clause 3 of the memorandum of association, annexed to the case, the objects for which the association was established were: "(A) To promote comradeship between and improve the condition "and welfare of all ranks, both past and present, of the Navy, "Army and Air Force of the United Kingdom, British Dominions, "Colonies, India, and such Allied Nations as the council shall "from time to time determine, together with all ranks, both "past and present, of the W.R.N.S., A.T.S. and W.A.A.F., "and the corresponding services of the British Dominions, "Colonies, India and Allied Nations. (B) With a view to the "furtherance of the last-mentioned object, to undertake all or "any of the following activities, namely, (i) To conduct a welfare "and advice bureau. (ii) To conduct an employment agency. "(iii) To establish, own, maintain and conduct a residential club "or clubs for such persons as are mentioned in object (A), and "for the wives or husbands of such persons as the case may be, "and to provide a club-house or club-houses and all suitable "conveniences and amenities in connection therewith."

Paragraphs (C) to (I) of clause 3 set out objects relating to dealings in real and personal property, the undertaking and execution of trusts conducive to the objects of the association, the borrowing of and investment of money, the establishment and support or aid in the establishment and support of any charitable or benevolent associations or institutions, the provision of money for charitable or benevolent purposes connected with the purposes of the association or calculated to further its objects, and in all such things as were incidental or conducive to the attainment of the above objects or any of them.

It was contended by the association that its main objects were concerned with the advancement of social welfare within the meaning of section 8 (1) (*a*) of the Rating and Valuation (Miscellaneous Provisions) Act, 1955, and that it was accordingly entitled to the relief claimed.

It was contended by the rating authority that the main objects of the association were not such as were mentioned in section 8 (1) (*a*), and that the association was accordingly not entitled to the relief prescribed by section 8 (2).

Quarter sessions were of the opinion that the main objects of the association were not concerned with the advancement of social welfare within the meaning of section 8 (1) (*a*) and, accordingly, dismissed the appeal.

The association appealed.

J. Ramsay Willis Q.C., *Alan Fletcher* and *Graham Eyre* for the association.

J. T. Molony Q.C. and *F. A. Amies* for the rating authority.

The following cases were referred to in argument: *Derbyshire Miners' Welfare Committee* v. *Skegness Urban District Council* [2]; *Working Men's Club and Institute Union Ltd.* v. *Swansea Corporation* [3]; *National Deposit Friendly Society Trustees* v. *Skegness Urban District Council* [4]; *Waterson* v. *Hendon Borough Council* [5]; *Independent Order of Oddfellows Manchester Unity Friendly Society* v. *Manchester Corporation* [6]; and *English Speaking Union* v. *Westminster City Council.* [7]

LORD PARKER C.J. This is an appeal by way of case stated by justices for the County of London sitting as an appeals committee of quarter sessions of that county. The justices found that the appellants, Victory (Ex-Services) Association Ltd., were not

[2] [1958] 1 Q.B. 298; [1957] 1 W.L.R. 764; [1957] 3 W.L.R. 1048; [1957] 2 All E.R. 405; [1957] 3 All E.R. 692; [1959] A.C. 293; [1959] 2 W.L.R. 711; [1959] 2 All E.R. 258, H.L. (sub nom. *Skegness Urban District Council* v. *Derbyshire Miners' Welfare Committee*).

[3] [1959] 1 W.L.R. 1197; [1959] 3 All E.R. 769.

[4] [1959] A.C. 293; [1958] 3 W.L.R. 172; [1958] 2 All E.R. 601.

[5] [1959] 1 W.L.R. 985; [1959] 2 All E.R. 760.

[6] [1958] 1 W.L.R. 1171; [1958] 3 All E.R. 378.

[7] (1959) 52 R. & I.T. 124.

1960

VICTORY (EX-SERVICES) ASSOCIATION LTD. v. PADDINGTON BOROUGH COUNCIL.

Lord Parker C.J.

entitled to the relief in regard to rates afforded by section 8 of the Rating and Valuation (Miscellaneous Provisions) Act, 1955.

The matter arises in this way: the appellants are a company limited by guarantee with no share capital, and were incorporated on February 7, 1947. In 1944 there had been a public appeal for money to form a fund to commemorate members of His Majesty's forces who had died in the last war, such memorial to take the form of a residential club in London which would be open to all ex-service members of such forces. A sum of over £300,000 was raised and the appellants, with that money, acquired premises at 73–79, Seymour Street, Marylebone, and opened the premises under the style of the Victory (Ex-Services) Club Ltd. in 1948. Those are the premises with which this appeal is concerned. The club was known as the Victory (Ex-Services) Club, and, with a few minor exceptions, membership of the club was restricted to ex-service men and ex-service women. Membership of the club entailed a payment of 10s. per head and a member of the club thereupon also became a member of the association. There are approximately 23,000 such members.

Apart from that part of the premises occupied as a club there is a part where the appellants provide a welfare advice bureau and employment agency. That part of the premises is open to all ex-service men and women without charge, whether or not they are members of the club or members of the association. The area of the premises made available for the club is, according to the findings in the case, considerably larger than that part used for the advice bureau and the employment agency.

The appeals committee found that the appellants were not entitled to relief, and they dismissed the appeal.

This is yet another of the many cases that have come before the courts of recent years under this section 8. The relevant words for the purposes of the present appeal are as follows: "This "section applies to the following hereditaments, that is to say— "(*a*) any hereditament occupied for the purposes of an organisa- "tion (whether corporate or unincorporate) which is not "established or conducted for profit and whose main objects"— and the relevant words—"are charitable or are otherwise con- "cerned with the advancement of . . . social welfare."

Certain matters are quite clear and are agreed in this case. The appellants were the occupiers of the hereditament. The hereditament was occupied for the purposes of the appellants. The appellants are a corporate organisation and they are not established or conducted for profit. Accordingly, the sole question in this case is whether they are an organisation whose main objects are the advancement of social welfare. Their activities are fully set out in the case, to many of which I have referred, though not in detail; but before one ever comes to a consideration of their activities, it seems to me that one must look at their objects. Prima facie, where an association has a written constitution setting out its objects, it is to the written constitution that

one must look to see what are the objects and what are the main objects. Of course, if there is any ambiguity, it would be right to look to see what in practice the organisation concerned was doing, what their activities were in fact. It is true that in the first case which came before the courts and went to the House of Lords, namely, the *National Deposit Friendly Society* v. *Skegness Urban District Council*,[1] Lord Denning, in the course of his speech, said[2]: "But in order to ascertain the 'main objects' "of an organisation, you are entitled, I think, to look not only "at its rules but also to consider the way in which it has "conducted its affairs." That is a very wide and general statement, but as far as I know that has never been the approach except in the case of an ambiguity, or in a case such as arose in *Working Men's Club and Institute Union Ltd.* v. *Swansea Corporation*.[3] There the position was that an organisation, formed a very long time ago, in 1862, had, by the time when the rating authority sought to levy rates, changed its activities very considerably, and it is to be observed that Morris L.J. said[4]: "The "objects of the union are set out in rule 2, which I have read. "Those objects are numerous and diverse. In considering the "applicability of section 8 it becomes necessary to ascertain "which are the 'main objects.' In my judgment, this cannot "be discovered merely by reading rule 2 or by construing rule 2. "It was legitimate, therefore, to consider the way in which the "union has conducted its affairs. It may be that an organisation "will have numerous declared objects which over many years will "remain its objects, but that in one period one or more of such "objects will be the 'main' ones, while in another period "other objects will be the 'main' ones."

In the present case, however, as I have said, this company was incorporated in 1947, and there is no suggestion in the case that its original objects have in practice changed. Accordingly, for my part, I think that the proper approach to this matter is to look, at any rate in the first instance, at the written constitution and only to look at the activities if there is any ambiguity in the objects expressed in the constitution. Clause 3 of the memorandum of association provides: "The objects for which the "association is established are," and then a number of objects (A) to (I) are set out. I think it is only necessary for me to read (A) and (B). They are in these terms: "(A) To promote com-"radeship between and improve the condition and welfare of all "ranks, both past and present, of the Navy, Army and Air Forces "of the United Kingdom, British Dominions, Colonies, India, "and such Allied Nations as the council shall from time to time "determine, together with all ranks, both past and present, of "the W.R.N.S., A.T.S. and W.A.A.F., and the corresponding "services of the British Dominions, Colonies, India and Allied

[1] [1959] A.C. 293; [1958] 3 W.L.R. 172; [1958] 2 All E.R. 601.
[2] [1959] A.C. 293, 320.
[3] [1959] 1 W.L.R. 1197; [1959] 3 All E.R. 769.
[4] [1959] 1 W.L.R. 1197, 1201.

1960

VICTORY (EX-SERVICES) ASSOCIATION LTD. v. PADDINGTON BOROUGH COUNCIL.

Lord Parker C.J.

"Nations. (B) With a view to the furtherance of the last-"mentioned object, to undertake all or any of the following "activities, namely:—(i) to conduct a welfare and advice bureau; "(ii) to conduct an employment agency; (iii) to establish, own, "maintain and conduct a residential club or clubs for such "persons as are mentioned in object (A), and for the wives or "husbands of such persons as the case may be, and to provide a "club-house or club-houses and all suitable conveniences and "amenities in connection therewith." I do not read the so-called objects set out in (C) to (I) because I think that it is clear, and, indeed, I think counsel admitted, that those are not objects in the true sense but are merely means by which the objects shall be carried out. It also seems to me that 3 (B) is also a means of carrying out the object expressed in (A) because it begins with the words "With a view to the furtherance of the last-"mentioned object." Though the words that follow may be of relevance in construing (A), they are not in themselves, in my judgment, an object. The main object or objects are, I think, to be found in paragraph 3 (A), and they are in these words: "To promote comradeship between and improve the condition "and welfare of all ranks, both past and present," broadly speaking, of the past and present members of the forces of the Crown throughout the Commonwealth. It seems to me that the class of persons whom it is intended to benefit is clearly of a sufficiently large and of sufficient public character to enable it to be said that the words "advancement of social welfare" if otherwise applicable, apply. It is also, I think, clear that in so far as it is necessary, there is here an element of altruism since the funds of the association were raised by voluntary gifts. The sole question, as I see it, is whether it is proper to say that the words "to promote comradeship between and improve the con-"dition and welfare of all ranks, both past and present" of members of the forces can properly be said to be the advancement of social welfare.

Mr. Molony has said that the object in paragraph 3 (A) is not a single object but that there are two objects, first, to promote comradeship between the members of the forces, and, secondly, to improve the condition and welfare of those members. He said that whereas it may be that an object to improve the condition and welfare of members of the forces may be capable of coming within the words "advancement of social welfare," an object which exists solely to promote comradeship between those members cannot be said to be the advancement of social welfare, and that, however praiseworthy such an object may be, it is not an advancement of social welfare within the meaning of the section. Of course one must be careful in these cases to apply, as indeed one always should, a strict construction, and it would be quite wrong to say that the appellants' objects are very worthy objects, and to try and stretch the words to give

them relief, because in so far as they are relieved the burden will fall upon others, namely, the ratepayers in Paddington. It is purely a question of construction as to whether those words can be brought within the words of the statute, "the advancement of "social welfare."

For my part, I think that there is only one object and a composite object in paragraph 3 (A). It is not divided up. It is framed in a composite form, "to promote comradeship between "and improve the condition and welfare of" all ranks of the forces. Read as a composite whole, I can see no reason why those words do not aptly describe the concept of the advancement of social welfare, and I think that some help is to be gained from the activities which it is envisaged will be used for the furtherance of the object contained in that composite phrase. Under paragraph 3 (B) the activities contemplated are the conducting of a welfare and advice bureau, an employment agency, a residential club and amenities, and it seems to me that read as a whole those words in paragraph 3 (A) can properly be construed as having the object of the advancement of social welfare.

It has been said in some of the cases that the conception is that there should be an activity which benefits the needy but, in my judgment, the reference to the needy in such a concept does not necessarily mean those in need financially. It seems to me that, in dealing with the vast number of people who, as the result of the many wars are now ex-service men, and those who are at present serving in the forces, there is a need for the sort of activities which this association propose to carry out and has, in fact, carried out with the object of promoting comradeship and improving the condition and welfare of all ranks. In my opinion, the association fully qualifies for the relief provided by section 8 of the Act. Accordingly, I find it unnecessary to go to a further stage and consider the activities of the association, or to consider what are the main or subsidiary activities of the association. It is sufficient to say that they are activities which were contemplated by the memorandum of association as a means whereby the objects expressed in paragraph 3 (A) should be carried out.

So far as the case is concerned, there is no finding of fact which is binding upon this court and would force me to come to a different conclusion. The appeals committee very properly set out the facts of the case. They do not find affirmatively what they consider is the main object, but that, as I said, is at any rate in this case, a pure question of the construction of the memorandum of association, and all that they hold is that, as a matter of opinion, the objects, whatever they are, are not concerned with the advancement of social welfare. In my judgment, the appeals committee came to a wrong decision; the main objects

1960

VICTORY (EX-SERVICES) ASSOCIATION LTD. *v.* PADDINGTON BOROUGH COUNCIL.

of the association are concerned with the advancement of social welfare, and, accordingly, this appeal should be allowed.

CASSELS J. I agree.

ASHWORTH J. I also agree.

Appeal allowed.

Solicitors: *Speechly, Mumford & Soames; W. H. Bentley, Town Clerk, Paddington.*

J. F. L.

[CHANCERY DIVISION.]

1960
Jan. 27.

* PRACTICE DIRECTION (COSTS).

Costs—Taxation—Order for—Form—Chancery Division—Originating summons—Construction of document or variation of trust.

The following precedent of an order for the taxation and payment of costs has been approved by the judges of the Chancery Division for use on an application by originating summons for the construction of a document or under the Variation of Trusts Act, 1958, or other like application:

"IT IS ORDERED that it be referred to the taxing master:

"FIRST to tax the costs of an incidental to the said application of the plaintiffs the trustees of the said will:

"SECONDLY to tax on the common fund basis the costs of the defendants of and incidental to the said application, and

"THIRDLY to tax on the common fund basis the costs to which the said Legal Aid and Advice Act applies and which have been incurred on behalf of the defendant A B.

"AND IT IS ORDERED that the first and secondly mentioned costs be respectively retained and paid out of the fund held by the plaintiffs upon the trusts of the said will."

Note: Sub-rule (2) of rule 1 of the Supreme Court Costs Rules, 1959, contains the following definition:

"'Costs' includes fees, charges, disbursements, expenses and remuneration."

J. B. H. WYMAN,
Chief Registrar,
Chancery Division.

January 27, 1960.

[QUEEN'S BENCH DIVISION.]

* REGINA *v.* GOVERNOR OF PARKHURST PRISON. *Ex parte* PHILPOT.

1959 *Dec.* 11.

Lord Parker C.J., Hilbery and Pearson JJ.

Criminal Law—Practice—Sentence—Preventive detention—Prison Commissioners' report—Copy of report not shown to prisoner—Effect on sentence—Criminal Justice Act, 1948 (11 *&* 12 *Geo.* 6, *c.* 58), *s.* 21 (4), (5).

Statute—Construction—Directory or obligatory—Procedural requirement — Whether condition precedent to effective order — Criminal Justice Act, 1948, *s.* 21 (4), (5).

The applicant, who was sentenced in 1953 to a term of preventive detention, applied for a writ of habeas corpus on the ground that, before being sentenced, no copy of the Prison Commissioners' report had been given to him or to his counsel or solicitor as required by section 21 (5) of the Criminal Justice Act, 1948 [1]:—

Held, that it was a well-known principle that the court did not in the ordinary way grant a writ of habeas corpus to a person who was serving a sentence passed by a court of competent jurisdiction, but assuming that the court had jurisdiction to entertain the application, section 21 (5) of the Act of 1948 was directive and not imperative, and did not make the handing of such a report to the prisoner a condition precedent to a sentence of preventive detention.

Rex v. *Dickson* [1950] 1 K.B. 394; 65 T.L.R. 749; [1949] 2 All E.R. 810 explained.

APPLICATION for writ of habeas corpus.

On July 10, 1953, the applicant, John Philpot, was convicted at Worcester County Quarter Sessions, together with two other persons, of attempted shopbreaking, and was sentenced to a term of nine years' preventive detention. The applicant, who was detained in Parkhurst Prison, applied for a writ of habeas corpus directed to the Home Secretary and the Governor of Parkhurst Prison on the ground that before the passing of the sentence of preventive detention upon him, no copy of the Prison Commissioners' report was handed to him or to his counsel or solicitor, as was required by section 21 (5) of the Criminal Justice Act, 1948.

Neil Butter for the applicant.

J. R. Cumming-Bruce for the Governor of Parkhurst Prison.

[Reported by A. H. BRAY, Esq., Barrister-at-Law.]

[1] Criminal Justice Act, 1948, s. 21: "(4) Before sentencing any "offender to . . . preventive detention, the court shall consider any "report or representations which may "be made to the court by or on behalf "of the Prison Commissioners. . . . "(5) A copy of any report or representations in writing made to the "court by the Prison Commissioners "for the purposes of the last foregoing "subsection shall be given by the "court to the offender or his counsel "or solicitor."

1959

REGINA
v.
GOVERNOR OF
PARKHURST
PRISON.
Ex parte
PHILPOT.

The following cases were cited in argument, in addition to those referred to in the judgments: *Reg.* v. *Evans*[2]; *Reg.* v. *Dunn*[3]; *Reg.* v. *Newton*[4]; *Ex parte Lees*[5]; *In re Corke.*[6]

LORD PARKER C.J. In these proceedings Mr. Butter moves for a writ of habeas corpus on behalf of one Joseph Philpot now undergoing imprisonment in Her Majesty's Prison at Parkhurst. The applicant was sentenced as long ago as July 10, 1953, to a term of preventive detention following on his conviction with two other persons of attempted shopbreaking. His complaint, which he has been voicing from time to time since 1954, is that he was not shown a copy of the Prison Commissioners' report.

Let me say at once that there are many difficulties in his way in this application. For one thing, it is almost impossible for this court to say with any certainty today whether, on a certain day in 1953, a copy of the Prison Commissioners' report was or was not handed to him or to his legal representative, although it appears from the affidavit evidence that, in fact, a report was made. Secondly, it is a well-known principle that this court does not in the ordinary way grant a writ of habeas corpus to persons who are in execution, that is to say, persons who are serving sentences passed by courts of competent jurisdiction: see, in particular, the judgment of the Divisional Court in *In re Featherstone.*[1] I will assume, however, for the purposes of these proceedings that no report of the Prison Commissioners was ever served on or given to the applicant or his legal representative, and I will also assume that, contrary to what my impression is at the moment, this court has jurisdiction to entertain the application.

Section 21 (5) of the Criminal Justice Act, 1948, provides: "A copy of any report or representations in writing made to the "court by the Prison Commissioners for the purposes of the last "foregoing subsection shall be given by the court to the offender "or his counsel or solicitor."

The sole question, and the short question, is whether the words "shall be given" in section 21 (5) are merely directed to the procedure which should be followed, or whether they are imperative and are making it a condition precedent to a sentence of preventive detention that the copy should be given. I am quite satisfied that those words are directed only to the procedure to be followed. They are, as it seems to me, in direct contrast to the words used in section 23, which provides for a notice being served of the intention to prove previous convictions. There the words used are: "No account shall be taken of any previous conviction "or sentence unless notice has been given to the offender . . ." In other words, the subsection is making it abundantly clear that the qualifying convictions which are necessary before a sentence

[2] [1957] 1 Q.B. 35; [1956] 3 W.L.R. 978; [1956] 3 All E.R. 750.
[3] (1847) 12 Q.B. 1026.
[4] (1855) 24 L.J.Q.B. 246.
[5] (1860) E.B. & E. 828.
[6] [1954] 1 W.L.R. 899; [1954] 2 All E.R. 440.
[1] (1953) 37 Cr.App.R. 146.

of preventive detention is given cannot be given in evidence at all unless a condition precedent is complied with, namely, the serving of the requisite notice.

Reliance, however, was put on the decision of the Court of Criminal Appeal in *Rex* v. *Dickson*.[2] In that case the prisoner was sentenced to 10 years' preventive detention, but no evidence had been given that the notice had been served upon him. It had, in fact, been served on him and his signature had been obtained to it, but at the trial no evidence was given that it had been served, nor was his signature proved, nor was he asked whether he admitted the convictions set out in it. The decision in *Rex* v. *Dickson* relates, as I read it, solely to the question of the section 23 notice. It is true that in the statement of the facts,[3] it is said that the appeal was on the question of the alleged failure to carry out the requirements of section 21, that is, the handing of the Prison Commissioners' report. It is quite clear, however, from reading the arguments and the judgment that that is a mistake, and the appeal was on the sole ground of the alleged failure at the trial to carry out the requirements of section 23. However, there is no doubt that in giving the judgment of the court, Lord Goddard C.J. did use words which, taken out of their context, would appear to convey that section 21 (5) was imperative, and was something which had to be done before a prisoner qualified for and could be sentenced to preventive detention. It is only perhaps necessary to refer to one passage, where he says[4]: "The "court thinks that this is a good opportunity for stating what is "the proper procedure to be adopted by all courts, concerning "proof of the matters necessary to qualify a prisoner to receive "a sentence of corrective training or preventive detention." He then goes on to say that that procedure should include the handing to the prisoner of the report of the Prison Commissioners. The truth of the matter, as I see it, is that this is merely a decision in regard to section 23, but that an opportunity was there taken by Lord Goddard to say what was the proper procedure as a matter of routine in regard to copies of the Prison Commissioners' report. I am quite satisfied that he was not treating or intending to treat section 21 (5) as setting out a condition precedent to a sentence of preventive detention.

I should add that the same view was taken by Glyn-Jones J. in *Kinally* v. *Home Office*[5] where, in regard to Lord Goddard's judgment, he said: "By those words"—that is, after quoting the passage in the judgment—"Lord Goddard was not laying down "conditions precedent to jurisdiction, he was merely giving "directions as to a businesslike way of complying with the proper "procedure laid down by the statute." I entirely agree. That, however, does not mean that the provisions of the subsection should not be complied with. Indeed, in *Dickson's* case,[6] and

[2] [1950] 1 K.B. 394; 65 T.L.R. 749; [1949] 2 All E.R. 810.
[3] [1950] 1 K.B. 394, 395.
[4] Ibid. 397.
[5] The Times, July 25, 1959.
[6] [1950] 1 K.B. 394.

1959

REGINA
v.
GOVERNOR OF
PARKHURST
PRISON.
Ex parte
PHILPOT.

Lord Parker
C.J.

again more recently in the Court of Criminal Appeal in a *Practice Note*,[7] this court has been anxiously concerned to see that a procedure is adopted whereby the handing of the Prison Commissioners' report or, in the case of Borstal, the Borstal Commissioners' report, is recorded in some way on the shorthand note. The point is constantly being taken by prisoners that a copy was never given to them or to their legal representatives, and, unless there is something recorded on the transcript it is almost impossible for the court to say whether it was done or not. But neither *Dickson's* case [8] nor the *Practice Note* [9] are in any way authorities for saying that section 21 (5) is a condition precedent to a sentence of preventive detention.

The matter is, I think, made even clearer when one realises that it is not in every case that there has to be a Prison Commissioners' report. Section 21 (4) merely says that before sentencing any offender to corrective training or preventive detention the court shall consider any report or representations which may be made to the court by or on behalf of the Prison Commissioners. In a case where a report of that sort is not of itself a condition precedent to a sentence of preventive detention, it seems to me all the less reason for saying that the handing of a copy to the prisoner is itself a condition precedent. Accordingly, in my judgment, this application fails and should be dismissed.

HILBERY J. I agree. I only add a word or two because I was a member of the court in *Rex* v. *Dickson* [10] when Lord Goddard C.J., giving the judgment of the court, referred to the handing of a copy of the Prison Commissioners' report and when it should take place. In that case, if the argument is looked at, it is perfectly clear, and it is in accordance with my recollection, that the whole case depended upon a contention that there was no evidence that the notice of an intention to prove previous convictions was served on the appellant, and that the provisions of section 23 (1) had not been observed. It was urged that in the absence of an admission of those previous convictions by the accused, the determination of the question whether those previous convictions had been suffered by the accused would have to be left to a jury. If the argument is looked at, it will be seen that for the Crown Mr. Fay admitted that there was certainly no evidence that the notice had been served on the appellant. The whole case turned on whether the service of the notice of intention to prove previous convictions required by section 23 was a condition precedent to a sentence of preventive detention or corrective training being passed. It is perfectly true that the court gave a direction as to the procedure which should be followed, but I think it is not unimportant to observe that, in giving that direction, if Lord Goddard's language is looked at carefully it will be

[7] [1959] 1 W.L.R. 849; [1959] 2 All E.R. 734; sub nom. *Reg.* v. *Wintle*, 43 Cr.App.R. 191.

[8] [1950] 1 K.B. 394.

[9] [1959] 1 W.L.R. 849.

[10] [1950] 1 K.B. 394.

seen that in the first part of it he deals with matters that require proof. He said [11]: "The court thinks that this is a good opportunity for stating what is the proper procedure to be adopted by all courts, concerning proof of the matters necessary to qualify a prisoner to receive a sentence of corrective training or preventive detention." He is dealing with proof of matters necessary to qualify and the procedure to be adopted concerning proof of those matters, and then he says [12]: "After a plea or verdict of guilty has been returned a police officer should be called by counsel for the prosecution to prove that he served a notice on the prisoner, as provided by section 23 (1), three days before the trial. When that has been proved, the clerk of assize or the clerk of the peace, as the case may be, should then put the contents of that notice to the prisoner and obtain his admission or his denial of the convictions in open court; generally speaking, it will be an admission that he has had the previous convictions." There he is dealing with the matters which must be proved. Then he gave a direction, and I think, speaking as one of the court, clearly intending, as I for my part certainly intended, that it should be read and understood as a direction that a copy of the Prison Commissioners' report should be handed to the prisoner. Stress is laid on the word "must," but I think it was never meant to imply any more than that as a matter of procedure and no more, that course is to be adopted. I think that explanation, if explanation is needed, is all I need add to what has fallen from my Lord, and I only ventured to add it as I was a member of the court in giving the judgment in *Dickson's* case.

It has been called to our attention that in *Kinally* v. *Home Office* [13] Glyn-Jones J. clearly indicated that that was the right interpretation of the judgment in *Rex* v. *Dickson*,[14] and what Lord Goddard intended to convey. I agree that this application fails, but I desire to emphasise that we are assuming for the purpose of giving this judgment that the application could be made although the prisoner is in execution.

PEARSON J. I agree and have nothing to add.

Application dismissed.

Solicitors: *Official Solicitor; Treasury Solicitor.*

[11] [1950] 1 K.B. 394, 397.
[12] Ibid.
[13] The Times, July 25, 1959.
[14] [1950] 1 K.B. 394.

[LEEDS ASSIZES.]

1959
Dec. 14, 15.

Wrangham J.

* McKINLEY *v.* McKINLEY.

Husband and Wife—Justices—Clerk—Note of evidence by—Whether privileged.

Practice—Note of evidence—Right of party to—Matrimonial proceedings—Note of clerk to justices—Required for divorce suit—Right to subpoena clerk.

Evidence—Privilege—Justices' clerk—Note of evidence in other proceedings.

In 1955 a wife unsuccessfully took proceedings against her husband before a stipendiary magistrate, and the assistant to the magistrates' clerk took a shorthand note of the evidence in those proceedings. The husband now petitioned against her for divorce in the High Court and the wife wished to adduce in the divorce proceedings evidence of what had occurred in the former proceedings before the magistrate, and issued subpoenas against both the clerk and his assistant to attend and bring with them a transcript of those proceedings and the relevant notebooks. On the application of the clerk the district registrar ordered that the subpoenas be set aside on the grounds that the clerk was a privileged person, and that the notes of evidence were privileged documents. It was conceded that the clerk would be able to give relevant and admissible evidence. From this order the wife appealed:—

Held, that there was no rule which prevented a magistrates' clerk from being compelled to attend and give evidence in divorce proceedings if there was any relevant or admissible evidence which he could give and the subpoena to the assistant should stand, but only to order him to bring his note.

INTERLOCUTORY APPEAL from the district registrar at Kingston-upon-Hull heard in open court.

In 1955 the appellant wife, Lily McKinley, took proceedings against her husband, Alfred McKinley, before the stipendiary magistrate at Kingston-upon-Hull on the grounds of cruelty and desertion which proceedings, after a three-day hearing, were dismissed. Charles Phillips, the assistant to the magistrates' clerk, took a shorthand note of those proceedings. The appellant's husband now instituted divorce proceedings against her in the Kingston-upon-Hull District Registry of the High Court on the ground of her desertion. The appellant was defending these proceedings and was herself asking for relief on the grounds of her husband's cruelty and desertion, and she wished to be able to adduce evidence of what occurred before the stipendiary magistrate. She therefore issued against the magistrates' clerk, Thomas Arthur Doubleday, and the assistant, Phillips, subpoenas ad testificandum and duces tecum requiring them to bring to the hearing of the divorce suit a certified transcript of the 1955 proceedings with five copies for the court and the relevant shorthand notebooks. The clerk and his assistant applied to have the

[Reported by G. M. SMAILES, Esq., Barrister-at-Law.]

subpoenas set aside and by their affidavits claimed (inter alia) that the documents were privileged documents. On November 20, 1959, the district registrar ordered the subpoenas to be set aside, and from this order the wife now appealed.

Rudolph Lyons Q.C. and *H. Ognall* (*A. M. Hurwitz* with them) for the appellant.

John McLusky for the magistrates' clerk and his assistant.

The following cases were referred to in argument which are not mentioned in the judgment: *Padley* v. *Padley* [1]; *In re S.* (*An Infant*) [2]; *Ainsworth* v. *Wilding* [3]; *Rawstone* v. *Preston Corporation* [4]; *Ward* v. *Shellmex and B.P. Ltd.* [5]

Wrangham J. This is an appeal against the decision of the district registrar at Kingston-upon-Hull setting aside two subpoenas issued to the clerk to the Kingston-upon-Hull justices and his assistant. It raises an important question of general interest and has, therefore, on the application of the parties, been argued in open court.

The relative facts are not very clearly set out in the affidavits—I think because, until the hearing, the nature of the real issues between the parties was not completely apprehended; but they are not really in dispute and the basis on which this appeal should be decided has been agreed between the parties here. The relevant facts are these: the appellant is the respondent in divorce proceedings in which her husband is petitioning on the ground of her desertion; in 1955 there were proceedings before the stipendiary magistrate for Kingston-upon-Hull against her husband on the grounds of his cruelty and desertion. After a three-day hearing those proceedings were dismissed. She now wishes to be able to adduce, in the divorce proceedings, evidence of what occurred in the magistrates' court. There is no doubt that she would herself be able to give evidence of what her husband said before the magistrate, and of any other matters that occurred there, provided that they were admissible in the divorce proceedings—if, of course, she could remember them. But far more reliable evidence on the same lines of what took place before the magistrate could be procured from the magistrates' clerk, not because he has a better memory but because he has got a note from which his memory can be refreshed. The note is one which he is under a duty to take for use in connection with appeals (see the Matrimonial Causes Rules, 1957 (S.I. 1957, No. 619), r. 73 (3)); so it is bound to be in existence. The note is not directed by any rule to be supplied to parties in divorce proceedings, and parties in divorce proceedings have, in my

[1] [1954] P. 302; [1953] 3 W.L.R. 834; [1953] 2 All E.R. 1197.
[2] The Times, Nov. 18, 1959.
[3] [1900] 2 Ch. 315.
[4] (1885) 30 Ch.D. 116; 52 L.T. 922.
[5] [1952] 1 K.B. 280; [1951] 2 T.L.R. 976; [1951] 2 All E.R. 904.

1959

McKINLEY
v.
McKINLEY.

Wrangham J.

judgment, no right to have that note produced to them; but the fact that the note must exist because, for another purpose, it is directed to be taken, is nevertheless a fact of prime importance in this particular appeal. Otherwise, the appeal, which might be equally good in law, would be of less value in practice. In those circumstances there can be no doubt that the clerk would be competent to give, on behalf of the appellant, evidence which would be relevant and admissible, and which could not be excluded on any ground of State privilege or legal professional privilege.

With certain exceptions, such as the Sovereign and others which it is not necessary to mention, all competent witnesses are compellable; and all compellable witnesses can, of course, be ordered to attend court by a subpoena issued under R.S.C., Ord. 37, r. 20. It appears from *Rex* v. *Baines*,[1] which has not actually been cited to me, but of which I have some recollection, that a subpoena issued to a potential witness can be set aside on the ground that it is oppressive because the witness has not in fact any admissible evidence which he is in a position to give; but it cannot be set aside on the ground of the status of the witness, even though that status may be very high, unless he is within the category of specific exceptions, none of which, save perhaps one which I am going to discuss in a moment, applies to this case.

The contention on behalf of the magistrates' clerk, the respondent to this appeal, is that it would be oppressive to compel him to attend court for a variety of reasons. He does not give as a reason that he would be unable to give relevant or admissible evidence; on the contrary, it is, and it must be, conceded that he would be able to give relevant and admissible evidence. It might turn out to be valuable; it might turn out not to be valuable; as to that, I have no means of judging. It is sufficient that it would be admissible and relevant. The first reason on which he relies in his affidavit is that attendance at court would be a serious interruption of his public duty as clerk to the magistrates. That may very well be true, but the law does not recognise it as an excuse for failure to attend as a witness. Attendance as a witness commonly involves serious interruption of private or public business. Nevertheless, the law requires such attendance unless there is some other reason for exemption.

The second and more substantial reason is, it is contended, that he is a privileged person and that his notes are privileged documents. There is some authority that judges of the superior courts should not be compelled to give evidence of what takes place in cases tried before them. In *Reg.* v. *Gazard*[2] in 1838, Patteson J., before whom a question had been raised as to whether the chairman of quarter sessions should be examined by a grand jury as a witness upon a matter into which the grand jury were inquiring, said: "It is a new point, but I should advise the grand jury not to

[1] [1909] 1 K.B. 258; 25 T.L.R. 79; 21 Cox C.C. 756; 100 L.T. 78.

[2] 8 C. & P. 595.

"examine him. He is the president of a court of record, and it "would be dangerous to allow such an examination, as the judges "of England might be called upon to state what occurred before "them in court." And later in the case, in reference to another case cited before him, in which it was stated that this same thing had been done, he said [3]: "I think it is wrong, and it ought not to be done." It is clear, therefore, that in 1838 Patteson J. took the view that the judges of England ought not to be compelled to give evidence of what had taken place before them in court.

In 1844, in *Reg.* v. *Morgan*,[4] Gurney B. was clearly contemplating, as a proper possibility, the calling of a magistrate as a witness to testify to what had happened before the magistrates in a judicial or semi-judicial proceeding. In another case, also called *Reg.* v. *Morgan* [5] in 1852, the matter was carried a little further by Martin B., who said in terms that if a county court judge had been served with a subpoena to attend a trial as a witness in order to prove, apparently, the evidence given by somebody before him in a case that he had tried, he could have been compelled to go; adding that there was in that particular case no necessity to subpoena him.

In 1858, in *Reg.* v. *Harvey*,[6] the distinction implicit in the difference between what Patteson J. had said in 1838, and what had been said by Gurney B. and Martin B. in the two cases called *Reg.* v. *Morgan*,[7] became more obvious, for in that case Byles J. said that judges of the superior courts ought not, of course, to be called upon to produce their notes, and added that, if he were to be subpoenaed for such a purpose he would certainly refuse to appear. One must assume that what Byles J. meant by that was that he would in such a case apply to set aside the subpoena, and that in his view such an application would, or ought to, succeed; in other words, that he would be perhaps a competent, but certainly not a compellable witness. He went on to say that the same objection was not applicable to the judges of the inferior courts; the inferior court in question in this case being the county court. He saw no reason why they should not be called and especially where, as in that case, the judge was willing to appear. It seems, therefore, that in the middle of the nineteenth century, at any rate, the general view was that the judges of superior courts—that is to say the courts which now have become the High Court—were competent no doubt, but not compellable; but that all other judges, except presumably chairmen of quarter sessions, were both competent and compellable.

In *Ramlochan* v. *The Queen*,[8] in 1956, the Privy Council, upon an appeal from the Court of Criminal Appeal of Trinidad and Tobago, held that upon his second trial for the offence, the

[3] 8 C. & P. 595.
[4] 1 Cox C.C. 109.
[5] 6 Cox C.C. 107.
[6] 8 Cox C.C. 99.
[7] 1 Cox C.C. 109; 6 Cox C.C. 107.
[8] [1956] A.C. 475; [1956] 3 W.L.R. 117; [1956] 2 All E.R. 577.

1959

McKINLEY
v.
McKINLEY.

Wrangham J.

accused person could not as of right demand to see the judge's notes of evidence of the first trial; and that, perhaps, implied that he could not have caused a subpoena to be issued to the judge to testify with the aid of those notes. The position as it existed in the middle of the nineteenth century is, therefore, consistent with the latest decision in 1956, and is also, I think, consistent with the decision in *Duke of Buccleuch* v. *Metropolitan Board of Works*,[9] where the matter is discussed by Cleasby B.[10]

The only other authority on this that I know of is the unreported case, the name of which I believe to be *Dawson* v. *Dawson*[11]; but I have not had the advantage of seeing any report of the case, which does not, I understand, appear in any of the official law reports. I was given some information about the case from which it appears, assuming as I do that the information is correct, that the Master of the Rolls, in holding that the magistrates' clerk's notes of proceedings before the magistrates cannot be admitted in divorce proceedings under the Evidence Act, 1938, pointed out that other proper proceedings could be taken to prove that which it was being sought to prove by such production. The inference seems to be, if not irresistible at least very tempting, that what the Master of the Rolls was contemplating, although he did not say so in terms, was evidence from the magistrates' clerk; and if he had thought that it was undesirable that magistrates' clerks should come to give evidence with the aid of their notes as to what had taken place before the magistrates, it seems to me to be highly probable that in that case he would have said so.

The conclusion at which I have arrived after consideration of the authorities, is that there is no rule which prevents a magistrates' clerk from being compelled to attend and give evidence in a divorce proceeding if there is any relevant or admissible evidence which he can give; and that where he has evidence which he can give with the aid of his notes as to the proceedings which have taken place between the same parties upon the same or very similar issues, there is no reason why he should not be compelled to come and give such evidence. That, I think, disposes of the point which is really at issue between these parties in this appeal.

Two matters remain to be disposed of. First, it is highly likely that the magistrates' clerk, in order to avoid the necessity of coming to give evidence on subpoena in the circumstances which I have described, will provide the parties with his note, or a transcript of his note if it was in shorthand, before the divorce proceedings actually come on, in the hope that the note will be agreed between the parties to be an accurate record of what took place so that his attendance at the Divorce Court can be dispensed with. That is a practice which has been widespread and well

[9] (1872) L.R. 5 H.L. 418; 27 L.T. 1.

[10] L.R. 5 H.L. 418, 433.

[11] Unreported, C.A., May 20, 1955.

recognised, and of fairly long standing. Whether it is desirable that rules should be made to define more clearly the position of the magistrates' clerks, the rights of parties in divorce proceedings, and the production of the magistrates' clerk's notes before the proceedings are actually heard or at any particular stage, is a matter which falls to be considered not by me, but by those who are in charge of such matters, and about that I express no opinion. It may also be that the burden upon magistrates' clerks of supplying notes or attending court is so heavy that some form of administrative readjustment will be necessary. That, again, is not a matter for me.

The second matter that has to be disposed of is the form of the subpoena which, in my judgment, should be allowed in these proceedings. For reasons into which it is not now necessary to enter in detail, the appellant in these proceedings issued the subpoenas both to the magistrates' clerk at Kingston-upon-Hull and to his assistant. It was his assistant who in fact acted as clerk to the stipendiary magistrate on the occasion upon which the relevant proceedings were heard.

If the clerk to the magistrates had thought fit to reveal to the appellant that a note of the proceedings existed in his possession, but that it would be handed to the assistant if the assistant were to be compelled to come to court I do not think that the appellant ever would have issued any subpoena to the clerk to the magistrates. As it is, it is now plain that the subpoenas to the clerk to the magistrates have become unnecessary—although I do not say they were unnecessary at the beginning. The subpoenas should therefore be set aside. The subpoenas to the assistant should stand and should stand subject to any argument about their form.

[His Lordship stated that, in his opinion, the assistant could not be compelled to bring five copies of his notes to court but only the notes which existed. The subpoena duces tecum against the assistant should be amended to order him to bring with him and produce his note of the proceedings.]

Order accordingly.

Solicitors: *Pearlman & Rosen, Hull; Williamsons, Hull.*

[PROBATE, ETC., DIVISION.]

* PRACTICE DIRECTION (COSTS).

1960
Jan. 22.

Probate—Costs—Taxation—Bill to show item numbers—Supreme Court Costs Rules, 1959 (*R.S.C.* (*No.* 3), 1959 (*S.I.* 1959, *No.* 1958), *Sch.* 2), *Appendix* 2.

Husband and Wife — Practice — Costs — Taxation — Bill to show item numbers—Supreme Court Costs Rules, 1959 (*R.S.C.* (*No.* 3) 1959 (*S.I.* 1959, *No.* 1958), *Sch.* 2), *Appendix* 2.

1960

PRACTICE DIRECTION (COSTS).

Bills drawn for taxation under Appendix 2 to the Supreme Court Costs Rules should show the item number in the Appendix under which each item of the bill is charged.

B. LONG,
Senior Registrar.

January 22, 1960.

[*Note*: This Direction will be included in the Compendium.]

[COURT OF APPEAL,]

C. A.

1959
Dec. 16.

Willmer and Harman L.JJ.

*DAWS *v.* DAILY SKETCH AND DAILY GRAPHIC LTD. AND ANOTHER.

[1959 D. No. 167.]

DARKE AND OTHERS *v.* SAME.

[1959 D. No. 848.]

Practice and Procedure—Consolidation of actions—Libel—Whether order for consolidation can be made on summons for directions in second action—Discretion—Principles of exercise.

On February 5, 1959, a police officer issued a writ for libel against the proprietors of a newspaper and the author of an article published in it. After the summons for directions had been taken out a second action was started, on June 25, against the same defendants in respect of the same article by a group of police officers who were associated with the plaintiff in the first action. The defences to the two actions were not the same. The same solicitors acted for the plaintiffs in both actions; those solicitors were informed that on the summons for directions in the second action the defendants were going to apply for an order consolidating the two actions, but no summons in the first action was issued. The master refused the application but on appeal the judge made an order consolidating the actions. The plaintiffs appealed:—

Held, allowing the appeal, that it was a fatal objection to the order consolidating the actions that it was made in the second action, and purported to direct how the first action should proceed without a summons being issued in the first action. Moreover, in the circumstances, there was not a common question of law or fact bearing sufficient importance in proportion to the rest of the action to render it desirable that the whole of the matters should be disposed of at the same time, and, accordingly, the judge had erred in principle in the exercise of his discretion.

Dictum of Scrutton L.J. in *Horwood* v. *Statesman Publishing Co.* (1929) 98 L.J.K.B. 450, 453; 45 T.L.R. 237 applied.

APPLICATION for leave to appeal out of time.

On January 22, 1959, the Daily Sketch and Daily Graphic Ltd. published an article by Peter Duffy. On February 5 Edmund

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[Reported by Miss EIRA CARYL-THOMAS, Barrister-at-Law.]

Walter Daws, an officer in the metropolitan police force, issued a writ alleging that he had been libelled in the article. The statement of claim was delivered on February 27, the defence on March 31, and there was a summons for directions in May. On June 25 a second action was started against the same defendants in respect of the same article by Norman John Horatio Darke, Eric John Wallace, Stanley Wilfred Wheal, James Rennie Norman and George Stretton Downes, who were officers associated with Daws in the same department of the metropolitan police. In both actions there was a denial by the defence that the words were defamatory. In the first action the only other defence was as to damages, and included an allegation that an offer was made to publish an apology; in the second action there was an issue raised as to whether the words complained of referred to, or were capable of referring to, the plaintiffs or to any of them, and an issue as to damages but with no reference to any offer of an apology.

The same solicitors acted for the plaintiffs in both actions, and they were informed that the defendants were going to apply for an order consolidating the two actions on the summons for directions in the second action. No summons in the first action was issued. On October 22 Master Harwood refused the application, but on October 30, Havers J. allowed an appeal from the order of Master Harwood and made an order in the second action consolidating the two actions.

The plaintiffs applied for leave to appeal out of time against the order made by Havers J. At the hearing before the Court of Appeal the application was granted and the hearing was treated as the appeal, the plaintiffs alleging, inter alia, that the judge had no jurisdiction to make an order in the second action affecting the first action.

Gilbert Beyfus Q.C., *L. J. Belcourt* and *H. S. A. Hart* for the appellants.

Neville Faulks Q.C. and *David C.-H. Hirst* for the respondents.

The following cases, in addition to those which are referred to in the judgment, were cited in argument: *Marchant* v. *Ford, Peter Davies Ltd.*[1]; *Evans* v. *Bartlam.*[2]

WILLMER L.J. This is an application for leave to appeal, and to appeal out of time, against an order made by Havers J., whereby he allowed an appeal from Master Harwood and made an order for the consolidation of two actions. On both sides technical questions arise. The plaintiffs are technically out of time, and they, in their turn, raise a technical point against the defendants with which I will deal in one moment.

[1] [1936] 3 All E.R. 104.

[2] [1937] A.C. 473; 53 T.L.R. 689; 106 L.J.K.B. 568.

C. A.
1959
Daws v. Daily Sketch and Daily Graphic Ltd.
Willmer L.J.

The first action is an action by an officer in the metropolitan police force and is brought against the proprietors of a newspaper in respect of an article published in that newspaper whereby the plaintiff alleges that he was libelled. The second action is brought by a group of officers who are associated with the plaintiff in the first action in the same department of the metropolitan police. The second action is brought by those plaintiffs against the same defendants in respect of the same article.

The defences to the two actions are not the same. It is true that in both actions there is a denial that the words are defamatory. But in the case of the first action the only other defence is as to damages, and in connection with that it is pleaded that an offer was made to publish an apology in a form set out in the defence, which offer was not accepted by the plaintiff. With regard to the second action, however, there is an issue raised as to whether the words complained of in the article refer to, or are capable of referring to, the plaintiffs or to any of them. There is also in that case an issue as to damages, but that issue is not complicated, as in the first action, by any allegation that an offer of apology was made.

The first action, brought by Daws, I will for convenience refer to as action No. 167; and the second action, in which several other plaintiffs are joined, I will refer to as No. 848. The question arose on the summons for directions in action No. 848. There was a good deal of difference in time between the progress of the two actions. In the first action, No. 167, the statement of claim was delivered on February 27, 1959, and the defence was delivered on March 31. There was a summons for directions in that action some time in May. The writ in the second action was not issued until June 25, 1959, that is to say, after the summons for directions in the first action. The statement of claim was delivered on June 27, and the defence was delivered on July 16.

When it came to the summons for directions in the second action, No. 848, one of the reliefs asked for was an order consolidating the two actions. The same solicitors acted for both sets of plaintiffs, and there is no doubt that the solicitors appearing for all the plaintiffs were duly informed that the application for consolidation was going to be made on the summons for directions in action No. 848. But no summons in action No. 167 was issued. I make that observation, bearing in mind that a form of summons for use in such circumstances is provided in the Annual Practice (1960) and appears as Form No. 4D, 1 on p. 2374. No such summons was taken out. When the matter came before the learned master he declined to make any order consolidating the two actions.

On appeal, Havers J. took the other view. He apparently regarded the fact that notice had not been given in the first action, No. 167, as a mere technicality, and on the merits of the application he made an order consolidating the two actions. The order was in fact made in action No. 848. So far as I know, up

to date no order has been made in action No. 167. In the absence of any summons in action No. 167, I do not see how any order could have been made in that action.

In those circumstances, the first point taken by the plaintiffs is that there was no jurisdiction in the judge to make any order at all affecting action No. 167. It has been argued before us very forcibly by Mr. Faulks, for the defendants, that that point is the merest technicality, that there is no merit in it at all, that the common solicitors knew all about it all the time, and that it would have been the easiest possible matter to cure, and, indeed, to cure even now, by drawing up an order in each of the two actions. But I have drawn attention to the provision of a form suitable for use in such a case as this, and I am bound to say that on this issue, in my judgment, the plaintiffs must succeed. I think it is a fatal objection, however unmeritorious it may be, that an order was made in action No. 848 purporting to direct how action No. 167 should proceed.

I confess that I dislike deciding an issue like this on a mere technical ground, and I am therefore consoled by the fact that I am now able to say that in my judgment, on the merits, the case is one in which the judge erred in the exercise of his discretion, and, as I see it, erred in principle in such a way as to entitle this court to interfere. The judge, we were told, relied very much upon the words used by Scrutton L.J. in *Horwood* v. *Statesman Publishing Co.*,[1] words which I think he was repeating from an earlier case of *Payne* v. *British Time Recorder Co.*[2]

The learned Lord Justice said[3] that the effect of the "latter "decisions is that you must look at the language of the "rules and construe them liberally, and that where there are "common questions of law or fact involved in different causes of "actions you should include all parties in one action, subject "to the discretion of the court, if such inclusion is embarrassing, "to strike out one or more of the parties. It is impossible to lay "down any rule as to how the discretion of the court ought to "be exercised. Broadly speaking, where claims by or against "different parties involve or may involve a common question of "law or fact bearing sufficient importance in proportion to the "rest of the action to render it desirable that the whole of "the matters should be disposed of at the same time the court "will allow the joinder of plaintiffs or defendants, subject to its "discretion as to how the action should be tried."

It seems to me, however, that when we look at the issues raised in this case we are far from finding here "a common "question of law or fact bearing sufficient importance in propor-"tion to the rest of the action to render it desirable that the "whole of the matters should be disposed of at the same time." The only issue in the two actions which is, strictly speaking,

[1] (1929) 98 L.J.K.B. 450; 45 T.L.R. 237.

[2] [1921] 2 K.B. 1, 16.

[3] 98 L.J.K.B. 450, 453.

C. A.
1959
DAWS v. DAILY SKETCH AND DAILY GRAPHIC LTD.
Willmer L.J.

common to both of them is the issue as to whether the words are defamatory at all, an issue which, as Mr. Beyfus suggested, might well be one which would not give the jury very much trouble. But there are very distinctive differences between the matters in issue in the two actions, having regard to the different defences put forward, to which I have already referred. In so far, therefore, as Scrutton L.J. was setting out any principle on which discretion should be exercised in what he said in *Horwood's* case,[4] I do not think that this case falls within that principle, and I am prepared to say that, in my judgment, the learned judge in this case erred in principle in the order he made.

The matter, however, does not quite rest there, for, thanks to the good sense of counsel who appear before us, there has been a certain amount of mutual concession, and both of them, I understand, are disposed to agree that, in lieu of an order for consolidation, it would be a proper case in which to make an order that the two cases be tried consecutively. That would involve action No. 848 being expedited so as to follow immediately after action No. 167. The only issue which appeared to remain between counsel, after having applied their minds to that suggestion, was that on one side it was said that the actions should follow each other so as to be tried by the same judge and jury, whereas on the other side it was said that that should be left to the discretion of the judge at the time, because it might be inconvenient to employ the same jury on the hearing of the second action as on the hearing of the first. As to that, I should have thought it was most important that the two actions should be dealt with by the same jury.

In those circumstances, and especially having regard to the close measure of agreement between counsel, I have come to the conclusion that this is a case in which leave to appeal should be granted, notwithstanding the fact that the plaintiffs are out of time, and that on the appeal the proper order should be that the appeal is allowed, the order for consolidation set aside and replaced by an order that the two actions be tried consecutively by the same judge and jury.

HARMAN L.J. I agree, and have nothing to add.

Appeal allowed with costs.

Solicitors: *Edward Thompson & Hauser; Swepstone, Walsh & Son.*

[4] 98 L.J.K.B. 450, 453.

[PROBATE, ETC., DIVISION.]

* PEPPER v. PEPPER.

1960
Jan. 18.

Lord Merriman P. and Collingwood J.

Husband and Wife—Justices—Maintenance—Attachment of earnings—Effect of order in subsequent proceedings as to quantum—Married Women (Summary Jurisdiction) Act, 1895 (58 *&* 59 *Vict. c.* 39), *s.* 7—*Maintenance Orders Act,* 1958 (6 *&* 7 *Eliz.* 2, *c.* 39), *s.* 6.

Husband and Wife — Maintenance — Justices — Jurisdiction — Wife's application for custody of and maintenance for child—No cross-complaint by husband—Whether original maintenance ordered for wife may be decreased.

Estoppel — Per rem judicatam — Husband and wife — Maintenance — Quantum—Attachment of earnings order—Subsequent proceedings.

In February, 1959, justices made an order in favour of a wife with maintenance for herself and two children of the marriage. On August 11, 1959, the husband having meanwhile made two unsuccessful applications for a decrease in the amount of the order, the wife's complaint for an attachment of earnings order under the Maintenance Orders Act, 1958, was heard, and after making the assessment of protected earnings and normal reduction rate as required by section 6 of that Act,[1] an order was made.

On August 13, 1959, the justices, on the wife's complaint for a variation of the original order by granting her the custody of and maintenance for a subsequently born child of the marriage, decreased the amount of the original order to conform with the assessment of the normal reduction rate. From that decision the wife appealed:—

Held, (1) that in the absence of a cross-complaint by the husband the justices had no jurisdiction to interfere with the original order.

Trathan v. *Trathan* [1955] 1 W.L.R. 805; [1955] 2 All E.R. 701 applied.

(2) That the assessment of the normal deduction rate in attachment of earnings proceedings under section 6 of the Act of 1958, as to which potential earnings were not relevant, did not constitute an estoppel as to the husband's means in the subsequent proceedings arising from the wife's complaint to vary; the appeal must be allowed and a rehearing ordered.

[1] Maintenance Orders Act, 1958, s. 6 (3): "An attachment of earnings order shall—(*a*) specify the normal deduction rate, that is to say, the rate at which, after taking into account any right or liability of the defendant to deduct income tax from payments made under the related maintenance order, the court making or varying the attachment of earnings order thinks it reasonable that the earnings to which that order relates should be applied from time to time in satisfying the requirements of the maintenance order, not exceeding the rate appearing to that court to be necessary for the purpose of—(i) securing payment of the sums falling due from time to time under the maintenance order; and (ii) securing payment within a reasonable period of any sums already due and unpaid under the maintenance order and any costs incurred in proceedings relating to the maintenance order which are payable by the defendant; (*b*) specify the protected earnings rate, that is to say, the rate below which, having regard to the resources and needs of the defendant and the needs of persons for whom he must or reasonably may provide, the court aforesaid thinks it reasonable that the relevant earnings within the meaning of the Schedule to this Act should not be reduced by a payment made in pursuance of the attachment of earnings order; . . ."

1960

Pepper
v.
Pepper.

Appeal from the Melton Mowbray justices.

On February 12, 1959, an order on the grounds of the husband's adultery and desertion was made in favour of the wife by the Melton Mowbray justices by which the wife was granted the custody of the two children of the marriage and the husband was ordered to pay the sum of £5 10s. for the maintenance of the wife and children. At that time the husband was a bus driver said to be earning £11 a week or thereabouts. The husband subsequently gave up his earnings as a bus driver and took employment as a farm worker, the advantage of which to him was that with the employment went a tied cottage, available for the occupation of himself and the woman with whom he was living, and who was pregnant by him.

On April 21, 1959, he made an application to reduce the amount of the order, on the ground that his wages, which he was earning as a farm worker, were only £7 6s. 1d. net, and he also applied for the remission of a certain sum off the arrears at the time. That application was dismissed. He applied again with a complaint to reduce, which was likewise dismissed on May 12, 1959, when the court must have had before it the fact that the husband was still in farm work and had not resumed his work as a bus driver.

On July 18, 1959, a third child of the marriage was born, and on August 7, 1959, the wife made a complaint seeking, on that ground, a variation of the original order granting her the custody of and maintenance for the third child, the return date for which was August 13, 1959. In the meanwhile, just after the child was born, the wife took out a summons for committal of the husband in respect of arrears, which were just under £60, the return date for which was July 28, 1959. Upon the suggestion of the justices' clerk that complaint was not proceeded with, and a complaint was taken out for an attachment of earnings order under the Maintenance Orders Act, 1958. That complaint was heard on August 11, 1959, and on that occasion the justices heard evidence which, in substance, agreed with what the husband was putting forward when he asked for a variation in his favour in April, 1959, that the gross wages were £7 16s. and the net wages £7 6s. 1d., and found that the "protected earnings" and the "normal deduc-"tion rate" under section 6 of the Maintenance Orders Act, 1958, were £4 16s. 1d. and £2 10s. respectively.

On the hearing of the wife's complaint for variation on August 13, 1959, the court proceeded on being informed about the protected earnings and the net wages, to recast the original order so that it conformed to the normal deduction rate, and varied the order for the wife down to £1, with 10s. in respect of each child, having in the meanwhile accepted the evidence that the third child was the child of the husband and that there were, therefore, three children to be paid for instead of only two.

From that decision the wife appealed.

Brian Woods for the wife.
G. D. Lane for the husband.

The cases cited in argument are referred to in the judgment.

LORD MERRIMAN P. referred to the facts and to the provisions of section 6 of the Maintenance Orders Act, 1958, remarking that it was the first occasion on which that Act had fallen to be considered by the court, and continued: It has been argued that if you apply to vary an order under section 7 of the Married Women (Summary Jurisdiction) Act, 1895,[1] or, to put it in concrete form, if the wife applies, as she did in this case, to add an additional figure, namely, for the third child, to the original order, it follows that magistrates may increase or diminish the amount of any weekly payment ordered to be made as long as they stay within the limits. I do not think that is the effect of the section, in that bald form, and I certainly do not think that when an application to vary is of a specific kind and for the express reason that a third child has been born, that automatically imports the right to tear up the original order and rewrite it altogether.

For my part, I think that this is a matter which this court has already decided, and I propose to hold that we are bound by the original decision. In *Trathan* v. *Trathan*,[2] Davies J. and I, sitting in this court, took what we thought was the strict view, and, if I may, I will read one passage from my own judgment, which was repeated, incidentally, in the later case of *Bowen* v. *Bowen*.[3] The actual point in *Trathan* v. *Trathan*[4] was that on an application to vary the justices had taken upon themselves the right to discharge the order, and I said[5]: " . . . it is quite plain on the " face of section 7 itself that, though these things are all put " together in one sentence, they do, in fact, raise quite separate " issues, and there must be, in my opinion, under the Magis- " trates' Courts Act, 1952, as there must have been under the " Summary Jurisdiction Act, a complaint which alleges that " there should be an alteration and upon what ground; or that " there should be a variation and upon what ground; or " that there should be a discharge, and again upon what " ground, though in that case at least the ground must be based " upon 'fresh evidence.'" That was, of course, to draw the distinction between complaints which are merely for variation of amount—with regard to which I need only say that it is common knowledge that the requirement of the words " upon fresh

[1] Married Women Summary (Jurisdiction) Act, 1895 (as amended), s. 7: " A court of summary jurisdiction . . . " may, on the application of the mar- " ried woman or her husband, and " upon cause being shown upon fresh " evidence to the satisfaction of the " court at any time, alter, vary or dis- " charge any such order, and may " upon any such application from time " to time increase or diminish the " amount of any weekly payment " ordered to be made . . . "

[2] [1955] 1 W.L.R. 805; [1955] 2 All E.R. 701.

[3] [1958] 1 W.L.R. 508; [1958] 1 All E.R. 770.

[4] [1955] 1 W.L.R. 805.

[5] Ibid. 812.

1960

PEPPER
v.
PEPPER.

Lord Merriman P.

"evidence" has been got rid of—and those cases in which discharge would almost necessarily involve the calling of fresh evidence. So here, this is a case which can only be brought upon fresh evidence, because it is the subsequent birth of the child since the order was made which entitled the wife to ask for the particular variation. But it is said that Davies J., who agreed absolutely with my judgment and said so,[5] has, in a passage I am going to read in a moment, said something which affords authority for the view that on any sort of application to vary, anything may be done by way of variation one way or the other. Davies J. said[6]: "For the reasons which my Lord has "given I agree that on an application by a wife for an increase "of the amount payable under an order the court has no power, "unless proper steps by a cross-summons are taken, to entertain "an application to discharge that order. I do not think it is "necessary to repeat the reasons that my Lord has given, or to "examine the statutes. I should like to add that I do not think "it is necessary to decide, for the purposes of this appeal, "whether on an application to increase the amount of an order, "the court has power to decrease it. I do not desire to express "any view about that, as I do not think it is necessary for "the purposes of this decision. For we are here concerned with "a case where the justices upon an application to increase have "purported to entertain an application to discharge, and for the "reasons that my Lord has given I am satisfied that that is "wrong." It seems to me that that passage is a very long way from affording any authority for the sort of case with which we are dealing here, which, I repeat, is an application to vary because of the "fresh evidence" that a child has subsequently been born, and which is said to give justices the opportunity to revise the whole order—maintenance for the wife, maintenance in respect of the other children, and, presumably, to alter the custody order in respect of the other children if they thought fit to do so. I do not agree, and I think that we are bound by the decision in *Trathan* v. *Trathan*[7] to hold that that point is not a good one.

[His Lordship then referred to the dates and facts of the various proceedings before the justices, and continued:] The procedure adopted by the justices on August 13, 1959, was clearly irregular, first, because I am of opinion still, as this court held in *Trathan* v. *Trathan*,[8] that any order such as was made by the justices on August 13, 1959, required a cross-complaint on the part of the husband, of which it is admitted there was none. Secondly, I do not think, even assuming that the justices had the technical right to act at all in connection with the alteration of the original order in the sense that I have mentioned, that they had, strictly speaking, the right to do so merely on the strength of what they or some other justices had heard in connection with

[5] [1955] 1 W.L.R. 812.
[6] Ibid. 813.
[7] Ibid. 805.
[8] Ibid.

the attachment of earnings order two days before. This matter must, therefore, go back to the justices and the husband must issue a complaint for reduction of the order, in whatever sense he can make good by evidence, and his evidence must be subject to being tested.

Although I agree that there is some force in the argument, I am not convinced that there is an estoppel as between these two parties about the husband's means merely because of the form the attachment of earnings order took two days before, but I do realise, and I think this must be stated plainly, that a great deal of what I have said, if strictly accurate so far as the Maintenance Orders Act, 1958, is concerned, may prove to be more or less academic. I say so for this reason: on any ordinary application to vary either up or down, and assuming that the application either way is supported by a proper complaint on proper grounds, the basic thing that has to be ascertained, not the only thing but the basic thing, in terms of the Married Women (Summary Jurisdiction) Act, 1895, is, what are the means of the parties, and now that we have got rid of the words "upon "fresh evidence" in connection with mere variations of amount up or down, if the original amount appears to be too much on the one hand or too little on the other hand, that is all that has to be decided, and there is ample authority for that which I do not propose to repeat. What is to be taken into account in the justices' court is, what the husband's earnings are, what his responsibilities are, whether the wife is earning money, and so forth, balancing one thing against another and arriving at a right figure.

I have said that, in my opinion, a finding under the attachment of earnings procedure is not necessarily binding on any such inquiry, but I am going to read the words governing the calculation of the "normal deduction rate" which appear in section 6 (3) (*a*): [His Lordship read the subsection and continued:] Pausing there, I wish to reserve the point which has been taken that, in this case, seeing that the related order was for a total sum of £5 10s., as soon as the justices went into the figures and saw that only £2 10s. was going to be available at all—(and I know in passing that it is suggested that they reserved the question of outstanding arrears to be dealt with on another occasion)—it at once became apparent that any order they might make would not secure "payment of the sums falling due from "time to time under the maintenance order," because by no known procedure can £2 10s. be made sufficient to pay £5 10s., or secure payment of the "sums already due and unpaid" under the maintenance order. I express no opinion upon that until I have heard the point properly argued, but I know that it is one of the points to be considered.

Under section 6 (3) (*b*) an attachment of earnings order shall "specify the protected earnings rate, that is to say, the rate "below which, having regard to the resources and needs of the

1960

PEPPER
v.
PEPPER.

Lord Merriman P.

"defendant"—and then I stress these following words—"and "the needs of persons for whom he must or reasonably may "provide, the court aforesaid thinks it reasonable that the "relevant earnings within the meaning of the Schedule to this "Act should not be reduced by a payment made in pursuance "of the attachment of earnings order." That is the sum of £4 16s. 1d. at which they arrived under the attachment of earnings procedure. When it is said in arriving at that that they have had "regard to the resources and needs of the defendant "and the needs of persons for whom he must or reasonably may "provide," that seems to me to be something very like a definition of, or at least a pointer to, the various factors which a court should take into account in considering the means of the parties, and it is much too late in the day for any court to say: "We only considered the husband and the wife. We ignored the "claims of the second or unofficial wife and the second or "unofficial family" as the case may be. It is too late in the day to say the court shall take that rigid view, and, therefore, it seems to me that the words "for whom he must or reasonably may "provide" would impel the court to consider the means of the parties, not, indeed, to prefer the paramour and her expected child to the needs of the wife and her children, but to take into account the fact, as was said in the Report of the Royal Commission on Marriage and Divorce,[9] that there is not the money to go round, and to find the fairest way they can of apportioning the money. That is why I say, at the end of it all, that when this rather tangled skein is sorted out and put on a regular basis the justices may get back very nearly to where we started with this, as I say, irregular order.

But that, of course, is the inevitable result so long as this attachment of earnings order holds the field. I want to make this plain, if it is not already plain from the words of the section itself, that I reject the suggestion that in an attachment of earnings case the justices have any right to consider the potential earnings of the defendant in some other occupation than that in which it is sought to attach his earnings. That will not do. The attachment of earnings procedure works by directing to a particular employer an order to pay out of the wages which he is paying to the husband in respect of a particular employment a specific sum either to or for the benefit of the wife, and in that calculation the question whether the husband has a potential capacity to earn greater wages does not come into the picture at all.

It may be that the proper course in this case, apart from putting the husband right in the way in which he can bring his side of the matter before the court, is that the wife may be advised, if it is possible, to get rid of this attachment of earnings order and go back to the ordinary enforcement procedure, and, if she is able, to base it not only upon his actual earnings but

[9] Para. 495.

upon his potential earnings; but I express no opinion about that because it is not my business. It may be, and again I express no opinion, that although subsisting enforcement proceedings are got rid of by section 9 of the Maintenance Orders Act, 1958, if she reverts to the procedure of ordinary enforcement, then that notice will vacate the attachment of earnings order, and the matter might then be dealt with on that basis. But, as I say, we have so little real information about the way in which this matter stands from that point of view that I do not propose to lay down any dogmatic view on that subject.

I end, therefore, as I began, by saying that, in my opinion, in its present form this order cannot stand, and the wife's complaint must be remitted to the justices for the whole matter to be put in order, so far as it can be put in order, and dealt with on a proper basis.

COLLINGWOOD J. I agree. What the justices have in effect done is to substitute the figures which they have found to be the proper figures on inquiry under the attachment order for the original order which the wife had obtained in February of last year.

Mr. Lane, for the husband, has urged before this court that that is within their powers, because once a wife asks for a variation that opens the door to justices to vary either up or down and that they are not restricted to varying upwards, although that is the only thing the wife was asking for. If that is correct, what it involves is that every application by a wife for an increase in maintenance imports an implied application by the husband to reduce without there being any necessity for notice being given to the wife that such application is to be made.

In my opinion that is not correct, and that it is not correct is clear, I think, from the judgment of Lord Merriman P. in *Trathan* v. *Trathan*,[10] and I cannot see any justification for drawing the conclusion which Mr. Lane would have us draw from the reservation made by Davies J. in his judgment in that appeal.

In my opinion the justices were mistaken in the course which they took here. They had no power to vary the order in the way in which they did upon the application which was then before them, and I agree that the case should be remitted.

Appeal allowed.

Solicitors: *Barradale, Blacket Gill, Silkin & Young for Latham, New & Smyth, Melton Mowbray; Dawson & Co. for H. P. Rushton, Grantham.*

E. J.

[10] [1955] 1 W.L.R. 805.

[QUEEN'S BENCH DIVISION.]

1960
Feb. 9.

Lord Parker C.J. and Donovan J.

* *In re* WRING.

In re COOK.

PRACTICE NOTE.

Habeas Corpus—Criminal cause or matter—Prisoner serving sentence—Application by—Practice.

APPLICATIONS for writs of habeas corpus.

The applicants, Brian John Wring and Albert Samuel John Cook, both now serving sentences of imprisonment, applied to the Divisional Court for writs of habeas corpus. Wring had been sentenced to five years' imprisonment on September 25, 1958, at Bristol Assizes for shopbreaking, larceny and possessing explosives; Cook to four years' imprisonment on September 26, 1958, at Somerset Quarter Sessions for false pretences and receiving.

The applicants appeared in person.

LORD PARKER C.J. The court has considered these two applications made by prisoners in person for habeas corpus. The court is quite clear that there is nothing in the grounds raised which would enable this court to make the order.

The court would like to take this opportunity of setting out the position in regard to these applications. The Divisional Court of the Queen's Bench Division has repeatedly stated that habeas corpus is not to be regarded as a means of appeal against conviction or sentence. As the court stated in *In re Featherstone* [1]: "The court does not grant, and cannot grant, writs of habeas "corpus to persons who are in execution, that is to say, persons "who are serving sentences passed by courts of competent "jurisdiction. Probably the only case in which the court would "grant habeas corpus would be if it were satisfied that the "prisoner was being held after the term of the sentence passed on "him had expired." Accordingly, a prisoner who wishes to challenge either his conviction or his sentence should apply to the Court of Criminal Appeal or to quarter sessions, as the case may be. If the prisoner nonetheless persists in his desire to apply for habeas corpus, the courses open to him are: (a) to consult a solicitor about the possibility of instructing counsel to make an application on his behalf, or (b) to ask someone to make an application for him or arrange for one to be made, and in either case to swear the necessary affidavit, or (c) to apply to the local committee of the Law Society for legal aid for the purpose of making an application.

[1] (1953) 37 Cr.App.R. 146, 147.

There is no right of access to the Divisional Court otherwise than by the means described above. As a concession, however, the court is prepared to consider any written statement by the prisoner setting out the grounds on which he considers that he is unlawfully detained and sent by letter to the Master of the Crown Office. This is not an application, since it is not in accordance with the Supreme Court Rules, but the Divisional Court (or in vacation the vacation judge) does as a matter of practice consider the letter and statement in order to see whether the prisoner has an arguable point. If he has, the court arranges for the Official Solicitor to instruct counsel to make a formal application under the rules on the prisoner's behalf. If the court is of opinion that there is no arguable point, the prisoner is informed that the court sees no reason to depart from the formal procedure, leaving it to the prisoner to proceed in accordance with the rules. Prisoners will not be permitted to make such an informal approach more than once.

The Divisional Court has ruled that no applicant for a writ of habeas corpus can be heard in person unless some exceptional ground is shown for departure from the established practice: compare *In re Greene.*[2] A prisoner, therefore, is not produced for the purpose of making an application in person unless the court so directs.

These applications are refused.

Applications refused.

E. M. W.

[2] (1941) 57 T.L.R. 533.

[HOUSE OF LORDS.]

H. L. (E.)†

1960 *Feb.* 11.

VERNAZZA, *In re.*

* ATTORNEY-GENERAL . . . . . PETITIONER;

AND

VERNAZZA . . . . . RESPONDENT.

* VERNAZZA . . . . . PETITIONER;

AND

ATTORNEY-GENERAL . . . . . RESPONDENT.

PETITIONS for leave to appeal to the House of Lords from the decision of the Court of Appeal in *In re Vernazza.*[1]

The Appeal Committee granted the petition of the Attorney-General and dismissed the petition of Vernazza.

† *Present*: VISCOUNT SIMONDS, LORD RADCLIFFE and LORD KEITH OF AVONHOLM.

[1] [1960] 2 W.L.R. 135; [1960] 1 All E.R. 183.

[COURT OF APPEAL.]

C. A.

1960
Jan. 21, 22.

Lord Evershed M.R., Willmer and Upjohn L.JJ.

* *In re* BOULTON.

PUBLIC TRUSTEE *v.* ROBB.

[1959 B. 148.]

Revenue—Estate duty—Contribution to—Estate duty not claimed on assigned part of fund—Whether duty payable rateably out of whole fund—Finance Act, 1894 (57 *&* 58 *Vict. c.* 30), *ss.* 1, 9.

A testator, who died in 1914, directed his trustee to hold a fund upon trust to pay the income to his sister C. for her life and, in the event which happened, of her having no issue, the fund was to be held in trust for his sister M. for life and her issue; subject to such trusts, the testator directed that the trust fund should be held on trust in equal shares for such of three named cousins as should be living at the death or failure of the issue of the testator's last surviving sister, such cousins' issue to take their deceased parents' share per stirpes. All three cousins named in the will died before the sisters named in the will. All left issue who lived to take a share of capital. In 1950 the sister M. assigned her reversionary life interest to the trustees of the will (subject to the reservation to herself of an annual sum which was also subsequently similarly assigned) upon trust to pay the income of the fund to the same persons and in the same manner as it would have been payable under the will if she had died. By an assignment of 1951 C. assigned to R. (the only child of one of the then deceased cousins) one-third part of her life interest in the trust fund to the intent that such life interest should, so far as the law permitted, merge in the reversionary interest of R. C. died in 1958 and M. in 1959, both unmarried. On the death of C. estate duty was claimed on the two-thirds of the trust fund of which she was in receipt of the income at her death. The question raised was whether the duty ought to fall exclusively on the two-thirds of the fund or rateably on the whole fund:—

Held, assuming that the Estate Duty Office had rightly levied estate duty on two-thirds of the trust fund on the footing that the remaining third did not pass on the tenant for life's death, then the conclusion followed that under section 9 (1) of the Finance Act, 1894,[1] the burden of the duty fell to be borne by the two-thirds of the fund which attracted the levy.

Decision of Vaisey J. affirmed.

APPEAL from Vaisey J.

Matthew Ernest Boulton, by his will dated December 13, 1912, directed his trustees to hold the trust fund thereby constituted upon trust to pay the income to his sister, Clara Gertrude Boulton (hereinafter called "Clara"), during her life, and after her death for her issue, and in the event (which happened) of her having no children, upon the like trusts for his sister, Pauline Margaret Boulton (hereinafter called "Margaret"), and her issue (she had

[1] Finance Act, 1894, s. 9: "(1) A "rateable part of the estate duty on "an estate, in proportion to the value "of any property which does not "pass to the executor as such, shall "be a first charge on the property "in respect of which duty is "leviable; . . ."

none) and, subject to trusts in favour of a third sister (which wholly failed), the testator by clause 19 of his will directed that subject to all the trusts thereinbefore contained the trust fund and the income thereof should be held in trust in equal shares for such of his cousins, Major-General Frederick Spencer Wilson Robb, Montagu Caesar Robb and Geoffrey Charles Napier Sturt (in the said will called Geoffrey Sturt), as should be living at the death or failure of issue of the testator's last surviving sister, or should have previously died leaving issue then living, such issue to take their parents' share in equal shares per stirpes, and if none of his said cousins should be living or have died leaving issue living at the time aforesaid, then in trust for such persons as the last survivor of his sisters should appoint. The testator died on July 14, 1914.

By an order made by Harman J. on December 6, 1948, in proceedings whereof the short title and reference to the record are "*In re* Boulton's Will Trusts, The Public Trustee *v.* Sturt, 1948 "B. No. 3174," it was declared that the ultimate trust contained in clause 19 of the will in favour of the testator's three cousins and their respective issue was a valid and effectual trust and, accordingly, the class of persons to take (subject to the respective life interests of Clara and Margaret) would be such of the said cousins as should be living at the death of the survivor of Clara and Margaret without leaving issue, and the issue then living (taking per stirpes) of such of the cousins as should be then deceased.

By an assignment dated January 2, 1950, Margaret directed the then trustees of the will, if she should survive Clara, to appropriate investments out of the trust fund sufficient by their income to produce £3,000 a year, and to hold the income of the appropriated fund upon trust for herself during her life. She assigned to such trustees all the income to arise during her life from the balance of the trust fund upon trust to pay it to the same persons and in the same manner as it would have been payable if she had died immediately before such instalment of income had commenced to accrue. By an assignment of March 27, 1955, Margaret assigned to the Public Trustee (the then sole trustee of the will), the income to which she might become entitled in the fund appropriated to produce £3,000, to the intent that such income should be held upon the trusts declared of the income assigned by the deed of January 2, 1950. The result of the two assignments was that Margaret wholly divested herself of her reversionary life interest in the fund.

By an assignment of July 17, 1951, made between Clara and Eustace Frederick Robb (hereinafter called "Major Robb") Clara assigned to Major Robb, the only child of Major-General Frederick Spencer Wilson Robb (one of the cousins named in the testator's will who was then dead), her life interest in one equal third part of the trust fund.

C. A.
1960
BOULTON, *In re.*

Clara died unmarried on February 8, 1958. The three cousins named in the testator's will all predeceased her leaving issue who survived her.

The Estate Duty Office, in consequence of Clara's assignment of July 12, 1951, claimed duty on her death in respect of two-thirds only of the trust fund. Such duty was estimated to exceed £170,000.

By this summons the Public Trustee, as sole trustee of the will, asked whether the estate duty leviable in respect of two-thirds of the trust fund by reason of Clara's death ought to fall on the two-thirds of the fund in which Major Robb was not interested in exoneration of the third in which he was interested, or ought to fall rateably on the whole fund.

When the summons was issued Margaret was alive; she died, unmarried, before the hearing on May 4, 1959.

The defendants to the summons were Major Robb (the only child of the cousin General Sir Frederick Spencer Wilson Robb), who was the first defendant, the children, or their successors in title, of Montagu Caesar Robb being defendants Nos. 2, 3, 4, 5, 6, 7 and 8, and the child and the children of a deceased child of the cousin Geoffrey Charles Napier Sturt being defendants Nos. 9, 10, 11 and 12.

Vaisey J. held that the estate duty leviable on two-thirds of the trust fund on Clara's death ought to fall for all purposes on the part of the trust fund in which Major Robb was not beneficially interested.

Esme Robb, a daughter of Montagu Caesar Robb, the 8th defendant, and the three grandchildren of Geoffrey Charles Napier Sturt, who took a one-sixth of the fund between them, being the 10th, 11th and 12th defendants, appealed.

John Pennycuick Q.C. and *Hector Hillaby* for the appellants, the 8th, 10th, 11th and 12th defendants.

E. I. Goulding for the plaintiff, the Public Trustee.

B. L. Bathurst Q.C. and *Eric Griffith* for Major Robb and for the 3rd, 4th, 5th, 6th and 7th defendants, who opposed the appeal.

The second defendant, a mortgagee, and the 9th defendant, a son of the cousin Geoffrey Charles Napier Sturt, were not represented.

The following cases were referred to in argument, which are not mentioned in the judgments: *In re the Earl of Carnarvon's Settled Estates* [2]; *In re Northcliffe* [3]; *Public Trustee* v. *Inland Revenue Commissioners* [4]; *Berry* v. *Gaukroger* [5]; *In re Parker-Jervis* [6]; *In re Townsend* [7]; *In re Nickels* [8]; *Midland Bank Executor and Trustee Co. Ltd.* v. *Inland Revenue Commissioners.* [9]

[2] [1927] 1 Ch. 138.
[3] [1929] 1 Ch. 327.
[4] [1960] 2 W.L.R. 203; [1960] 1 All E.R. 1.
[5] [1903] 2 Ch. 116; 19 T.L.R. 445.
[6] [1898] 2 Ch. 643.
[7] [1901] 2 K.B. 331.
[8] [1898] 1 Ch. 630.
[9] [1959] Ch. 277; [1959] 2 W.L.R. 77; [1959] 1 All E.R. 180.

LORD EVERSHED M.R. The point raised in this appeal is one of novelty (as Mr. Pennycuick conceded in opening) and not free from difficulty. It might in certain circumstances be considered to have strange consequences.

By his will, dated in 1912, the settlor disposed of his residue by a somewhat elaborate scheme of trusts in favour of his two named sisters successively and their children (if they had any) and then, in the event (which happened) of both sisters dying without issue, disposed of his trust estate by the following language: that it was to be "held in equal shares for such of "them my cousins Major-General Frederick Spencer Wilson Robb "Montagu Caesar Robb and Geoffrey Sturt as shall be living at "the death or failure of issue of my last surviving sister or shall "have previously died leaving issue then living . . . ", and there followed directions defining the interests of that issue, should they take, as was again the fact.

It may be useful to make some reference to the pedigree in order to explain the position of the parties now before the court. The two sisters have been called (and I hope I may, without disrespect to their memory, continue to call them) by their Christian names, respectively Clara and Margaret. The first trust was to pay the whole income to Clara for her life, and, in the event (as happened) of her death unmarried, to pay the whole income to Margaret for the residue of her life. Margaret likewise died unmarried on May 4, 1959. All the three cousins named in clause 19 had predeceased that date. Those whom Mr. Pennycuick as appellant represents are certain of the issue of what I will call the Sturt stirps: one of the issue has taken no part in the dispute, and the remaining three are represented by Mr. Pennycuick, who also represents one member of Montagu Caesar Robb's family, a Miss Esme Robb. On the other side, and represented by Mr. Bathurst, are the remainder of the Caesar Robb stirps and the one child (still living) of General Robb, namely, Major Eustace Robb.

In the events which have happened, the corpus of the estate is now divisible in the shares indicated in the pedigree. Thus, Major Eustace Robb, as the sole member of General Robb's stirps, takes a third. The issue of Caesar Robb take between them another third, but not in equal proportions because they belong to two generations. That last observation applies also to the issue of Geoffrey Sturt.

But the complication and the present problem have arisen because of the dealings with their respective interests of the two sisters, Clara and Margaret. In point of time, the first transaction was one of Margaret, whereby she, by appropriate deed, provided that her life interest, when it came to enjoyment, should be held so that the persons who would have taken on each distribution date, were she then dead, should between them and in the appropriate proportions take the income of the estate,

C. A.
1960
Boulton, *In re.*
Lord Evershed M.R.

subject to the qualification that she retained for her personal enjoyment an annual sum of £3,000.

Then next came an assignment, dated July 12, 1951, by Clara, and it is that assignment which is particularly relevant to the present problem. After the date of that assignment Margaret, by a later deed in 1955, in effect, released the retained interest she had previously created in her own favour of £3,000 a year. Clara, after very long and elaborate recitals of the will and subsequent events in reference to the estate, then proceeded to assign to Major Robb all "the life interest of the assignor," that is Clara, "in one equal third part of the trust fund and in any "property hereinafter representing or substituted for the same." There followed a reference to certain specific property, which then in part represented the estate. The relevant clause of the deed finished: "To the intent that the life interest of the assignor "in the premises . . . hereby assured may so far as the law "permits forthwith merge in the reversionary interest of the "assignee in the same and be extinguished."

The intent was plain, and has, I conceive, been acted upon in practice, but as a matter of law was (as Mr. Pennycuick observed) strictly ineffective, for this reason. Major Robb, the assignee, only had at the date when Clara executed this instrument a contingent reversionary interest. In order to take any share of corpus he had to survive both Clara and Margaret. Therefore, in strictness, it was incompetent for Clara by this instrument to cause any merger of an appropriate part of the income interest in the estate with what Major Robb might take did he survive the date of distribution. That was the instrument, and I assume that, in accordance with it, from its date in 1951 until Clara's death on February 8, 1958, Major Robb received one-third of the income of the estate. There was, as appears from the evidence, no kind of appropriation of any part of the assets, and, therefore, it is correct to say that he received one-third of the total income, notwithstanding (as Mr. Griffith pointed out) that the actual terms of the assignment purported to relate to the income of one-third of the estate. When Clara died, Major Robb continued in fact to receive a similar share.

It will be recalled that by the joint effect of the two assignments made by Margaret, the income was then periodically distributed among the persons who would have been entitled to it had she died at the date of the income distribution, and at every relevant date there were representatives of all three stirps and Major Robb was the sole representative of the General's stirps. Thus he continued to enjoy a third of the income. Finally, when Margaret died, a similar state of affairs existed, so that Major Robb became entitled to one-third of the corpus.

This case relates to the estate duty which became leviable upon the death of Clara. So far as the evidence goes, it is apparent what happened and, as I think, what view the Estate Duty Office took of their right to charge duty. In paragraph 22

of the affidavit of Mr. Worthington of the Public Trustee Office, it is stated: "In consequence of the said assignment dated "July 12, 1951, estate duty has been claimed by reason of the "death of the said Clara Gertrude Boulton in respect of two-"thirds only of the residuary trust fund." The question is whether the duty should fall exclusively on the two-thirds of the fund in which Major Robb is not interested, in exoneration of the one-third of which (it may be said) he has at all relevant times enjoyed the interest; or whether the whole amount of duty ought to be borne rateably by the persons interested in the whole subject-matter of the estate.

The argument of Mr. Pennycuick is clear, and certainly founded upon legal propositions which may be difficult to controvert as such. What he says is this: Clara was only competent to dispose of that which she had, namely, an interest in the whole income of the estate during her life. She could, of course, dispose of the whole of it or any part of it she liked, and for such period as she chose. What she could not do was, by any such assignment, to cause the subject-matter of the trust estate to be severed into distinct proprietary subject-matters. Therefore, Mr. Pennycuick says, whatever the amount of the duty (and the office may be right or wrong in their assessment), it is a duty leviable upon the property, incapable of severance, and not in fact severed, which passed at her death. As Mr. Pennycuick stated clearly in his reply, the property which passed on Clara's death was the whole property. True, it is, that Major Robb enjoyed a third of the income of the property before Clara died, and it so happened that he enjoyed a similar fraction of the income immediately thereafter, and now has a right to a third of the corpus; but that fractional identity is accidental and does not affect the proposition.

It will be observed that the argument at once raises a somewhat alarming prospect which has, not unnaturally, impressed itself on the minds of those who have resisted Mr. Pennycuick's case; because it is said, or feared, that if that proposition is right and that, if the truth is that the whole property passed, it may well be that the Estate Duty Office's charge or levy has been so far for a less sum than it ought properly to have been. Mr. Bathurst said, I have no doubt quite correctly, that if as a result of anything that is said in this court that fear should be realised, then if Mr. Pennycuick won, what with the amount of the additional duty and the increased rate, everybody, including the appellants, would be worse off than they are now. Whether that is right or wrong is, of course, a matter irrelevant to the decision of this case. But the fear having been expressed, I have formed the view that perhaps the less I expatiate on this matter the better.

I do not at all dissent from the general proposition that, strictly speaking, and certainly to the eye of the conveyancer, a person having an interest such as Clara had in a trust fund like

C. A.
1960
Boulton, *In re.*
Lord Evershed M.R.

this cannot sever the trust fund into distinct properties. But I do not, with all respect to the argument, think that that is quite the problem which we have to decide. On the evidence it seems to me quite plain what has occurred. The Estate Duty Office have claimed to levy duty on two-thirds only of the residuary estate. They have taken a view which, whatever might be said against it by a conveyancer, at any rate corresponds quite manifestly with common sense and, I should be inclined to think, with justice. They have said: "If you look at the facts as they were "when Clara died, it appears that two-thirds of the estate then "passed and one-third did not; and the one-third did not pass "because Major Robb enjoyed both before and after the death "to exactly the same extent, one-third of the trust property or "its income." The claim, therefore, was one made, so far as I can see, in respect of two-thirds of this trust property and no more.

If that is right, what is the result? In my judgment, the result is that which section 9 of the Finance Act, 1894, enjoins; for by the terms of subsection (1) it is provided that: "A rate-"able part of the estate duty on an estate, in proportion to the "value of any property which does not pass to the executor as "such"—as this did not—"shall be a first charge on the pro-"perty in respect of which duty is leviable." It may be a question whether the duty was leviable in respect of something else, but I have little doubt that it was levied in respect of two-thirds, and, it seems to me, that the short answer to this case, therefore, is that the duty should be rateably borne by the two-thirds of the estate in respect of which it was levied. Mr. Griffith drew attention to the change in language between section 1 and section 9, which I note. Mr. Pennycuick's argument has been founded, as I have already said, on the proposition that you cannot avoid the circumstance that the property which passed was the whole property. I think, for my part, that there may be some help to be gained by considering later enactments in pari materia, including the terms of section 43 of the Finance Act, 1940, as amended. It does, at any rate, appear from that section that where someone with an interest such as Clara had disposes partly of such an interest, then the statute seems to contemplate that the subject-matter so disposed of will or may be the subject of exemption, as being in some sense a distinct item of tax subject-matter (I avoid using the word "property"). But however that may be, I confess that I take the view, as did the judge, that if you assume, as I think you must—and I am far from saying the assumption is not well-founded—that the Estate Duty Office have properly performed their duties in making a levy for tax, then they have levied tax on a two-thirds of the estate which excludes that fraction in which Major Robb was interested. If that premise is right, then it seems to me that the conclusion must follow under section 9 that the burden should be borne by the two-thirds which attracted the levy. Agreeing, therefore,

with the judge in this respect, I would, without saying more, and for reasons which I have indicated, dismiss the appeal.

C. A.
1960
BOULTON, *In re.*

WILLMER L.J. I agree, and have nothing to add.

UPJOHN L.J. I also agree.

Appeal dismissed. Appellants to pay the party and party costs of the respondents. Plaintiff's excess costs over party and party costs to come out of the estate.

Solicitors: *Radcliffes & Co.; Lawrence, Graham & Co.; Payne Hicks Beach & Co.; Wild, Collins & Crosse.*

B. A. B.

[COURT OF CRIMINAL APPEAL.]

* REGINA *v.* CHAPMAN AND ANOTHER.

C. C. A.
1960
Feb. 2.
Lord Parker C.J., Cassels and Ashworth JJ.

Criminal Law—Sentence—Probation order—Breach—Charge of—Breach found by justices—Remand to quarter sessions—Whether certificate of justices conclusive—Procedure—Criminal Justice Act, 1948 (11 *&* 12 *Geo.* 6, *c.* 58), *s.* 6 (4).

On February 6, 1958, the appellants were convicted of larceny at quarter sessions and put on probation for three years. In July, 1958, they were convicted at a magistrates' court of loitering with intent to steal, and one of the appellants was also convicted of larceny; as a result they were brought before quarter sessions and on July 15, 1958, the recorder made a new probation order for three years with a condition that they should not associate. They were informed by the recorder that if they met by chance they were not prohibited from conversing. In October, 1959, the appellants were brought before different magistrates' courts, where it was found that they were in breach of the latter probation order in that they had associated. Both appellants were remanded to quarter sessions under section 6 (4) of the Criminal Justice Act, 1948,[1] the magistrates certifying that the appellants had failed to comply with the

[Reported by A. D. RAWLEY, Esq., Barrister-at-Law.]

[1] Criminal Justice Act, 1948, s. 6 (4): "Where the court of summary "jurisdiction [commits the proba- "tioner to custody or releases him on "bail until he can be brought before "the court of assize or quarter "sessions] then—(*a*) the court shall "send to the court of assize or quarter "sessions a certificate signed by a "justice of the peace, certifying that "the probationer has failed to comply "with such of the requirements of the "probation order as may be specified "in the certificate, together with such "other particulars of the case as may "be desirable; and a certificate pur- "porting to be so signed shall be "admissible as evidence of the failure "before the court of assize or quarter "sessions; and (*b*) where the proba- "tioner is brought or appears before "the court of assize or quarter ses- "sions, and it is proved to the "satisfaction of that court that he "has failed to comply with any of the "requirements of the probation order, "that court may deal with him, for "the offence in respect of which the "probation order was made, in any "manner in which the court could "deal with him if he had just been "convicted before that court of that "offence."

C. C. A.
1960
REGINA
v.
CHAPMAN.

requirements of the probation order. At quarter sessions the original offences were put to the appellants, and it was also put to them that they had been found in breach of the probation order by the magistrates' courts. This they admitted. They were not asked whether in fact they had associated and their case throughout was that they had met accidentally. The recorder, taking the view that the findings of the magistrates' courts were conclusive, regarded the appellants as having been committed to him for sentence, and sentenced each of them to 12 months' imprisonment. On appeal:—

Held, that the certificate which had to be sent forward by the magistrates' court when this procedure was adopted was not conclusive; while the certificate was admissible as evidence it was for quarter sessions to be satisfied that a breach of the probation order had been committed; the breaches of the probation orders should have been put to the appellants and they should have been asked to say whether they admitted them or not. If they admitted the matters put to them, the court could then have proceeded to deal with them. If the appellants had denied the breaches, they should have been proved; and for that purpose quarter sessions could treat the matter as if it was an appeal from the magistrates, hear further evidence and come to their own conclusion in the matter. Accordingly, there was a mistrial at quarter sessions, and in the circumstances the sentences would be quashed.

Reg. v. *Devine* [1956] 1 W.L.R. 236; [1956] 1 All E.R. 548 applied.

APPEALS against convictions.

The appellants, Oliver George Chapman and James George Pidgley, were both convicted at Andover Borough Sessions on February 6, 1958, of larceny of a handbag and its contents, and were put on probation for three years. In July of 1958 they were convicted at a magistrates' court of loitering with intent to steal, and one of them, Pidgley, also of larceny, and as a result they were brought before quarter sessions. The recorder on July 15, 1958, then made a new probation order for three years with a condition that they should not associate with each other, and at the same time he told them that if they met by chance they were not prohibited from conversing and what he was dealing with was true association. On October 15, 1959, Chapman, and on October 22, 1959, Pidgley, were brought before magistrates' courts and those courts adjudged that each of them had been in breach of that last probation order in that they had associated. Having done that, they remanded the appellants to quarter sessions. On October 27 the matter came before the recorder at quarter sessions again, when he sentenced each of them to 12 months' imprisonment.

At quarter sessions the original offences were put to the appellants, and it was also put to them that in Pidgley's case the Ringwood Magistrates' Court, and, in Chapman's case, the Salisbury and Amesbury Magistrates' Court, had found that they were in breach of the probation order by associating with each other, and they admitted that those magistrates' courts had so found. They were never asked in fact whether they admitted that they had associated, and it was clear that their case throughout was that

they never did associate in the true sense of the word, but they had in fact met accidentally and were conversing, a matter which the recorder originally told them would not constitute a breach of probation. Not only were they not asked whether they had associated, but the recorder took the view that it was impossible for him to go behind the findings of the two magistrates' courts; he treated the findings of the magistrates' courts as conclusive and regarded the appellants as having been committeed to him for sentence.

F. H. L. Petre for the appellants.
Martin Tucker for the Crown.

No cases, other than that referred to in the judgment, were cited in argument.

LORD PARKER C.J., after stating the facts, continued: The question is whether the procedure adopted by the learned recorder was right, and that depends on the true construction of section 6 of the Criminal Justice Act, 1948. By subsection (3) it is provided: "If it is proved to the satisfaction of the court before "which a probationer appears or is brought under this section "that the probationer has failed to comply with any of the "requirements of the probation order, that court may without "prejudice to the continuance of the probation order, impose on "him a fine not exceeding £10 . . . or may . . . (*b*) if the proba-"tion order was made by a court of assize or quarter sessions, "commit him to custody or release him on bail (with or "without sureties) until he can be brought or appear before the "court of assize or quarter sessions." Pausing there, both magistrates' courts in this case had it proved to their satisfaction that each appellant had failed to comply with the requirements of the probation order. They did not exercise their right to fine the appellants, but they then remanded them to quarter sessions under paragraph (*b*). Subsection (4) goes on: "Where the court "of summary jurisdiction deals with the case as provided in "paragraph (*b*) of the last foregoing subsection then—(*a*) the "court shall send to the court of assize or quarter sessions a "certificate signed by a justice of the peace, certifying that the "probationer has failed to comply with such of the requirements "of the probation order as may be specified in the certificate, "together with such other particulars of the case as may be "desirable; and a certificate purporting to be so signed shall be "admissible as evidence of the failure before the court of assize "or quarter sessions; and (*b*) where the probationer is brought or "appears before the court of assize or quarter sessions, and it is "proved to the satisfaction of that court that he has failed to "comply with any of the requirements of the probation order, "that court may deal with him, for the offence in respect of "which the probation order was made, in any manner in which

C. C. A.
1960
REGINA
v.
CHAPMAN.

"the court could deal with him if he had just been convicted "before that court of that offence."

The real question here is whether the certificate which has to be sent forward by the magistrates' court when this procedure is adopted is conclusive so that quarter sessions cannot go behind it. In the judgment of this court, it is not conclusive. It is not said to be conclusive but merely admissible. Further, by paragraph (*b*) of subsection (4) it is the court of quarter sessions that has to be satisfied that the probationer has failed to comply with the requirements. It is suggested that they can be satisfied that the requirements of the probation order have been fulfilled by looking at the certificate and the certificate alone, but as a matter of construction, that is clearly wrong, because paragraph (*b*) is in the form "where the probationer is brought or "appears before the court of assize or quarter sessions, and it is "proved to the satisfaction of that court." Paragraph (*a*) has already provided that where the probationer is to appear before quarter sessions there has to be a certificate, and yet the paragraph goes on to say that quarter sessions must be satisfied. It is clear from the framework of section 6 (4), taken as a whole, that Parliament never intended that the certificate of the justices should be final and conclusive. Indeed, looking at the matter from a rather broader angle, if that were right, and the certificate is conclusive, then it would follow that there was no machinery in the nature of appeal from a finding of the magistrate that there had been a breach of probation. It seems to this court that under paragraph (*b*) while the certificate is admissible, it is for the court of quarter sessions to be satisfied, and for that purpose they can treat the matter as if it was an appeal from the magistrates, hear further evidence and come to their own conclusion in the matter.

It follows that in such a case as this the procedure laid down in *Reg.* v. *Devine* [1] is applicable. It is true that *Devine's* case was dealing with a case of a probationer being brought before the court that had originally sentenced him; in other words, it was not a question of going to magistrates first, but the court there laid down the proper procedure as this [2]: "Where a defendant "is brought before a court for breach of a probation order, when "he is arraigned before the court the breach should be put to him "in the clearest possible terms and he should be asked to say "whether he admits it or not. The way in which it should be "put to him is as follows: he should be told the court at which "he was convicted; the offence of which he was convicted and "the terms of the probation order. He should then be told the "grounds upon which it is alleged that he has broken the terms "of the probation order. If the order has been broken by the "commission of a further offence, he should be told the court at "which he appeared, the offence with which he was charged and

[1] [1956] 1 W.L.R. 236; [1956] 1 All E.R. 548; 40 Cr.App.R. 45.

[2] [1956] 1 W.L.R. 236, 237; 40 Cr.App.R. 45, 46.

"the adjudication of the court. If he admits the matters put to "him, the court can then proceed to deal with him. If he denies "those matters they must be proved and it being a trial albeit "without a jury the defendant must be asked if he desires to give "evidence and call witnesses. After all the evidence has been "heard the court must pronounce whether it finds the breach "proved. It is, therefore, desirable that the proceedings should "begin by the matter being put clearly to the defendant and for "him to be asked whether he admits the allegation."

It seems to this court that that procedure is equally applicable to such a case as the present, where the matter has been in the first instance before a magistrates' court. It follows that in this case there has been a mistrial at quarter sessions from the outset. It is just as if a trial proceeded without prisoners being asked to plead, and in those circumstances it seems to this court that the proceeding was a nullity, and it would be open to this court to send the matter back for a retrial. It is to be observed, however, that these appellants have already been in prison since October 27 last, and, having regard the nature of the alleged breach, the court feels that justice would be done in this case if they merely quashed the sentence and did not send the matter back to quarter sessions. Accordingly, the appellants are now discharged.

Appeal allowed.

Solicitors: *Woodford & Ackroyd, Southampton; Registrar, Court of Criminal Appeal.*

[QUEEN'S BENCH DIVISION.]

* TAYLOR AND OTHERS *v.* MUNROW (DISTRICT AUDITOR).

1960
Jan. 28.

Lord Parker C.J., Cassels and Ashworth JJ.

Local Government—Powers—Duty to exercise statutory discretion—Resolution by local authority to bear whole of rent increases of derequisitioned properties—Whether periodic reviews called for—Requisitioned Houses and Housing (Amendment) Act, 1955 (3 *&* 4 *Eliz.* 2, *c.* 24), *s.* 4 (4).

Housing — Requisitioned houses — Recoverable rent — Rent increases in respect of requisitioned properties released to owners—Payment of increases by local authority—Whether duty of local authority to make periodic reviews—Requisitioned Houses and Housing (Amendment) Act, 1955, *s.* 4 (4).

The Requisitioned Houses and Housing (Amendment) Act, 1955, provides, by section 4 (1) and (2), that, where a local authority serves on the owner of a requisitioned dwelling a notice inviting him to accord to the licensee of the dwelling the status of a statutory tenant, and the owner gives notice of acceptance, the Rent Acts shall apply to the dwelling as if the licensee had retained possession by virtue of those Acts after the expiration of a tenancy at a rent equal to the standard rent as determined in accordance with the provisions of subsection (3). By subsection (4): "Except so far

1960

Taylor
v.
Munrow.

"as the local authority may from time to time determine, the rent "recoverable by the landlord of any such dwelling . . . from the "licensee or any statutory successor of his shall not exceed the rent "last payable by the licensee to the local authority under the "licence; and where the rent so recoverable . . . falls short of "the rent which would be recoverable apart from this subsection, the "local authority shall pay to the landlord an amount equal to "the difference."

A local authority, acting under the provisions of the Requisitioned Houses and Housing (Amendment) Act, 1955, from time to time derequisitioned numerous houses and in respect of many of them made payments to the owners in accordance with section 4 (4). Such houses became subject to the provisions of the Rent Act, 1957, relating to increase of rent. The local authority were duly notified of and had acceded to many rent increases but they carried out no general review of rents paid by the tenants of their derequisitioned properties and made no determination under section 4 (4), with the result that they themselves became liable to make additional payments to the owners. On October 9, 1957, the local authority resolved "that the council bears the full cost of any increases in "rent between the operative date of any valid notices received and "the date on which the council is able to make a formal decision," and on March 19, 1958, they resolved that ". . . the whole of the "valid rent increases under the Rent Act, 1957, in regard to all "tenancies of formerly requisitioned properties released to owners "under section 4 of the Requisitioned Houses and Housing (Amend-"ment) Act, 1955, be borne by the council." In passing the latter resolution the council approved and adopted a report and recommendation of the housing management committee from which it appeared that two of their reasons for that decision were that, as it was impossible to give consideration to individual cases without investigating the question of the tenant's income, which they were not prepared to do, the matter should be dealt with as one of policy, and that, as they considered the basis on which the rents of the properties were originally fixed was fair and reasonable, they saw no reason for raising them and were satisfied that by meeting the whole of the increases they would not be placing an unduly heavy burden on the rates. The district auditor considered that the local authority, by omitting to make determinations under section 4 (4) of the Act of 1955 consequent upon the coming into operation of the Rent Act, 1957, or to make such inquiries as might properly and reasonably have justified that omission, acted in a manner which was contrary to law, and had thereby incurred expenditure which he fixed at £200, and disallowed and surcharged jointly and severally upon 23 members of the council. On appeal by six of those members:—

Held, that the proper performance of the duty of a local authority towards the general body of ratepayers called for periodic reviews under section 4 (4) of the Act of 1955, and not only the rent but also the tenant's general ability or inability to pay were relevant considerations; that the council, in making arbitrary determinations without carrying out any such review, had acted in a manner which was inconsistent with that duty; and that, therefore, the resulting payments were contrary to law, and the district auditor was right in disallowing the £200 and surcharging it on the appellants.

Roberts v. *Hopwood* [1925] A.C. 578; 41 T.L.R. 436 applied.

Appeal under section 229 (1) of the Local Government Act, 1933, from a decision of a district auditor.

The appellants, Charles Arthur Taylor, David Goldhill, Hilda Mary Lane, John Lawrence, Philip Gerald Sheridan and Albert William Stallard, members of the St. Pancras Urban District Council, appealed from a decision of W. D. Munrow, the district auditor for the metropolitan borough of St. Pancras, dated January 20, 1959, in auditing the accounts for the year ending March 31, 1958, disallowing £200, part of an item debited to the Requisitioned Properties Revenue Account in the Housing General Ledger and described as "Contributions under section 4 (4)," included in the total expenditure in respect of requisitioned properties carried to the General Rate Fund Revenue Account, and surcharging that sum jointly and severally upon them and other members of the council.

The facts sufficiently appear from the judgment of Lord Parker C.J.

Ralph Millner for the appellants.

R. J. Parker for the district auditor.

The following cases were cited in argument: *Reg.* v. *Roberts, Ex parte Scurr* [1]; *Roberts* v. *Hopwood* [2]; and *Pentecost* v. *London District Auditor.* [3]

LORD PARKER C.J. This is an appeal from a decision dated January 20, 1959, of the district auditor for the metropolitan borough of St. Pancras, who surcharged 23 councillors of the St. Pancras Urban District Council jointly and severally with £200 which he found to have been unlawfully paid. Only the present six appellant members of the council have appealed.

The matter now comes before this court on appeal under section 229 of the Local Government Act, 1933, and the duties of the district auditor so far as they are relevant to this case are to be found in paragraphs (*a*), (*b*) and (*d*) of section 228 (1). That subsection, so far as it is material, reads as follows: "It shall be "the duty of the district auditor at every audit held by him— "(*a*) to disallow every item of account which is contrary to law; "(*b*) to surcharge the amount of any expenditure disallowed upon "the person responsible for incurring or authorising the expendi- "ture," and "(*d*) to surcharge the amount of any loss or "deficiency upon any person by whose negligence or misconduct "the loss or deficiency has been incurred."

The district auditor found that sums of not less than £200 ought to be disallowed in the accounts for the year ending March 31, 1958, as being contrary to law. He then went on under paragraph (*b*) to surcharge that sum upon the persons responsible for incurring or for authorising the expenditure, whom

[1] [1924] 2 K.B. 695; 40 T.L.R. 769.

[2] [1925] A.C. 578; 41 T.L.R. 436.

[3] [1951] 2 K.B. 759; [1951] 2 T.L.R. 497; [1951] 2 All E.R. 330.

1960

TAYLOR
v.
MUNROW.

Lord Parker C.J.

he held to be the 23 councillors, and under (*d*) he held that the loss or deficiency had arisen through their negligence.

It is necessary to state the position in a little detail in order to show how this decision came about. Prior to 1955, there was power in the Minister of Health to requisition premises under regulation 51 of the Defence (General) Regulations, 1939. In practice that power was delegated to the town clerks including to the town clerk of the St. Pancras Borough Council, and houses were thus requisitioned in the borough and used for housing persons. Those persons were not tenants in the strict sense but were licensees, and the payments that they made under the licence, whether you call them rent or not, were arrived at, broadly speaking, as the equivalent to the maximum rents payable under the Rent Acts or, if there was no controlled tenancy, the rent payable for comparable properties. Considerable discretion had to be exercised in fixing the rents to meet the circumstances. It might be, for instance, that some licensees were being housed in rather expensive property—what one might perhaps refer to as luxury flats—whereas the premises which they normally occupied, and which they may well have had to leave owing to enemy action, were of quite a different character. In such a case the licensee was only called upon to pay the rent which he would have paid for premises of the type which he normally occupied. Alternatively, it might be that for administrative reasons a very small family would be housed in rather large premises, when, again, they would not be asked to pay more by way of rent under the licence than they would pay for premises of the type and size they would normally occupy.

In 1955 the position was changed by the Requisitioned Houses and Housing (Amendment) Act, 1955. Under that Act the power of the Minister of Health, who had then become for this purpose the Minister of Housing and Local Government, was brought to an end, but his rights of occupation were transferred to the local authorities. Section 1 (1) provides: "On the commencement of "this Act, any power of the Minister to retain possession of "requisitioned houses shall be terminated, and the right to "possession of every such house shall vest in the appropriate "local authority." The appropriate local authority were permitted by subsection (2) to retain the possession of requisitioned premises until March 31, 1960, that is, this year.

It was also provided by that Act that the requisitioned premises might be derequisitioned and handed back to the owner, the landlord, if he was prepared to accord the sitting licensee, broadly speaking, the status of a statutory tenant, Thus, by section 4 (1) it is provided: "Any local authority may, subject to such "directions, if any, as may be given by the Minister, and shall, "if so required by the Minister, serve on the owners of such "requisitioned dwellings as may be decided by the authority or "specified by the Minister, as the case may be (being dwellings "of which possession is retained under this Act) a notice inviting

"those owners to accord to the licensees of the dwellings the "status of statutory tenants in consideration of payments to be "made by the local authority in accordance with this section by "way of compensation for loss of the right to vacant possession "on the release of the dwellings."

Section 4 (2) provides: "If within the period specified "in that behalf in any such notice of invitation the owner gives "to the local authority notice of acceptance in such form as may "be so specified, then— . . . (*b*) as from the expiration of that "period, the Rent Acts shall apply to the dwelling as if the "licensee had retained possession by virtue of those Acts after "the expiration of a tenancy at a rent equal to the standard rent "specified in subsection (3)," upon certain terms. Subsection (3) then set out what the standard rent should be.

The material provision for the purposes of these proceedings is section 4 (4), which provides: "Except so far as the local autho-"rity may from time to time determine, the rent recoverable by "the landlord of any such dwelling in respect of any period before "April 1, 1965, from the licensee or any statutory successor of "his shall not exceed the rent last payable by the licensee to the "local authority under the licence; and where the rent so recover-"able in respect of any such period falls short of the rent which "would be recoverable apart from this subsection, the local "authority shall pay to the landlord an amount equal to the "difference." Accordingly, put quite shortly, unless and until the local authority otherwise determines, the landlord, while he will get the full standard rent from someone, will only be able to get from the ex-licensee the rent which the ex-licensee had been paying under the licence. The difference between that and the standard rent as fixed by the subsection was to be borne by the local authority. Pausing there, the standard rent as fixed by section 4 (3) might be lower or might be higher than the rent being paid under the licence. If it was higher than that being paid under the licence, then by subsection (4) until the local authority otherwise determined the difference was to be borne by the local authority. On the other hand, in cases where it was lower, the landlord was only entitled to recover that lower rent, and, accordingly, an ex-licensee whose standard rent was lower than he had been paying would, in effect, have a reduction in rent and pay less.

The question with which we are concerned in these proceedings is the duty of the local authority under section 4 (4) to review the position, and as to the matters which they are entitled to consider on such a review. It is to be observed, first, that these derequisitioned premises, having become subject to the Rent Acts, were, amongst other things, subject to the Housing Repairs and Rents Act, 1954, under which provision was made, broadly speaking, for an increase of rent for improvement in the property. These premises also in due course become subject to the Rent Act, 1957, which, quite generally throughout the country, raised

1960

Taylor v. Munrow.

Lord Parker C.J.

the standard rents which landlords were entitled to get from their tenants.

This council made no determination whatsoever under section 4 (4) of the Act of 1955, and, when the Act of 1957 was passed, and the matter was brought to their attention not only by Ministry circular but by the town clerk, they refused to determine otherwise within the meaning of subsection (4) and continued to bear the difference, a difference which had been increased in some cases by the exercise by landlords of their powers under the Housing Repairs and Rents Act, 1954, and also increased by reason of their powers under the Rent Act, 1957.

Perhaps the two most relevant resolutions of the council—certainly those relied upon by the district auditor—are those passed on October 9, 1957, and March 19, 1958. On October 9, 1957, the council had before them a report of the housing management committee of September 16. They had various cases before them in which they were told that notices of rent increases had been served by the landlord, and perhaps it is relevant that under the Act of 1957 notices of increase in rent which landlords had to serve on their tenants were required also to be served on the local authority. As a result of that meeting the council adopted and approved the recommendation of the housing committee, which was in these terms: "That the council "bears the full cost of any increases in rent between the operative "date of any valid notices received and the date on which the "council is able to make a formal decision."

On March 5, 1958, the position was again reviewed by the housing management committee, and they recommended by seven to four, as appears in the council's minute: "That, having "regard to the foregoing observations on the position generally, "the whole of the valid rent increases under the Rent Act, 1957, "in regard to all tenancies of formerly requisitioned properties "released to owners under section 4 of the Requisitioned Houses "and Housing (Amendment) Act, 1955, be borne by the council." In putting forward that recommendation they put forward a number of reasons, to which I must refer later. The matter came before the full council on March 19, 1958, the motion was put to the vote, a division was taken and by 26 to 20 the recommendation of the housing management committee was adopted.

The district auditor has given his reasons in a long document of some seventeen pages, to which are appended various schedules and various extracts from the transcript of the evidence which he heard. In my judgment, the district auditor's reasons, if I may say so, are most admirably stated and, as will appear later, not only am I not satisfied that they are wrong but I feel very inclined to adopt them as they stand. He came to the conclusion that this council did not have what I may call an absolute discretion under section 4 (4) of the Act of 1955, but a discretion under which they were bound to act reasonably, preserving a balance between the duty which they owed to the general body

of ratepayers and the duty they owed to these particular tenants. He went on to hold that this council had never really faced the problem at all within the ambit of their duty, and that the sums which had been paid under section 4 (4) were, to the extent of £200 at least, paid in breach of their duty and, accordingly, were in law unlawful payments. Upon that he surcharged the councillors and found them guilty of negligence as well.

The first question that arises is the extent of the duty of a council where by statute they are given a discretion. The classic authority on the matter is to be found in *Roberts* v. *Hopwood*,[1] often referred to as the *Poplar* case. The Poplar Borough Council had power under the Metropolis Management Act, 1855, to "employ . . . such . . . servants as may be necessary, and may "allow to such . . . servants . . . such . . . wages as [the council] "may think fit." The council in that case had fixed a minimum wage of £4 for every employee, regardless of the nature of the work he was to do, and regardless of the fact that the cost of living had fallen during the year from 176 per cent. to 82 per cent. above the pre-war level. It was held in the House of Lords: "That the discretion conferred upon the council by the statute "must be exercised reasonably, and that the fixing by the "council of an arbitrary sum for wages without regard to existing "labour conditions was not an exercise of that discretion." It was also held: "That an expenditure upon a lawful object might "be so excessive as to be unlawful, and that to the extent by "which the amount exceeded legality the auditor was bound to "disallow it and surcharge the excess upon the persons "responsible."

I find it unnecessary, at this stage, to read any passages from the speeches in that case. It is enough to say that the nature of the duty must, of course, be ascertained from the words of the section in question and their context, but it was clearly held there that where the matter is something with which the auditor can deal by way of surcharge, in other words when it is paying money out of a fund provided by the general body of ratepayers, the council must preserve a balance between the duty owed to that general body of ratepayers and the duty owed to the particular ratepayer in respect of whom the payment is made. Accordingly, whatever the exact wording of the section may be—and it is pointed out by Mr. Millner in his able argument that the wording here is quite different from the wording of section 113 (4) of the Housing Act, 1957, where periodical review is provided for—I am quite satisfied that under those words a periodic review is necessary if their duty is to be performed.

Mr. Parker, in his argument for the district auditor, has indicated a number of different matters which may from time to time arise, all of which, if their duty is to be performed, must necessitate a reconsideration of the matter. It may be that on

[1] [1925] A.C. 578.

1960

Taylor v. Munrow.

Lord Parker C.J.

de-requisition there ought to be a consideration. Certainly the council must keep abreast of what is happening from time to time and collect information to see what is the position. As the sub-section provides, the benefit of it devolves upon a statutory successor. It is said that the statutory successor may be a son in very affluent circumstances, and that, if the duty owed to the general body of ratepayers is to be properly borne in mind, the council must consider at any rate the fact that that statutory successor is in very different financial circumstances. Again, it is said by Mr. Parker that whenever the controlled rent is raised, whether it be under the Housing Repairs and Rents Act, 1954, or, as in most of these cases, under the Rent Act, 1957, there must be a review. Indeed, it is only right to say that the council themselves realised that the passing of the Act of 1957 and the notices served by landlords as a result did call for a consideration of the matter.

The reasons which the council gave are set out in that minute to which I have referred of March 19, 1958. They said that they felt that they had a moral obligation to treat these tenants in the same way as they treated their council tenants. They drew attention to the fact that the de-requisitioned property was in a very poor condition and provided a relatively low standard of accommodation. They went on to say that the tenants formed a particularly unfortunate section of the population. Finally, they said: "We consider that the basis on which the rents of "these properties was fixed originally was a fair and reasonable "one, and we see no reason for raising them; having regard to "the fact that 75 per cent. of the cost will normally be met by the "Exchequer until March 31, 1960, we are satisfied that by "meeting the whole of these increases the council will not be "placing an unduly heavy burden on the rates." Those reasons were introduced by this statement: "We consider that it is "impossible to give consideration to individual cases without "investigating the question of the tenants' income, and this we "are not prepared to do. In these circumstances we have agreed "that the matter should be dealt with as one of principle."

So far as the reasons are concerned, the district auditor went through each one of them in great particularity, and has made it—to me, at any rate—abundantly clear that there is nothing whatsoever in those reasons; in fact, the district auditor's criticism of them and the facts he found are barely criticised. Indeed, it is, I think, admitted that the real reason for the decision arrived at by the council was twofold: (1) that as a matter of policy they would never adopt what is referred to as a means test, and (2) that they thoroughly disliked the action of Parliament in passing the Rent Act, 1957, and raising rents generally throughout the country.

Whatever the council may say as to having taken into consideration the general body of ratepayers, at the end of the day, if I may use that expression, it is a matter of what is the true

inference behind their determination. There are two passages which I will read, one, if not both, of which clearly created an impression on the district auditor. The first is in the evidence of Councillor Lawrence: "We feel very strongly about it. As "far as we are concerned we consider that this is the crux of "the whole business. There is definite interference stemming "from three borough councillors who, for the purpose, have "transformed themselves into ratepayers; they raised objection "at audit and tried to overthrow by this method decisions which "they have fought all the time and have been defeated in the "council. They do not object merely to the payments in respect "of the de-requisitioned tenants, they object to the whole of the "council's rent policy. Our attitude towards the derequisitioned "tenants arises from the policy of this council. We do not "believe that the circumstances at the moment justify a local "authority imposing rent increases on its tenants. That is our "political position, we honestly believe that, we fight for that, "and, bearing that in mind, the fact that we have refused to "impose or permit to be imposed rent increases on the derequisi-"tioned tenants follows consequentially."

Finally, almost at the end of his evidence, the district auditor asks: "Were you aware, when you came to the decision, that "the basis upon which you were dealing with derequisitioned "premises was not being followed by other borough councils in "London? (Councillor John Lawrence): No; on the contrary, I "discussed the matter with a councillor in south London and he "told me they were doing the same, and I congratulated him. "Subsequently I found they had not done the same; it was a "case of fifty-fifty and they lost their nerve. I am a member of "the Metropolitan Boroughs' Standing Joint Committee; this "problem of derequisitioned rents is constantly coming up, and "I only wish that all the Labour-controlled bodies in London "would take the same action as we, and protect the tenants from "the Rent Act."

If that be so, if that was the real reason behind these decisions of the council, in my judgment they were purely arbitrary decisions. They were not decisions arrived at through the council fulfilling their duty to the general body of ratepayers amongst others. In many ways the position is rather like that in *Roberts* v. *Hopwood*.[2] One could refer to a number of passages which bear out the similarity, but I will refer to a passage in the speech of Lord Sumner who, after referring to judgments of Lord Russell C.J. and Farwell L.J. in *Thomas* v. *Devonport Corporation*[3] and *Rex* v. *Roberts*,[4] said[5]: "One of the ways in which a "payment may be illegal, is, as Lord Russell C.J. says, that it is "not within the authority or not in accordance with the duty of "the council. By questions of policy I understand Farwell L.J.

[2] [1925] A.C. 578.
[3] [1900] 1 Q.B. 16, 21; 16 T.L.R. 9.
[4] [1908] 1 K.B. 407, 435; 24 T.L.R. 226.
[5] [1925] A.C. 578, 605.

1960

TAYLOR v. MUNROW.

Lord Parker C.J.

"to mean such matters as the necessity for a urinal and the "choice of its position, provided no public or private nuisance is "created"—and he refers to certain cases—"and similar ques-"tions of policy. The word, however, is policy, not politics, and "I can find nothing in the Acts empowering bodies, to which the "Metropolis Management Act, 1855, applies, which authorises "them to be guided by their personal opinions on political, "economic or social questions in administering the funds which "they derive from levying rates." Later he said[6]: "To my "mind a council acts for a collateral purpose, if it fixes by "standards of its own on social grounds a minimum wage for all "adults, and is not in so doing acting for the benefit of the whole "community."

It is perhaps worth adding a passage from the speech of Lord Atkinson who, dealing with the view taken by the council, said[7]: "Nobody has contended that the council should be bound by any "of these things"—by "these things" he was referring to trade union rates, the cost of living, and so on, in fixing wages—"but it "is only what justice and common sense demand that, when deal-"ing with funds contributed by the whole body of the ratepayers, "they should take each and every one of these enumerated things "into consideration in order to help them to determine what was "a fair, just and reasonable wage to pay their employees for the "services the latter rendered. The council would, in my view, "fail in their duty if, in administering funds which did not belong "to their members alone, they put aside all these aids to the "ascertainment of what was just and reasonable remuneration "to give for the services rendered to them, and allowed them-"selves to be guided in preference by some eccentric principles of "socialistic philanthropy." Then he said[8]: "A body charged "with the administration for definite purposes of funds con-"tributed in whole or in part by persons other than the members "of that body, owes, in my view, a duty to those latter persons "to conduct that administration in a fairly businesslike manner "with reasonable care, skill and caution, and with a due and "alert regard to the interest of those contributors who are not "members of the body. Towards these latter persons the body "stands somewhat in the position of trustees or managers of the "property of others."

I have come to the conclusion that the district auditor's findings were abundantly justified, and that it is quite impossible to say that he has gone wrong in law. In deference to Mr. Millner's argument I should refer to a number of points he made. He said, first, that the district auditor had misconstrued section 4 (4) of the Act of 1955, and the effect of the Act of 1957 on that section. He also said that the various Ministry circulars which had been brought to the attention of the council, to which I find it unnecessary to refer, had themselves misconstrued section 4 (4) of the

[6] [1925] A.C. 578, 606.
[7] Ibid. 594.
[8] Ibid. 595.

Act of 1955. He pointed out, as I have already said, that the wording here is quite different from the wording of the Housing Act, 1957, which calls specifically for periodic review. If I understand him aright, he seeks to say that the local authority have no duty at all to make any review except in so far as they think it should be done. That seems to me an absolute discretion which is not to be found there. Indeed, I think he really departs from that argument because he concedes, amongst other things, that the controlled rent from time to time must be a relevant consideration if one is making a determination. If, therefore, what was a relevant consideration, namely, the old controlled rent, has gone up, then one of the matters which was a relevant consideration originally has altered, and it must be necessary for the council then in the performance of their duty to make a review of the matter. In truth and in fact the wording of section 4 (4) calls for periodic review, although it does not say so in express words.

He then points to the fact that Parliament, when it passed the Rent Act, 1957, although it amended certain provisions of the Act of 1955, left subsection (4) of section 4 intact. I think, if I understand his argument, it is that if Parliament had intended that a rise in controlled rents should be an occasion upon which the local authority should review the matter under section 4 (4), it would have said so. I do not understand that argument. It is quite true that the Act of 1957 does not touch section 4 (4) at all. But all that that means is that whatever was the duty of the local authority before the Act of 1957, remained their duty after the passing of the Act of 1957. He then says that the council in this case were not acting unreasonably, that they were performing their duty, and that all they were doing was to put into action their bona fide policy, which was that on no account would they consider the ability to pay of individual tenants, and that there was no occasion for increasing the rents. I have already dealt with what I think was the real reason, and I think that whether you call it policy or politics matters not. The whole question is whether the action, be it policy or politics, was consistent with the duty the council owed to the general body of ratepayers.

There has been much talk about the means test, but I find it quite unnecessary to go into that matter. All that I think is being referred to by the district auditor is a general ability or inability to pay, and it seems to me that that must be a relevant consideration. Indeed, it is not without interest to see that this council, while going out of their way to say they would be no party to a consideration of ability to pay, have and do take that into consideration in fixing the rents of their tenants in council houses. I believe that the real reason as disclosed here is that they felt that the action of Parliament in the Rent Act, 1957, was wrong, and they were not going to allow landlords of derequisitioned premises to recover from the tenants any part of the general increase in rents provided for by that Act.

1960

Taylor v. Munrow.

Lord Parker C.J.

I should say this: that I think it is not unfair, in considering whether the council have acted reasonably in the performance of their duty, to consider two matters which have resulted from that action. I have already said that the standard rent fixed under the Act of 1955 might be lower than the rent being paid under the licence, in which case the tenant only paid the standard rent. So determined, however, were this council to consider not individual cases but the matter as one of principle, that they completely omitted to see that they were through the years paying the difference between the two amounts, namely, the full difference between the old standard rent and the new standard rent. They had no power to that under section 4 (4) at all, because all they had power to do was to pay the difference between the new standard rent and the amount which had been paid under the licence which, in these cases, was higher than the old standard rent. To that extent they missed entirely seeing that they were making ultra vires payments. Another thing that has resulted is this: it is found, and the council so stated, that in many cases these properties were in a state of disrepair and were cases in which tenants, if they applied, could get certificates of disrepair. If they got those certificates of disrepair, a landlord would not be able to get the full increase permitted by the Act of 1957 unless he did certain repairs or undertook to do those repairs. The council, however, decided that they would pay the full difference between the licence rent and the new standard rent which the landlord was demanding. That was the standard rent which he was not entitled to exact if the tenant took certain steps in the form of getting a certificate of disrepair. To that extent this policy of theirs resulted in what is really, however you look at it, a gift to the landlord, in that he was getting something he was not entitled to get if the tenant was encouraged to take, and did take, the appropriate steps. In my judgment, those are quite relevant matters to consider when one is asking oneself the question: Was this council performing its duty as laid down in *Roberts* v. *Hopwood*? [9]

There were two other small matters raised by Mr. Millner. He said, in the first place, that the district auditor was wrong in finding, as he did, that the tenants of these derequisitioned premises were a fair cross-section during the year of review of the council tenants generally. That was a matter of the construction of the evidence given, I think, by the housing manager, and I find no reason to say that the district auditor was wrong in making that finding. It is also said that, at any rate, he was wrong in finding that some of these tenants had the ability to pay more, and therefore was wrong in saying that there were excess payments to the extent of £200. I think he had ample evidence upon which he could arrive at that conclusion and, as the case emerged, it seemed quite clear that the £200 could be justified in whole, or

[9] [1925] A.C. 578.

1960

TAYLOR v. MUNROW.

Lord Parker C.J.

certainly to a large extent, by reason of the ultra vires payments to which I have referred, and payments made to landlords in cases where the council knew that if the tenants took steps to get certificates of disrepair they would not be entitled to them. Those two matters alone produce a figure in the neighbourhood of £200, and it seems to me quite idle to say that the district auditor could not find that at least £200 was an unlawful payment. Indeed, I think he was being very considerate to the councillors.

Finally, it is said that the district auditor was wrong in finding that the appellants were negligent. I find it unnecessary to go into that. Under paragraphs (*a*) and (*b*) of section 228 (2) of the Local Government Act, 1933, he was, as I have said, perfectly entitled to disallow this sum and to surcharge the appellants. It is unnecessary, therefore, to go on and consider the further question of whether this can be said to be a case of loss or deficiency through negligence. I do not propose to deal with that matter. Accordingly, in my judgment, the district auditor's reasons were right and this appeal should be dismissed.

CASSELS J. I agree.

ASHWORTH J. I also agree.

Appeal dismissed.

Solicitors: *Gaster & Turner; Sharpe, Pritchard & Co.*

J. F. L.

[COURT OF CRIMINAL APPEAL.]

C. C. A.

1960 *Jan.* 18, 19, 20, 21, 22, 25, 26, 27, 28, 29; *Feb.* 2.

Finnemore, Davies and Hinchcliffe JJ.

* REGINA *v.* DAWSON.
REGINA *v.* WENLOCK.

Criminal Law — Conspiracy — Complicated charge of — Undesirability —Whether one conspiracy—Substantive charges to be considered first.

Criminal Law—Fraud—Credit by, obtaining—Sale—Agreement for—Price paid—Goods not delivered (post, p. 175).

Criminal Law—Court of Criminal Appeal—Substitution of verdict—Alternative counts—Convictions on both—No rule that lesser charge should be preferred—Criminal Appeal Act, 1907 (7 *Edw.* 7, *c.* 23), *s.* 5 (2).

Criminal Law—Evidence—Previous testimony of accused—Bankruptcy proceedings, in—Admissibility—Larceny Act, 1916 (6 *&* 7 *Geo.* 5, *c.* 50), *ss.* 20, 43 (2), (3).

Criminal Law—Indictment—Need for few counts—Inclusion of charges rejected at preliminary inquiry—Undesirability—Conspiracy count joined with substantive counts—Undesirability.

D. and W. were convicted of conspiracy to cheat and defraud. The indictment included, in addition to the count for conspiracy,

C. C. A.

1960

REGINA
v.
DAWSON.

14 substantive counts for false pretences, obtaining credit by fraud, and fraudulent conversion, some of which had been rejected by the magistrate at the preliminary hearing. D. was charged on every substantive count and W. on two. The conspiracy alleged was that D and W., with four other accused, had conspired with four companies and other persons unknown between November 1, 1954, and December 31, 1957, to cheat and defraud such persons as might be induced to part with moneys and goods in connection with transactions relating to the purchase, sale and processing of orange juice concentrate, and the purchase, sale and conversion of buses, bogies and landing vehicles, and such persons as might be induced to discount bills of exchange accepted by D. or the companies, by false pretences and by fraudulent conversion, and by other false or fraudulent devices. D. was also convicted on nine other counts, two being alternative counts of false pretences and obtaining credit by fraud, and one of fraudulent conversion, contrary to section 20 (1) (iv) (*a*) of the Larceny Act, 1916. In relation to that charge the judge admitted in evidence answers given by D. in his public examination in bankruptcy. W. was convicted on the two substantive counts on which he was also charged. After a nine-week hearing the judge, in summing up, directed the jury to consider the whole case first and form a view of the conspiracy before proceeding to the substantive charges.

D. and W. appealed against their convictions:—

Held, (1) that where a charge of conspiracy in addition to substantive charges was laid, the jury should be directed to consider first the substantive charges (post, p. 171).

(2) That the conspiracy charged was not one but a number of conspiracies, and it was no more correct to charge several conspiracies (although called one conspiracy) in one count than it was to include other different charges in one count. Moreover, the inclusion of a long count of such a kind was highly undesirable and unnecessary, as it had lengthened the case enormously and worked injustice on at least one of the appellants. Accordingly, the convictions for conspiracy would be quashed (post, p. 172).

Observations of Sankey J. in *Rex* v. *Luberg* (1926) 19 Cr.App.R. 133, 137, and *Rex* v. *Cooper and Compton* (1947) 32 Cr.App.R. 102 applied.

Rex v. *Meyrick and Ribuffi* (1929) 21 Cr.App.R. 94, and *Regina* v. *Hammersley* (1958) 42 Cr.App.R. 207 distinguished.

Per curiam. Where there are substantive charges which can be proved it is, in general, undesirable to add a charge of conspiracy; it can work injustice on the defendants because evidence otherwise inadmissible on the substantive charges against certain defendants becomes admissible; it adds to the length and complexity of the case, so that the trial may become unworkable and impose an intolerable strain upon the court and jury (post, p. 170).

(3) That, although the Court of Appeal was not acting as a sort of super-jury, it had to see that the verdict was reasonable in view of the actual evidence including the documents on which much of the present case depended (post, p. 170).

W.'s convictions would be quashed.

(4) That where there were alternative counts in an indictment and the jury had convicted on both, there was no rule that the conviction should be treated as if it had been on the lesser charge. It was the duty of the court to look at the realities of the position and as here a false pretence had clearly been made out, the proper count on which to register the conviction was that charging the false pretence; accordingly, the conviction of D. on that count would be affirmed and that on the alternative count quashed (post, p. 173).

Rex v. *Smith* (1915) 11 Cr.App.R. 81, and *Rex* v. *Johnson* (1913) 9 Cr.App.R. 262 considered.

(5) That section 43 (2) of the Larceny Act, 1916,[1] did not apply to bankruptcy proceedings, but protection in relation to such proceedings was afforded by section 43 (3), and, accordingly, evidence of answers given by D. in his public examination on bankruptcy was inadmissible (post, p. 174); but that as the evidence admitted could have had no effect on the minds of the jury, and as there was clear evidence of fraudulent conversion, the court would apply the proviso to section 4 of the Criminal Appeal Act, 1907, and confirm the conviction on that count (post, p. 175).

(6) That in the result the convictions of D. on three counts, for fraudulent conversion, false pretences and obtaining credit by fraud, would be affirmed, and the other convictions quashed. The appeal of W. would be allowed.

Per curiam. It is an undesirable practice, although such a course is permissible and in certain cases necessary, to include in an indictment charges which have been rejected by the magistrate at the preliminary hearing as it may cause hardship on the defendants, and the right to include such charges should be carefully watched.

APPEALS against conviction.

On January 6, 1959, the appellant, George John Frederick Dawson, was charged with the appellant, Albert Wenlock, and four other men, with conspiracy to cheat and defraud. The indictment also contained 14 substantive counts including four for false pretences, six for obtaining credit by fraud, one for fraudulent conversion and three for other offences. Dawson was charged on all 14 substantive counts and Wenlock on one count for false pretences and one for aiding and abetting Dawson in obtaining credit by fraud. All 14 counts related to the series of transactions described in the count for conspiracy. The count for conspiracy charged the appellants and the other accused with conspiring between November 1, 1954, and December 31, 1957, together with one George Ernest Barker (otherwise known as Arya), Michael Eaton Eland, Orchard Gold Ltd., Orchard Gold Producers Ltd., Smarden Fruit Juices Ltd., Bulk Containers Ltd. and with other persons unknown to cheat and defraud such persons as might be induced to part with moneys and goods in connection with transactions relating to the purchase, sale, barrelling, bottling and processing of orange juice concentrate, and the purchase, sale and conversion of buses, bogies and landing vehicles, and such persons as might be induced to discount or

[1] Larceny Act, 1916, s. 43: "(2) No person shall be liable to be "convicted of any offence against "sections . . . 20 . . . of this Act "upon any evidence whatever in "respect of any act done by him, if "at any time previously to his being "charged with such offence he has "first disclosed such act on oath, in "consequence of any compulsory "process of any court of law or equity "in any action, suit, or proceeding "which has been bona fide instituted "by any person aggrieved. (3) In "any proceedings in respect of any "offence against sections . . . 20 . . . "of this Act, a statement or admission made by any person in any "compulsory examination or deposition before any court on the hearing "of any matter in bankruptcy shall "not be admissible in evidence "against that person."

C. C. A.
1960
REGINA
v.
DAWSON.

accept liability in respect of bills of exchange accepted by Dawson or by the companies, by false pretences and by fraudulent conversion, and by divers other false and fraudulent devices.

Both Dawson and Wenlock were convicted of conspiracy. Dawson was also convicted on three counts of false pretences (counts 2, 6 and 7), on five counts of obtaining credit by fraud (counts 4, 8, 9, 12 and 14, count 8 being an alternative count to count 7), and of fraudulent conversion (count 11). He was sentenced to six years' imprisonment on the conspiracy count and to lesser concurrent terms on the other nine counts. Wenlock was convicted on the two counts on which he was charged (counts 2 and 14), both of which concerned contracts for the sale of orange juice in which he had acted as an agent. He was sentenced to two years' imprisonment for conspiracy and to concurrent terms of one year's imprisonment on the other two counts.

The facts relating to the counts on which this case is reported are referred to in the judgment.

The trial lasted nine weeks. At the beginning of the summing up Judge Aarvold directed the jury " not to put blinkers on " but to look at all the circumstances of the case and make up their minds on the whole matter. In conclusion he said: " You may " think a good way to approach the problem would be by " considering the first count in the indictment first, that is the " count of conspiracy, and making up your minds whether it has " been proved that in this case there was a conspiracy in being, " was there a course of fraudulent conduct agreed by that list of " people. If there was not such a course of fraudulent conduct " then you would acquit everybody at once. If there was such a " course of fraudulent conduct you would have to consider who " took part in it, and when you made up your minds which, if " any, of the defendants had taken part in it, you would then " have to consider when they took part in that dishonest and " fraudulent conduct did they know that is what they were doing. " Were they willing participants in dishonest acts?

" When you have dealt with the first count of the indictment " in that way, the rest of the counts in the indictment may fall " into a very much smaller compass and be more simple to " decide. Because, of course, if you find any one is not taking " part in the fraudulent conduct, if there was such a thing, you " would acquit that person, and you would acquit that person of " all the counts in which he was involved.

" If you find a particular person was knowingly taking part in " dishonesty and fraud in the way it is suggested, then you would " have to turn to the particular count in the indictment with " which that particular person is concerned, and then you would " have to ask yourselves whether the other matters alleged have " been proved to your satisfaction.

" In the case of obtaining money or credit by false pretences, " you will ask yourselves whether it was the fraudulent conduct

"of the person concerned which operated on the mind of the "person who parted with his money.

"You may think it simpler to consider after you come to your "decision on the conspiracy charge."

Dawson appealed against conviction and sentence on the grounds, inter alia, of misdirection in law by the judge in failing to direct the jury that alleged acts of misconduct in connection with an amorphous agglomeration of entirely separate transactions between different and unassociated people at different times and places could not be tried as one conspiracy; in directing the jury to consider the whole circumstances of the case first and then to proceed to consider the substantive counts; and that evidence had been admitted of various transactions when the magistrate had ruled at the preliminary hearing that no ground of complaint had been disclosed in relation to them. On counts 7 and 8 (which were in the alternative), he alleged misdirection by the judge in failing to direct the jury that they should not convict on both; on count 11, charging him with fraudulent conversion contrary to section 20 (1) (iv) (*a*) of the Larceny Act, 1916, that the judge had wrongly admitted answers given by him (Dawson) at his compulsory examination in bankruptcy, contrary to section 43 (2) and (3) of the Act.

Wenlock appealed against his conviction for conspiracy on the ground that the conspiracy count of the indictment was bad in law in that, although it purported to charge a general conspiracy to cheat and defraud over a period of three years, in reality a number of separate conspiracies were charged in one count; and that, to avoid a miscarriage of justice and prejudice in the minds of the jury, he should have been granted a separate trial confined to those persons charged with, and those acts in furtherance of a conspiracy dealing with transactions relating to the purchase and sale of orange juice. He appealed against his convictions on counts 2 and 14 on the ground of misdirection by the judge in regard to the evidence.

The case is reported on counts 1, 2, 7, 8, 11 and 14. Counts 4, 6 and 9, on which Dawson's convictions were quashed by the court, and count 12, on which the conviction was affirmed, do not call for report.

John Platts-Mills for Dawson.

James Burge for Wenlock.

Mervyn Griffith-Jones and *John Charles Mathew* for the Crown.

The following cases were cited in argument: *Rex* v. *Luberg* [2]; *Rex* v. *West* [3]; *Rex* v. *Cooper and Compton* [4]; *Osborne* v.

[2] (1926) 19 Cr.App.R. 133.
[3] [1948] 1 K.B. 709; 64 T.L.R. 241; [1948] 1 All E.R. 718.
[4] (1947) 32 Cr.App.R. 102; 63 T.L.R. 561; 2 All E.R. 701.

C. C. A.
1960
REGINA
v.
DAWSON.

Barton[5]; *Regina* v. *Ingram*[6]; *Rex* v. *Johnson*[7]; *Rex* v. *Smith*[8]; *Rex* v. *Lurie*[9]; *Rex* v. *Laurens*[10]; *Rex* v. *Hooley*[11]; *Rex* v. *Meyrick and Ribuffi*[12]; *Regina* v. *Hammersley*[13]; *Regina* v. *Wickham*[14]; *Regina* v. *Boulton*[15]; *Regina* v. *Noel*.[16]

Cur. adv. vult.

February 2. FINNEMORE J. delivered the following judgment of the court: These are appeals by George John Frederick Dawson, who was sentenced to six years' imprisonment and various lesser terms running concurrently, and Albert Wenlock, who was sentenced to two years' imprisonment in total, against their convictions and sentences at the Central Criminal Court. It is necessary to say that it was a case of very great length and considerable complexity which lasted, we are told, for nine weeks at the Central Criminal Court, and the appeal has taken two full weeks to hear in this court. It is also right to say here that we are indebted to counsel on both sides for having put their submissions to us so clearly. There was a mass of evidence which had to be considered. There were some 15 counts, one count for conspiracy to cheat and defraud, and 14 other counts dealing with various substantive charges. There was, we are told, obviously some difficulty in framing the charges because they changed from time to time before the accused were committed and, indeed, before the indictment itself was settled. There were several charges rejected by the chief magistrate at the preliminary hearing, some of which nevertheless appeared in the indictment. That course is permissible and in certain cases may be necessary, but we think it right to say, as has been said by other judges before us, that it is an undesirable practice and can easily in some cases work hardship on defendants, and the right to prefer in the indictment charges which the magistrate has rejected is one which ought to be very carefully regarded. This may be the reason (the difficulty of framing some of these charges) why count 1 charging the conspiracy to cheat and defraud was included.

I hope this judgment is not going to be unduly long, but we are anxious not to keep those concerned in suspense and, still more, we do not wish to raise false hopes which might easily be raised in view of the opinion we have formed on a number of the counts. I propose, therefore, to say at once what is the final result of our decision, and then briefly to indicate the reasons count by count.

[5] [1951] 66 T.L.R. (Pt. 1) 115.
[6] [1956] 2 Q.B. 424; [1956] 2 All E.R. 639.
[7] (1913) 9 Cr.App.R. 57.
[8] (1915) 11 Cr.App.R. 81.
[9] (1951) 35 Cr.App.R. 113; [1951] 2 T.L.R. 686; [1951] 2 All E.R. 704.
[10] (1915) 11 Cr.App.R. 215.
[11] (1922) 16 Cr.App.R. 171; 38 T.L.R. 724.
[12] (1929) 21 Cr.App.R. 94; 45 T.L.R. 421.
[13] (1958) 42 Cr.App.R. 207.
[14] (1839) 10 A. & E. 34.
[15] (1871) 12 Cox C.C. 87.
[16] [1914] 3 K.B. 848.

As far as Wenlock is concerned, his appeal will be allowed and the conviction quashed. Dawson's case is very different, and, while we are going to quash a number of convictions, we say at once that there are several counts upon which he was properly convicted which were serious cases of fraud, and the final result will be that we shall change the sentence overall from six years, to which he was sentenced, to one of four years.

Wenlock was convicted on only two counts, 2 and 14, plus the conspiracy. The first was in January, 1955, and the second in September, 1956. There was only one other matter in which he was concerned, count 5, on which there was an acquittal, which happened in April, 1955. With all the other charges he had nothing to do, either directly or indirectly. He was an agent trying to negotiate contracts, mostly on the Continent and in particular in Germany, a country from which we believe he originally came. We think Mr. Burge was right when he said that all the contemporary documents in this case, assuming they were genuine, go to prove Wenlock's bona fides, and there is no proof that we can see that these documents were not in fact genuine.

In count No. 2, the Shimwell contract, the whole case depended on an alleged contract signed by Wenlock as the agent for the Salvicta Co., and, in our view, there was nothing to show that that was not a genuine contract. The person who could have proved it to be not genuine—Mr. Berger from Salvicta—was not called, and we think there is no evidence that it was in fact other than a genuine contract as far as Wenlock was concerned. With regard to the second substantive charge on which he was convicted, count 14, it must be remembered that by that time he had fallen out with Dawson, had already issued two writs against him and written some rather violent letters. Again, the chief thing against him was what was alleged to be a mala fide contract in which he certainly drew what we may call a pro forma contract between the proposed seller, Pearson, and the buyer, F. C. Peterson, whose agent he was represented to be, but that was not in fact a contract, as Wenlock himself said at the interview; and fortunately for him, he had the good sense to write a letter immediately after saying in terms to Pearson: "Of "course this is not a contract." He wrote in the letter that it was the sort of contract he hoped and believed Peterson would be prepared to make, but he was not authorised to sign a contract and there would not be one until Peterson confirmed it from Germany. That seems to this court really to dispose of the contention that Wenlock was putting forward a bogus contract in order to deceive Peterson as part of a conspiracy. It would be a conspirator deliberately warning and putting the proposed victim on guard. The other matter which was alleged against him was that each of the proposed contracts, said to be the bait for the victim, went off for trivial reasons. This court does not think that was really made out, because the trivial reason in the Shimwell case was the failure to produce quickly the performance bond, the

C. C. A.
1960
REGINA
v.
DAWSON.

importance of which had been admittedly emphasised by Wenlock orally and also in letters. In the second case of Pearson there was a matter which was certainly not trivial. The German buyers found out that the orange juice was being emptied from tins into barrels and on that closed the contract, because by that time orange juice in tins was suspect and they were not prepared to go on with the contract under those circumstances.

We think that Wenlock is really a typical example of a man who was sunk by means of a mass of evidence about frauds of different kinds, with the great majority of which he had no connection either direct or indirect, and in which he took no part whatever, and in which his name was never even mentioned. What this court has to consider is whether we are acting as a sort of super-jury and trying to alter the verdict of the jury who saw and heard the witnesses, a verdict with which this court is extremely reluctant to interfere in any way, but we think we ought to say this: This court has the overall duty of seeing that there is no miscarriage of justice. It has to see that the verdict is reasonable in view of the actual evidence, and in this case we have ourselves seen the documents on which so much of the case depended. We want to make it quite plain that we are not in any way criticising the jury, nor are we criticising the judge, who, if we may say so, subject, of course, to some matters which were quite inevitable in a case of this great length, summed this case up quite fairly, and put quite properly to the jury the defences which had been put forward by the accused people. However, we have come to the view that the conviction of Wenlock on counts 2 and 14 and on the count for conspiracy is unsatisfactory and must be set aside and the appeal allowed.

With regard to the first count, for conspiracy, we feel that it is desirable to say something more. This court has more than once warned of the dangers of conspiracy counts, especially these long conspiracy counts, which one counsel referred to as a marathon conspiracy count. Several reasons have been given. First of all, if there are substantive charges which can be proved, it is in general undesirable to complicate and to lengthen matters by adding a charge of conspiracy. Secondly, it can work injustice because it means that evidence which otherwise would be inadmissible on the substantive charges against certain people becomes admissible. Thirdly, it adds to the length and complexity of the case so that the trial may easily be wellnigh unworkable, and impose a quite intolerable strain both on the court and on the jury. We would like to refer once again to what has been said, not once but numbers of times in this court. There is first *Rex* v. *Luberg*,[1] where Sankey J., giving the judgment of the court, referred to what was said by Cockburn C.J. in *Regina* v. *Boulton*.[2] Sankey J. said[3]: "There is the well-known case of *Boulton and*

[1] (1926) 19 Cr.App.R. 133.
[2] (1871) 12 Cox C.C. 87.
[3] 19 Cr.App.R. 133, 137.

"*Others*,[4] where Cockburn C.J., in summing up, refers to this "procedure and says[5]: 'I am clearly of opinion that where the "'proof intended to be submitted to a jury is proof of the actual "'commission of crime, it is not the proper course to charge "'the parties with conspiring to commit it; for that course "'operates, it is manifest, unfairly and unjustly against the "'parties accused; the prosecutors are thus enabled to combine "'in one indictment a variety of offences, which, if treated "'individually, as they ought to be, would exclude the possibility "'of giving evidence against one defendant to the prejudice of "'others, and deprive defendants of the advantage of calling "'their co-defendants as witnesses.'" That is the end of the quotation, and Sankey J. went on: "It is perfectly true that "that case was different from the present one. It is equally "true that since the decision in that case an Act of Parliament "has been passed which enables a prisoner to go into the witness-"box and give evidence. It is a perfectly admissible and proper "course to pursue, and a course which is often pursued, but we "think that if that course is pursued, great care and great caution "is necessary during the hearing of the evidence to be quite sure "that no evidence is given which is inadmissible, and great care "is required in the summing-up to keep all the several issues "perfectly clear." Again, he said[6] in regard to the summing-up: "The judge does not, I think, at the end of his long summing-"up"—which was not otherwise at all criticised—"in one way "put it quite correctly, where he says: 'That is the whole case "'and you must take it as a whole and not by bits.'" That is very like the direction given to the jury in the present case; they were told to look at the whole of the case, and having formed a view about the whole of the case, which really means the conspiracy, then to proceed to the substantive charges. We think the proper course is to proceed the other way, to deal with the substantive charges and then proceed to see how far the conspiracy count should be there at all and if it is made out.

On the other side we would refer to *Rex* v. *Meyrick and Ribuffi*,[7] and also to *Reg.* v. *Hammersley*,[8] fairly recent cases, but the difference is that in each of those cases the court held that there was only one conspiracy, even though people took part in it independently of one another, and I think in one case not even knowing the main person in the conspiracy. They were both conspiracies to defeat the ends of justice, and both dealt with bribes given to police officers in order to allow infringements of the law to take place.

The case of *Luberg*[9] and the quotation from Cockburn C.J. in *Boulton's* case[10] were again referred to in *Rex* v. *Cooper and Compton*,[11] and without going into it further, this court suggests

[4] 12 Cox C.C. 87.
[5] Ibid. 93.
[6] 19 Cr.App.R. 133, 139.
[7] (1929) 21 Cr.App.R. 94.
[8] (1958) 42 Cr.App.R. 207.
[9] 19 Cr.App.R. 183.
[10] 12 Cox C.C. 87.
[11] (1947) 32 Cr.App.R. 102.

C. C. A.
1960
REGINA
v.
DAWSON.

that when counsel have to deal with these problems they would do well to read again and bear in mind the judgment of this court delivered in that case by Humphreys J.

There is more than this in the present case, for this court, after very careful consideration of this point, is of opinion that this was not one conspiracy. Although conspiracy there may have been, it was a number of conspiracies. Dawson was dealing with orange juice; he was dealing with buses, bogies and landing vehicles; and he was dealing with bills of exchange, with different kinds of people at different times over a period of three years. The count charges conspiracy with some 12 men, of whom six were actually charged and three convicted. It is an odd circumstance that one person named Eland was included in the count as one of the conspirators, and in a later count as one of the victims, which illustrates again the great difficulties in which one is placed by these abnormally long conspiracy charges. In addition to the other matters we have mentioned, we are satisfied this was not one conspiracy, and it is no more correct to charge several conspiracies, though they are called one conspiracy, than it is to include several different charges, in one count. Again we wish to say that quite apart from that matter we think it is wholly undesirable, and in the present case it was obviously quite unnecessary, to have a long count of this kind, because it has lengthened the case enormously, and we think that in the result it plainly worked an injustice on one at least of the appellants before this court today. Therefore we quash the convictions on the first count.

Count No. 2 charges both Dawson and Wenlock. There were three false pretences alleged and two were abandoned by the prosecution. Mr. Maxwell Turner, who was conducting the case for the prosecution, said in the plainest terms that he accepted the view that the first and second false pretences may have ceased to operate on the minds of the persons concerned, and, therefore, the only matter which was concerned was the third false pretence that I have dealt with. It was this same false pretence which affected Wenlock: the Salvicta letter. As we think the genuineness of that letter was not disproved, and there was no false pretence, the conviction on count 2 also must be quashed against both Wenlock and Dawson.

[His Lordship considered counts 4 and 6, said that Dawson's convictions on those two counts would be quashed, and continued:] Counts 7 and 8 are very different. Mr. Platts-Mills made no sort of admission, but the real case on counts 7 and 8—that is why I take them together—was that the jury were wrong in convicting Dawson on both counts because they were alternative charges. That we take to be right. One was a charge of false pretences on which he was sentenced to five years' imprisonment, and the second, dealing with exactly the same matter, charged him with obtaining credit by fraud other than false pretences, on which he was sentenced to 12 months' imprisonment. Mr. Platts-Mills developed his argument to say that if

that mistake is made and a person is convicted on two alternative counts, the rule is that the court should act on the lesser of the two and pass the smaller sentence. We do not think that really is a rule. In *Rex* v. *Smith*,[12] Lord Reading C.J. said that no doubt the court could, and in a proper case would, treat the conviction as if it had been upon the lesser of the charges. It was not a direction or a rule, and in the previous case which is referred to in that case, *Rex* v. *Johnston*,[13] it was said that if the court is in doubt, then it should choose the lesser of the two charges of which the man has been convicted. We think it is the duty of the court to look at the realities of the position, and, in our view, there was the plainest possible evidence of false pretences. We think the false pretence count, which is 7, is the proper one on which the conviction should be registered and not as it happens in this case, the lesser offence contained in count 8. It was a false pretence in which a false letter, amongst other things, was handed to the man concerned, saying that the companies for whom the work was being done had many assets, including some £60,000 worth of stock and had negligible liabilities, when, in fact, the companies concerned were insolvent. There were other matters as well, but we think it is a plain case of false pretences, and we therefore affirm the conviction on count 7 upon which a sentence of five years was passed, which we think appropriate to reduce to a sentence of four years.

[His Lordship dealt with count 9, on which the conviction was also quashed, and continued:] Counts 11 and 12 we take together, and this is quite a different point. [His Lordship said that count 11 charged Dawson and another accused with fraudulent conversion of £1,600 entrusted to them by Veritas Investments and Finance Ltd. in order that it could be applied for payment to Bulk Containers Ltd. for locomotive bogies, diesel motors and gear boxes, and for the construction of diesel locomotives. Count 12 dealt with the same matter but the charge was one of obtaining credit by fraud from Veritas Investments and Finance Ltd. by the same pretence to the amount of £8,740. There was no doubt that this was a fraudulent transaction because the work of conversion was never carried out, and there were a number of false documents purporting to show that it was done. It had been argued by Mr. Platts-Mills on count 11 that the £1,600 had been paid to Dawson as part of the purchase price of goods so that it could not be entrusted and could not be converted. That was not a proper reading of the transaction. There was ample evidence on which the jury could find that £1,600 was paid for the purpose of work being done on the vehicles and the charge of fraudulent conversion was made out. There was also evidence on which the jury could find that credit had been obtained by fraud.] His Lordship continued:

There is, however, another point which arises on count 11,

[12] (1915) 11 Cr.App.R. 81.

[13] (1913) 9 Cr.App.R. 262.

C. C. A.
1960
Regina
v.
Dawson.

which charges an offence under section 20 (1) (iv) (*a*) of the Larceny Act, 1916. Mr. Platts-Mills raised two points. For some reason on this count—it applies only to this count—evidence was proffered and admitted of part of Dawson's public examination in bankruptcy, and Mr. Platts-Mills took two points on that, first on section 43 (2) and, secondly, on section 43 (3) of the Larceny Act, 1916. Subsection (2) provides: "No person shall be liable to be "convicted of any offence against sections . . . 20 . . . of this Act "upon any evidence whatever in respect of any act done by him, "if at any time previously to his being charged with such offence "he has first disclosed such act on oath, in consequence of "any compulsory process of any court of law or equity in any "action, suit, or proceeding which has been bona fide instituted "by any person aggrieved." He said that no proceedings could be taken on this matter and the count would fail. Mr. Griffith-Jones's answer to that is that that subsection does not apply to bankruptcy proceedings.

It seems to this court, having been referred to the relevant statutes, that that is the correct view. The Larceny Act, 1861, contained section 85 in which this provision first appeared. The interesting thing about it is, that having used very much the same words as I have just read from the Act of 1916, it added this: "or if he shall have first disclosed the same in any compulsory "examination or deposition before any court upon the hearing of "any matter in bankruptcy or insolvency." That would seem to "suggest that subsection (2) of section 43 of the Larceny Act, 1916, as I read it, would not apply to bankruptcy proceedings. But in the Act of 1861, special provision was made to give a similar protection to a man who first disclosed offences of this kind in the bankruptcy proceedings. The matter becomes, it seems to us, quite plain when we look at section 27 of the Bankruptcy Act, 1890, because that section repeals this very provision, and it puts in its place a new subsection, section 27 (2): "A statement or "admission made by any person in any compulsory examination "or deposition before any court on the hearing of any matter in "bankruptcy shall not be admissible as evidence against that "person in any proceedings in respect of any of the misdemeanours "referred to in the said section 85." It appears to us to be as plain as anything can be, that the legislature repealed the protection of what is now subsection (2) of section 43 as applying to bankruptcy matters, and gave a new protection, section 27 (2), which is now subsection (3) of section 43 of the Larceny Act, 1916. Therefore, we think subsection (2) of section 43 had no application to the present case, but we do think subsection (3) applies, and we think that this evidence was in fact inadmissible.

We have to consider another matter which was also urged on this point by Mr. Griffith-Jones: Did this evidence in fact have any real effect upon the jury? We do not know why it was ever thought to be necessary, much less desirable, to tender it, or why it was allowed to be given, but we have read it and considered it

and heard the arguments about it. We think it is a proper case in which we can say that we do not think the questions which were in fact admitted from the public examination could have had any real effect upon the jury, or could have influenced them in any way in coming to the verdict on this count. We therefore think it is right in the interests of justice to apply the proviso to section 4 of the Criminal Appeal Act, 1907, because we think no miscarriage of justice resulted from it. Therefore, we have affirmed the convictions on count 11 and also on count 12, and think the proper sentence on count 11 is four years' imprisonment to run concurrently with the other sentence, and on count 12, 12 months' imprisonment, also to run concurrently.

That leaves only count 14. In this count the major charge is against Dawson, Wenlock being charged with aiding and abetting him. As far as Dawson is concerned, the charge is again one of obtaining credit. What happened, shortly, was this. He sold to Pearson a quantity of orange juice which was seen by Pearson, or by someone on his behalf. It was tested by somebody on Pearson's behalf, and it was situated then either at Smarden or West Ferry. The contract was for 30,000 gallons, and if there was not that quantity of orange juice at the proper place where the sale took place, Dawson was to make it up with orange juice which he obtained elsewhere. £750 was paid, quite plainly, as it seems to us, as part of the purchase price, and the argument was, that inasmuch as there were not in fact 30,000 gallons in the place, and he therefore would have to get other orange juice to make up the quantity, it was in fact a case of his being given credit. We would refer to *Osborne* v. *Barton*[14] and *Reg.* v. *Ingram*[15] on this question, which arises on some other counts as well. We think the principles are not really difficult. If a person buys goods and the man to whom he sends the money does not send the goods back to him or hand them over, it does not mean that the purchaser has given him credit. He may be guilty of other frauds, but he is not guilty of obtaining credit. On the other hand, if by arrangement a purchaser hands over to a person the purchase-money for the goods with the arrangement between them that the goods are not going to be delivered until some time in the future, then that may be a case, as in *Reg.* v. *Ingram*,[15] of credit being enjoyed by the person who has to supply the goods. We do not think this case was that at all. We do not think in any real sense it can be said that under this count, whatever else he may have done, Dawson in fact obtained credit. Therefore, the conviction on count 14 is also quashed.

The result is that the appeal of Wenlock is allowed and the conviction quashed. With regard to Dawson, on count 7 and count 11 there is a sentence of four years' imprisonment to run

[14] (1951) 66 T.L.R. (Pt. 1) 115.

[15] [1956] 2 Q.B. 424; [1956] 2 All E.R. 639.

C. C. A.
1960

REGINA
v.
DAWSON.

concurrently, and on count 12 a sentence of 12 months' imprisonment, also to run concurrently, to date from the original date.

Appeal of Wenlock allowed with costs of the preliminary hearing, the trial and of the appeal.
Appeal of Dawson allowed in part.

Solicitors: *G. B. Hemming & Son; Eric H. Davis & Co.; Director of Public Prosecutions.*

E. M. W.

[QUEEN'S BENCH DIVISION.]

1959
Dec. 1, 21.

Pearson J.

* GREEN *v.* BOWES-LYON.

[1959 G. No. 1240.]

Landlord and Tenant — Reversionary tenancy — Agreement for future tenancy—Distinction—Landlord and Tenant Act, 1954 (2 & 3 *Eliz.* 2, *c.* 56), *ss.* 28, 65 (3).

R. held certain premises under a very long lease. W. held a sub-lease of the whole of the premises from R. for a term expiring on April 4, 1959. The plaintiff held a sub-lease of the ground floor and basement of the premises from W. for a term expiring on April 1, 1959. The defendant held a sub-lease of the ground floor only from the plaintiff for a term expiring on March 31, 1959. Part II of the Landlord and Tenant Act, 1954, did not apply to W.'s tenancy. The plaintiff occupied the basement for business purposes and therefore Part II of the Act applied to her tenancy. The defendant occupied the ground floor for business purposes and therefore Part II of the Act applied to her tenancy also. By an instrument dated March 19, 1958, and called a reversionary lease, R. granted the defendant a lease of the ground floor of the premises for a term of seven years from April 5, 1959.

In an action by the plaintiff for one quarter's rent due on June 24, 1959, the defendant contended that section 28 [1] of the Act

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[Reported by A. D. RAWLEY, Esq., Barrister-at-Law.]

[1] Landlord and Tenant Act, 1954, s. 28: "Where the landlord and "tenant agree for the grant to the "tenant of a future tenancy of "the holding, or of the holding with "other land, on terms and from a "date specified in the agreement, the "current tenancy shall continue until "that date but no longer, and shall "not be a tenancy to which [Part II] "of this Act applies."

S. 65 (3): "Where by virtue of "any provision of this Act a tenancy "(in this subsection referred to as 'the "'continuing tenancy') is continued "beyond the beginning of a reversionary tenancy which was granted "(whether before or after the commencement of this Act) so as to "begin on or after the date on which "apart from this Act the continuing "tenancy would have come to an end, "the reversionary tenancy shall have "effect as if it had been granted "subject to the continuing tenancy."

Sch. 6, para. 3: "(1) Any notice

applied, that the instrument of March 19, 1958, was an agreement between the landlord and the tenant for the grant to the tenant of a future tenancy of the holding on terms and from a date, viz., April 5, 1959, specified in the agreement, and that the defendant's tenancy was the "current tenancy" referred to in section 28 of the Act, and that it was continued by section 24 of the Act only until April 5, 1959, and no longer, and was not, therefore, a tenancy to which Part II of the Act applied; and that the defendant was not the plaintiff's sub-tenant but the sub-tenant of R. under the instrument dated March 19, 1958, which bound the interest of the plaintiff, giving her a right to compensation under the Act. The plaintiff contended, inter alia, that the instrument of March 19, 1958, was a reversionary lease within the meaning of subsection (3) of section 65, so that the position was governed by that subsection:—

Held, that a reversionary lease was something that created an estate, whereas an agreement for a future tenancy created merely a set of contractual rights and obligations. The instrument of March 19, 1958, was not an agreement for a future tenancy within the meaning of section 28 of the Act: it was a reversionary lease, and therefore the position was governed by section 65 (3) of the Act. The plaintiff's tenancy continued indefinitely, until determined under the Act, by virtue of section 24 of the Act, as did the defendant's tenancy from the plaintiff. By virtue of section 65 (3) of the Act the reversionary tenancy created by the instrument of March 19, 1958, had effect only subject to the defendant's continuing tenancy. On that basis, the defendant had a continuing tenancy from the plaintiff and was the plaintiff's sub-tenant. Accordingly, the plaintiff was entitled to recover the rent claimed in the action.

ACTION.

The plaintiff, Olga Mary Green, by a specially indorsed writ, sued to recover £187 10s., being one quarter's rent due on June 24, 1959, in respect of the ground floor shop at 64, South Molton Street, London, W.1., from the defendant, Edith Katherine Bowes-Lyon.

The facts and the issue arising are set out in the judgment.

Charles Lawson for the plaintiff.
John Wilmers for the defendant.

"given by the competent landlord "under Part II of this Act to terminate the relevant tenancy, and any "agreement made between that landlord and the tenant as to the "granting, duration, or terms of a "future tenancy, being an agreement "made for the purposes of the said "Part II, shall bind the interest of "any mesne landlord notwithstanding "that he has not consented to the "giving of the notice or was not a "party to the agreement.

"(2) The competent landlord shall "have power for the purposes of "Part II of this Act to give effect to "any agreement with the tenant for "the grant of a new tenancy beginning with the coming to an end of "the relevant tenancy, notwithstanding that the competent landlord will "not be the immediate landlord at "the commencement of the new "tenancy, and any instrument made "in the exercise of the power conferred by this sub-paragraph shall "have effect as if the mesne landlord "had been a party thereto."

Sch. 6, para. 4: "(1) If the "competent landlord, not being the "immediate landlord, gives any such "notice or makes any such agreement "as is mentioned in sub-paragraph "(1) of the last foregoing paragraph "without the consent of every mesne "landlord, any mesne landlord whose "consent has not been given thereto "shall be entitled to compensation "from the competent landlord for any "loss arising in consequence of the "giving of the notice or the making "of the agreement."

1959

Green
v.
Bowes-Lyon.

The following cases, not referred to in the judgment, were cited in argument: *Wheeler* v. *Mercer* [2]; *Martinali* v. *Ramuz* [3]; *Cornish* v. *Brook Green Laundry*.[4]

Cur. adv. vult.

December 21. Pearson J. read the following judgment: In this case the facts are not in dispute, and there is no oral, but only documentary, evidence. The issue arises under the Landlord and Tenant Act, 1954. It is common ground that the defendant is somebody's sub-tenant of the ground floor shop of 64, South Molton Street, but she is claimed as sub-tenant by the plaintiff on the one side, and by a Mr. Rye on the other side, and the real dispute is between the plaintiff and Mr. Rye. In form, the action is a claim by the plaintiff against the defendant for £187 10s. rent due on June 24, 1959, and the defence is that the defendant is not the plaintiff's sub-tenant and, therefore, does not owe any rent to the plaintiff.

Mr. Rye holds a very long lease of the whole of the premises, 64, South Molton Street. On April 5, 1945, he demised the whole premises to a Mr. Wells for a term of 14 years from April 4, 1945, so that the term would expire on or about April 4, 1959.

On February 18, 1946, Mr. Wells demised the ground floor and basement of the premises to Mr. Alvine for a term of 10 years from February 1, 1946. That term would have expired on or about February 1, 1956, but there was a supplemental lease on January 11, 1956, from Mrs. Wells, widow and successor in title of Mr. Wells, to the plaintiff, who together with another lady then held the residue of the term which had been granted by the lease of February 18, 1946. By this supplemental lease Mrs. Wells demised the ground floor and basement of the premises to the plaintiff from February 1, 1956, for a term of three years and 59 days, expiring on April 1, 1959.

On March 19, 1958, Mr. Rye granted to the defendant an instrument which purported to be a reversionary lease. There was a recital that the lessor was the superior landlord of the whole of the premises, 64, South Molton Street. There was also a recital that by an underlease of April 5, 1945, between the lessor of the one part and Mr. Wells of the other part, the whole of the building was let to Mr. Wells from April 4, 1945, for a term of 14 years expiring on April 4, 1959. That is the underlease to which I have already referred. There was a further recital that the interest of Mr. Wells had now passed to his widow, Mrs. Wells. There was also a recital that the lessee, that is to say, the defendant, was the sub-tenant of the ground floor only upon which she carried on the business of the sale of light refreshments and farm produce. Then the instrument provided as follows: "The lessor conditionally upon the

[2] [1956] 1 Q.B. 274; [1955] 3 W.L.R. 714; [1957] A.C. 416; [1956] 3 W.L.R. 841; [1955] 3 All E.R. 455; [1956] 3 All E.R. 631.

[3] [1953] 1 W.L.R. 1196; [1953] 2 All E.R. 892.

[4] [1959] 1 Q.B. 394; [1959] 2 W.L.R. 215; [1959] 1 All E.R. 378.

"lessee obtaining a lease of the demised premises until the 1st "day of April, 1959, hereby demises"—in effect, a ground floor shop—"for a term of seven years from the 5th day of April, "1959," at a stated rent. The defendant thus had to fulfil a condition in order to have the benefit of the instrument. She obtained an underlease from the plaintiff who, as I have said, had the supplemental lease of the ground floor and basement. By the underlease dated June 17, 1958, the plaintiff demised the ground floor shop to the defendant from June 17, 1958, to March 31, 1959. That has been treated as a fulfilment of the condition, no question being raised as to the apparent slight discrepancy in dates between "until the 1st day of April, 1959," and "until the 31st day of "March, 1959."

Early in 1959, therefore, the position at common law, if we disregard for the moment the effect of the Landlord and Tenant Act, 1954, would be this: (1) Mr. Rye as head lessor has a very long lease of the whole of the premises; (2) Mrs. Wells holds from Mr. Rye a sub-lease of the whole of the premises expiring on April 4, 1959; (3) the plaintiff holds from Mrs. Wells a sub-lease of the ground floor and basement expiring on April 1, 1959; (4) the defendant holds from the plaintiff a sub-lease of the ground floor expiring on March 31, 1959; (5) the defendant has the instrument being or purporting to be a reversionary lease commencing on April 5, 1959, which is evidently timed to take effect immediately after the expiration of Mrs. Wells's lease, although it has also the curious effect of leaving a gap of four days between the expiry of the defendant's sub-lease from the plaintiff and the commencement of the reversionary lease.

Next comes the impact on this situation of Part II of the Landlord and Tenant Act, 1954. Subsection (1) of section 23 provides: "Subject to the provisions of this Act, this Part of this "Act applies to any tenancy where the property comprised in the "tenancy is or includes premises which are occupied by the tenant "and are so occupied for the purposes of a business carried on by "him or for those and other purposes." Subsection (3) defines "the holding."

The plaintiff was occupying the basement for business purposes, so that the property comprised in her tenancy of the ground floor and basement included premises occupied by her for business purposes, and therefore Part II of the Act applied to her tenancy. Moreover, the defendant was occupying the ground floor for business purposes, and therefore Part II of the Act, prima facie at any rate, applied to her tenancy. Mrs. Wells, as I understand the position, was not occupying any part of the premises for business purposes, and was not personally occupying any part of it at all, and so Part II of the Act did not apply to her tenancy.

Then we come to section 24 and the opening words of subsection (1) are: "A tenancy to which this Part of this Act applies

1959

Green
v.
Bowes-Lyon.

Pearson J.

" shall not come to an end unless terminated in accordance with " the provisions of this Part of this Act."

The effect of that section was to continue the plaintiff's tenancy of the ground floor and basement beyond April 1, 1959, indefinitely, until it should be terminated in one of the several ways provided by the Act. Similary, the defendant's tenancy was, prima facie at any rate, continued indefinitely until terminated in one of the ways provided by the Act. The question now arises: How is the defendant's position affected by the instrument dated March 19, 1958? That is really the issue in this case.

The plaintiff's contention is that the instrument is what it calls itself, namely, a reversionary lease, and that therefore the position is governed by section 65 (3), which provides: " Where by " virtue of any provision of this Act a tenancy (in this sub- " section referred to as ' the continuing tenancy ') is continued " beyond the beginning of a reversionary tenancy which was " granted (whether before or after the commencement of this " Act) so as to begin on or after the date on which apart from " this Act the continuing tenancy would have come to an end, " the reversionary tenancy shall have effect as if it had been " granted subject to the continuing tenancy." If that subsection applies, then the continuing tenancy is the defendant's sub-lease from the plaintiff which was originally timed to expire on April 1, 1959, but was continued by section 24 indefinitely. On that basis the reversionary tenancy created by the instrument of March 19, 1958, is to have effect only subject to the defendant's continuing tenancy, which is her sub-lease from the plaintiff, and the defendant is the plaintiff's sub-tenant and owes her the rent claimed in this action.

The defendant's contention, on the other hand, is based on section 28, which provides: " Where the landlord and tenant " agree for the grant to the tenant of a future tenancy of the " holding, or of the holding with other land, on terms and from " a date specified in the agreement, the current tenancy shall " continue until that date but no longer, and shall not be a " tenancy to which this Part of this Act applies."

The defendant's contention is that the instrument dated March 19, 1958, which is called a reversionary lease, is in truth an " agreement between the landlord and the tenant for the grant " to the tenant of a future tenancy of the holding . . . on terms " and from a date specified in the agreement . . . " within the meaning of section 28. If that is right, then the defendant's sub-lease from the plaintiff was the " current tenancy " referred to in section 28, and it continued only until April 5, 1959, and no longer, and was not, therefore, a tenancy to which Part II of the Act applied. Then, on that basis, it is said that the agreement binds the interest of the plaintiff under paragraph 3 (1) of the Sixth Schedule to the Act, and that paragraph 4 (1) of that Schedule gives the plaintiff a right to compensation.

The question in the end is a very simple one: is the instrument of March 19, 1958, a reversionary lease or is it an agreement for the grant of a future tenancy? Having regard to its name and provisions I hold that it is a reversionary tenancy and not an agreement for the grant of a future tenancy. It creates an estate and not merely a set of contractual rights and obligations.

The nature of a reversionary lease is explained in Woodfall on Landlord and Tenant, 25th ed., p. 286: "A lease may be limited to take effect either immediately or from a future date. "It is provided by the Law of Property Act, 1925, s. 205 (1) "(xxvii), that 'a term of years absolute' includes a term of years "taking effect either in possession or in reversion.

"Reversionary leases. All leases which are not to take effect "in possession immediately, but from a future day, are con- "sidered as reversionary leases, within the meaning of powers "to grant leases in possession and not in reversion. In legal "acceptance a lease for years in reversion, and a future interest "for years, are one and the same; a future lease and a lease in "reversion are synonymous. But strictly speaking, a reversion- "ary lease is one granted for a term which is to commence from "or after the expiration or other determination of a previous "lease."

In my view, this instrument is a reversionary lease which was granted for a term which was to commence from and after the expiration of the previous lease. The previous lease from Mr. Rye to Mr. Wells was expiring on April 4, and this instrument granted a reversionary lease commencing on April 5. The difference between the reversionary lease referred to in section 65 (3) and the agreement for a future tenancy referred to in section 28 is the difference between something which creates an estate and something which creates merely a set of contractual rights and obligations.

I therefore hold that the defendant was on June 24, 1959, the plaintiff's sub-tenant under the sub-lease dated June 17, 1958, which was being continued under section 24 of the Act. Accordingly, the rent claimed in this action is due from the defendant to the plaintiff. It is unnecessary to venture a decision or express an opinion on the interesting points which were discussed at the trial as to the application to the facts of this case of the definition of "landlord" contained in section 44 of the Act. Nor is it necessary to deal with the correspondence which was exhibited on affidavits. In the result, there will be judgment for the plaintiff for the amount claimed.

Judgment for the plaintiff with costs.

Solicitors: *Tringhams; Layton & Co.*

[PROBATE, ETC., DIVISION.]

1959
Nov. 16, 17, 18, 19, 20.

Sachs J.

* BLACK *v.* BLACK (MAY Intervening).

Practice Note.

Husband and Wife—Divorce—Evidence—No evidence adduced by one party seeking decree—Jurisdiction of court.

Defended petition for divorce.

The husband, by his petition dated June 24, 1957, prayed for a declaration that his marriage was validly dissolved by a decree of divorce granted to the wife on January 8, 1953, by a Pennsylvanian court, and, in the alternative, for divorce, in the exercise of the court's discretion in respect of his adultery, on the ground of desertion by the wife from June 16, 1951. The wife, by her answer dated September 24, 1957, denied desertion, admitted withdrawing from cohabitation with the husband on June 16, 1951, but pleaded just cause for so doing; she alleged that the husband, by not opposing the granting to her of the Pennsylvanian decree, consented to her thereafter living separate and apart from him; she charged the husband with desertion and adultery with the intervener; she cross-prayed for divorce. The wife, who resided in the United States, did not give evidence in the suit, either in person or in any other way. It was submitted that the court could not pronounce a decree in favour of a party without receiving evidence from that party. The case is reported solely on the judge's ruling on that point.

P. Goodenday for the husband and intervener.
Joseph Jackson for the wife.

Sachs J. referred to the pleadings and the facts, held that the husband had established his charge of desertion, and continued: Now I will turn to the wife's cross-prayer. The first point taken was that the court ought not or could not (I am not sure which) give relief to a wife who had not appeared in person nor given evidence on commission or tendered her evidence in some such way. I will merely say that, in my view, the court has jurisdiction to hear and determine any petition or cross-prayer of a person who seeks a decree, in a cause even if that person is not called as a witness nor tenders evidence on commission or otherwise.

On the other hand, it seems to me equally clear that this jurisdiction will not be exercised in favour of the applicant save in really exceptional cases, because otherwise the court would very often be prevented from inquiring fully into the matter.

I am inclined to the view that this is an exceptional case.

[Reported by D. R. Ellison, Esq., Barrister-at-Law.]

I think it would be unreal to expect a wife in such financial circumstances as have so far been put before the court to come to this country and incur additional expense in order merely to fortify a position which is already completely secured in her own country. As regards the question of tendering evidence on commission, I am told that the giving of evidence by the wife otherwise than in person was, during the interlocutory proceedings, strongly opposed. Suffice it to add that one often realises how little use, in cases such as the present, evidence may be when it is not backed by the appearance of the witness, so that his or her demeanour can be observed. Here the real issue is whether the husband was guilty of the adultery charged, and on that issue there is no contest whatsoever, and I am prepared to consider the wife's prayer on its merits.

In so far as any question of discretion arises under the proviso to section 4 (2) of the Matrimonial Causes Act, 1950, I see no reason to exercise it in favour of the wife, and a reason of considerable strength for exercising it against her. In those circumstances I do not propose to embark upon the question whether the conduct of the wife was, in law, conduct conducing. Still less need I consider the question whether the wife connived at the husband's adultery.

Having thus explained that I would not be prepared to exercise my discretion in favour of the wife, I now turn to the question of whether I should exercise it in favour of the husband. Having taken into account all the facts of the case, including the husband's desire to marry the intervener, I have without hesitation come to the conclusion that I should exercise my discretion in his favour.

The result will, accordingly, be a decree nisi to the husband on his petition, the wife's cross-prayer being rejected.

Decree nisi for husband.

Solicitors: *Alec Woolf & Turk; Oswald Hickson, Collier & Co.*

[PROBATE, ETC., DIVISION.]

* OHOCHUKU *v.* OHOCHUKU.

1959
Oct. 27.
Wrangham J.

Husband and Wife — Divorce — Jurisdiction — Residence, based on — Polygamous marriage in Nigeria—Subsequent ceremony at register office in England — Jurisdiction of English court — Matrimonial Causes Act, 1950 (14 *Geo.* 6, *c.* 25), *s.* 18 (1) (*a*).

The parties, whose domicile at all material times was Nigerian, were validly married in Nigeria. The marriage was polygamous. The parties subsequently came to England and went through a

[Reported by D. R. ELLISON, Esq., Barrister-at-Law.]

1959

Ohochuku
v.
Ohochuku.

second ceremony of marriage at a London register office. After being ordinarily resident in England for upwards of three years, the wife petitioned for divorce on the ground of cruelty. The charge of cruelty was established:—

Held, that as the Nigerian marriage was polygamous, and as the English courts will not assume jurisdiction to dissolve a polygamous marriage, the wife was entitled to a decree nisi of dissolution of the marriage celebrated in London.

Petition for divorce.

On January 1, 1949, the parties, who were Nigerians, went through a ceremony of marriage in Nigeria. According to an expert in Nigerian law whose evidence was accepted, the ceremony was valid by Nigerian law and was polygamous. Later, the parties came to England and on July 24, 1953, went through a ceremony of marriage at a London register office. After being ordinarily resident in England for upwards of three years, the wife petitioned for divorce on the ground of cruelty.

P. H. Ripman for the wife.

The following cases were cited in argument: *Hyde* v. *Hyde and Woodmansee* [1]; *Baindail* (*orse. Lawson*) v. *Baindail* [2]; *Thynne* v. *Thynne*.[3]

Wrangham J. Although this is an undefended divorce suit it is one in which a point of some little interest and difficulty arises.

The parties are Nigerians. I am not satisfied on the evidence that the husband ever abandoned his Nigerian domicile of origin, so that this court only obtains jurisdiction to dissolve the marriage by virtue of section 18 (1) (*a*) of the Matrimonial Causes Act, 1950.

The history of the matter is that, on January 1, 1949, the parties, who are Nigerians and formerly lived in Nigeria, there entered into a union which was the result of a ceremony which by the law of Nigeria would be described as a ceremony of marriage. The wife described to me, in evidence, what that ceremony consisted of. Dr. Elias, who is qualified to give evidence about Nigerian law, testified to me, and I accept his testimony, that under Nigerian law the ceremony described by the wife would amount to a marriage, and that that marriage would be potentially polygamous, that is to say, Nigerian law would permit the husband to marry other women besides the one whom he married in that ceremony. The parties ultimately came to England, first the husband and then the wife, and on July 24, 1953, not long after the wife's arrival in England, they went through a ceremony of marriage at a register office in London. The reason for that was not that they had any particular doubt about the validity of the ceremony which they had gone through in Nigeria but that

[1] (1866) L.R. 1 P. & D. 130.
[2] [1946] P. 122; [1946] 1 All E.R. 342; 62 T.L.R. 263.
[3] [1955] P. 272; [1955] 3 W.L.R. 108, 465; [1955] 3 All E.R. 129.

the wife found it desirable to have a marriage certificate which she could show for practical purposes in England. Subsequently, there was trouble between husband and wife, to which I need not refer further than to say that the wife has satisfied me that her husband treated her with cruelty, and that she is entitled to a decree nisi of dissolution of marriage. The only question is, which marriage is it that has to be dissolved? Recent authorities have shown that it is important that the court which dissolves a marriage should make it clear in the decree what marriage it has dissolved. That raises the question whether this court has jurisdiction to dissolve the Nigerian marriage or only the marriage celebrated in London.

It is established by authority, to which I need not refer, that an English court will not assume jurisdiction to dissolve a polygamous marriage. Polygamous marriages are recognised now by the courts for various other purposes but they are not recognised for that purpose. This marriage in Nigeria was a polygamous marriage.

I have considered whether the fact that the parties were of the Christian faith, and would therefore regard this ceremony as monogamous because the obligations of their faith so required, makes any difference for this purpose. It is relevant in this connection to note that Dr. Elias proved before me that whether the parties were Christian or not, Nigerian law would recognise a subsequent union between the husband and another woman as being a lawful marriage; in other words, it would not forbid polygamy even if that were contrary to the religious tenets of the spouses.

In those circumstances, I have come to the conclusion that whatever might be the effect on the marriage for other purposes and in other courts of the parties being Christians, in this court and for this purpose the Nigerian marriage must be regarded as a polygamous marriage over which this court does not exercise jurisdiction.

I therefore pronounce a decree nisi for the dissolution not of the Nigerian marriage but of the marriage in London. I am told that, in fact, that will be effective by Nigerian law to dissolve the Nigerian marriage; but that forms no part of my judgment. That is for someone else to determine and not for me. There will, therefore, be a decree nisi of dissolution of the marriage celebrated on July 24, 1953. I ought to add, there being one child of the marriage, that I am satisfied that proper arrangements have been made for looking after that child. The arrangements made are in accordance with those agreed between the parties and approved by a stipendiary magistrate in London by whom the matter has already been considered.

Decree nisi.

Solicitors: *Marshal & Co.*

[PROBATE, ETC., DIVISION.]

1959
Nov. 23, 24, 25, 26, 27.

Lord Merriman P. and Collingwood J.

* THE SEISTAN.

Shipping — Court of formal investigation — Report — Expression of censure in rider signed by one assessor—Absence of notice of charge against officer censured—Irregularity.

Natural Justice—Opportunity to meet charge—Notice of charge—Court of formal investigation—Expression of censure without previous notice of charge against officer censured.

A court of formal investigation, consisting of a commissioner assisted by three assessors, inquired into the circumstances attending the loss of the *Seistan* at Bahrein on February 19, 1958. The finding of the court was that the most probable cause of the loss of the *Seistan* was spontaneous combustion of toe-puff material in No. 5 lower hold, thereby originating a fire which spread to the No. 5 'tween-deck where it caused the detonation of explosives therein. The report of the court was signed by the commissioner and the three assessors, the annex thereto was unsigned, and the questions and answers were signed by the commissioner and two assessors. The third assessor had added to the questions and answers a rider in the following terms: "I concur in the above but in my opinion the "advice given by the chief officer, Mr. Jones, as to flooding the lower "hold offered the better chance of a quicker extinction of the fire. "The conduct of the chief engineer in misinforming the chief officer "regarding No. 5 bilge line non-return valve was reprehensible."

Prior to the formal investigation, no notice had been given to the chief engineer of the possibility of any charge being made against him, nor was his conduct adversely criticised at the hearing. Accordingly, he was not made a party, nor was any application made on his behalf for him to be made a party.

On a rehearing of so much of the case heard at the formal investigation as related to the conduct of the chief engineer, the Divisional Court found that there was no justification for censuring the chief engineer in connection with the answer which he gave to the chief officer, or otherwise in connection with the casualty:—

Held, that in the absence of any charge against the chief engineer and of any opportunity to meet any such charge, the expression of censure by one assessor in the rider was wholly irregular, irrespective of the merits of the case.

Rehearing by order of the Minister of Transport and Civil Aviation under the Merchant Shipping Act, 1894, s. 475, of part of the case heard by a court of formal investigation.

A court of formal investigation, consisting of a commissioner assisted by three assessors, inquired into the circumstances attending the loss of the *Seistan* at Bahrein on February 19, 1958. The finding of the court was that the most probable cause of the loss of the *Seistan* was spontaneous combustion of toe-puff material in No. 5 lower hold, thereby originating a fire which spread to the No. 5 'tween-deck, where it increased until a temperature was reached which caused the detonation of

[Reported by B. D. J. Walsh, Esq., Barrister-at-Law.]

explosives therein. This finding was incorporated in the report of the court, which was signed by the commissioner and the three assessors. Then followed the annex, which was unsigned, and the questions and answers, which were signed by the commissioner and two of the assessors. One of the questions (No. 32) read: "Was the loss of the *Seistan* caused or contributed to by the "wrongful act or default of anyone?" and the answer given to this question was "No." A rider had been added, however, by the third assessor in the following terms: "I concur in the above "but in my opinion the advice given by the chief officer, Mr. "Jones, as to flooding the lower hold offered the better chance "of a quicker extinction of the fire. The conduct of the chief "engineer in misinforming the chief officer regarding No. 5 bilge "line non-return valve was reprehensible."

Prior to the formal investigation, which commenced on February 10, 1959, no notice had been given to the chief engineer, Mr. George Robertson, of the possibility of any charge being made against him, nor was his conduct adversely criticised at the hearing. Accordingly, he was not made a party to the proceedings nor was any application made on his behalf for him to be made a party.

On the application of the chief engineer, the Minister of Transport and Civil Aviation, on May 27, 1959, ordered a rehearing of such part of the case heard at the formal investigation as related to the conduct of the chief engineer.

R. F. Stone for the chief engineer.
Peter Bucknill for the Minister of Transport and Civil Aviation.

Two assessors sat with the court.

The following authorities and cases were cited in argument: Temperley's Merchant Shipping Acts, 5th ed., p. 305; McMillan's Shipping Inquiries and Courts, pp. 18, 20, 21, 96, 105 and 118; *The China* [1]; *The Chelston* [2]; *The Royal Star.* [3]

Cur. adv. vult.

LORD MERRIMAN P. read the following report of the court: This is a rehearing by order of the Minister of Transport and Civil Aviation, dated May 27, 1959, of a formal investigation into the loss of the M.V. *Seistan* on February 19, 1958, at Bahrein. The finding of the court was that the most probable cause of the loss of the *Seistan* was spontaneous combustion of toe-puff material in No. 5 lower hold, thereby originating a fire which spread to the No. 5 'tween deck where it increased until a temperature was reached which caused the detonation of explosives therein.

The matter to be reheard is restricted to so much of the case heard at the formal investigation as relates to the conduct of the

[1] [1899] Shipping Gazette.
[2] [1920] P. 400; 36 T.L.R. 688.
[3] [1928] P. 48; 44 T.L.R. 163.

1959

The Seistan.

chief engineer, George Robertson, between February 17 and 19, 1958. By an order for directions dated June 19, 1959, it was ordered that the court of rehearing should be a Divisional Court of this Division, and that the court should be assisted by one Elder Brother of the Trinity Corporation and one nautical assessor, and that oral evidence should be heard. We have had the advantage of hearing the evidence of the chief officer, Jones, and the chief engineer, Robertson; and the case has been very well presented by counsel.

In the course of the hearing of the investigation no charge was made against the chief engineer, and no notice was given to him of the possibility of any such charge. He was not made a party, nor was there any reason why he should have applied to be made a party.

During the hearing Robertson became seriously ill. Accordingly, a discussion took place on February 19, 1959, about the best way of dealing with his inability to attend. Two statements signed by him had already been taken, and a third statement was taken on that day.

The commissioner said that in view of the medical certificate he did not intend to press for the presence in the witness-box of Robertson, and added that he thought that the medical certificate obviated any complaint that could be made by anyone that Robertson was not called, and stated specifically that he would not draw any adverse inference if in those circumstances he was not called.

Some confusion was caused by the fact that the original report has been put together and copied in the wrong order. It is now accepted that the proper order is: report, annex, questions and answers and the rider. The report itself was signed by the commissioner and the three assessors. Then followed the annex, which was not signed, the questions and answers, which were signed by the commissioner and two of the assessors; and, finally, what has been called the rider was added by Captain Parfitt, the third assessor, in the following words: "I concur in the above "but in my opinion the advice given by the chief officer, Mr. "Jones, as to flooding the lower hold offered the better chance "of a quicker extinction of the fire. The conduct of the chief "engineer in misinforming the chief officer regarding No. 5 bilge "line non-return valve was reprehensible."

Having regard to the absence of any charge against the chief engineer, and the consequent lack of any opportunity to meet any such charge, this expression of censure by one assessor in the rider was wholly irregular whatever view may be taken of the merits.

It is obvious, however, that the real object of this rehearing is to inquire into the merits of the censure.

As to the merits, the evidence satisfies us that on February 19, 1958, the chief officer wished to use the method of flooding No. 5 hold, to extinguish the fire. The first sentence of the rider shows

that Captain Parfitt accepted the view that flooding, as against steam-smothering, was the preferable method. We find that on the instructions of the master, the chief officer inquired of the chief engineer whether he could assist in flooding No. 5 hold through the bilge line. The chief engineer replied: "No, because "of the non-return valves in the bilge line." At that time the chief officer knew that the master had ordered that No. 4 hold should be pumped dry and kept dry, and also, as was the fact, that this order had not been countermanded. He also knew that if the bilge line were used for flooding No. 5 hold it would be impossible also to use it for pumping out No. 4 hold, both holds being on the same bilge line. There were also other possible disadvantages, in flooding through the bilge line, upon which we need not enlarge. The chief officer accepted without demur the above answer from the chief engineer, and at once asked him what alternative assistance the chief engineer could give. To this the chief engineer replied that he would give the maximum pressure possible on the deck service line to flood No. 5 hold.

The earlier flooding of No. 5 hold and 'tween deck had been done by the general service pump and the fire emergency pump with one hose through the port ventilator and another through the starboard ventilator. Accordingly, the chief engineer ordered steam for the more powerful ballast pump, and two additional hoses were attached, making two in each ventilator, that is, four in all. The nozzles were removed from all the hoses and the hoses were introduced into the ventilators in such a manner as to allow the water to flow direct into No. 5 lower hold.

This method of flooding was in operation for about one hour, and was working to the complete satisfaction of the chief officer, who stated that he received every possible assistance from the chief engineer and the engine room staff.

If the rider is taken to imply that the chief engineer's answer caused retardation of the flooding of the hold, we are convinced that the implication is unjustified. On the contrary, we go further; we are convinced that, taking all the relevant factors into account, the method of flooding adopted was at least as efficacious as flooding through the bilge line would have been, so far as speed is concerned.

It should be noted that Mr. Bucknill satisfied us that it had been assumed before the investigation started that the chief engineer thought that he could not use the bilge line for flooding No. 5 hold because he was under the mistaken belief that the non-return valves were in the hold itself, instead of being, as is the fact, in the tunnel. Some colour was lent to this assumption by the fact that in earlier ships of the same line this had been the case. It was not until the chief engineer's statement, taken during the inquiry on February 19, 1959, was seen that this assumption was shown to be unfounded. In that statement the chief engineer said: "I was, of course, quite aware that the non-"return valve to No. 5 was situated in the tunnel and was

1959

The Seistan.

"accessible for removal if necessary, and that the hold could have "been flooded by the bilge line." But he added that the reason why this was not done was the master's requiring No. 4 to be kept pumped out.

Mr. Bucknill made it clear that, on behalf of the Ministry, he had not challenged this statement.

In any case, even if the chief engineer had made this assumed mistake the question would still remain whether it had any bearing on the casualty. For the reasons already given we are convinced that the chief engineer's answer to the chief officer had no adverse effect on the course of events.

It remains, however, to consider why the method of flooding which was in process for about an hour on the morning of February 19, with the approval of the chief officer, who had reported to the master, was abandoned in favour of a resumption of the method of steam-smothering. This decision was made after a conference in which the marine superintendent, representing the owners at Bahrein, took part. We are satisfied that the dominating factor was the belief that the earlier attempts at steam-smothering had been effective in extinguishing, or at least in damping down, the fire before it broke out again in No. 5 hold.

We find as a fact that the decision taken by the master together with the marine superintendent was to resort again to steam-smothering for a consecutive period of 24 hours, and then, if that proved ineffectual, to beach the vessel and flood her.

The fact that the explosion occurred during this period has, in our opinion, no bearing upon the question with which we are concerned.

Our conclusion on the matter is that there was no justification for censuring George Robertson, the chief engineer, in connection with the answer he gave to the chief officer, or otherwise in connection with this casualty. That is signed by all of us.

No order as to costs.

Solicitors: *Treasury Solicitor; Ingledew, Brown, Bennison & Garrett.*

[COURT OF APPEAL.]

C. A.

1960
Feb. 2.

Hodson, Willmer and Devlin L.JJ.

* SAMSON *v.* SAMSON.

Husband and Wife—Property—Act of 1882, *s.* 17—*Wedding presents—To whom?—Married Women's Property Act,* 1882 (45 *&* 46 *Vict. c.* 75), *s.* 17.

Husband and Wife—Property—Act of 1958, *s.* 7—*Wedding presents—To whom?—Matrimonial Causes (Property and Maintenance) Act,* 1958 (6 *&* 7 *Eliz.* 2, *c.* 35), *s.* 7.

A wife made a claim under the Married Women's Property Act, 1882, and the Matrimonial Causes (Property and Maintenance)

Act, 1958, to one-half of the wedding presents in chattels and money received by her husband and herself on the occasion of their marriage, asserting that there was a prima facie presumption of law that wedding presents should be regarded as gifts made jointly to the spouses. The registrar made an order to the effect that gifts to the spouses from their respective relatives and friends should be their respective property; and, in particular, that as the larger part of the gifts in money had come from the husband's side, there should be a relatively small payment to the wife. On appeal:—

Held, dismissing the appeal, that there was no such principle of law as contended for by the wife, and that in the circumstances the registrar had exercised his discretion rightly in drawing inferences from the origin of the gifts.

Per Hodson L.J. I do not think that, as a matter of law, any intention is to be attributed to the donor. Where there is evidence of intention on the part of the donor, it may well be that wedding presents may be found to have been given to one spouse, or the other, or to both; but where no intention is clear, the court is fully entitled, in my judgment, to draw the inference that money and gifts in kind originating from one side of the family were intended for the husband, and those from the other side, from friends of that party, were intended for the wife. Another possible position may arise—that property which is given at the time of the wedding to one spouse or the other may become joint property by the conduct of the parties (post, p. 195).

Newgrosh v. *Newgrosh* (cited in *Rimmer* v. *Rimmer* [1953] 1 Q.B. 63, 68; [1952] 2 T.L.R. 767; [1952] 2 All E.R. 863, C.A.) and observations of Lord Goddard in *Hichens* v. *Hichens* [1945] P. 23, 26; 61 T.L.R. 302; [1945] 1 All E.R. 451, C.A. considered.

APPEAL from Mr. Registrar Forbes.

The appellant wife, Ruth Rayner Samson, and respondent husband, Samuel Israel Samson, were married in October, 1956, but matrimonial differences led to a separation, and proceedings were taken pursuant to section 17 of the Married Women's Property Act, 1882, and section 7 of the Matrimonial Causes (Property and Maintenance) Act, 1958, to determine the ownership of the gifts in chattels and money received by the spouses on marriage. The amount of money received was £1,023, of which £175 came from the wife's side and the remainder from the husband's side, and this was paid into the husband's banking account. From this the husband spent £135 on the honeymoon, with the wife's knowledge and consent, and further sums, of which the wife claimed to have had no knowledge, in connection with the occupation of a flat which became the matrimonial home; these sums were £725 paid ostensibly for the purchase of some furniture which was in the flat, £94 for decorations and £17 for solicitors' costs. The husband claimed the return of all the gifts which had come from his family and friends. The wife claimed that all the wedding presents, including gifts of money, were given to the spouses jointly, and that she was entitled to a one-half share of the whole.

The registrar held that gifts from the husband's side belonged to the husband and vice versa; on this basis he made an order for the delivery of certain chattels in both directions and for the

C. A.
1960
Samson
v.
Samson.

payment by the husband to the wife of £135, representing the wife's share of £175 less a deduction of the wife's fair share of the money expended with her knowledge and consent. The wife appealed.

G. V. Owen for the wife.
H. S. Law, for the husband, was not called upon.

The following cases which were cited in argument are not referred to in the judgments: *Jones* v. *Maynard* [1]; *Cobb* v. *Cobb* [2]; *Fribance* v. *Fribance (No. 2)* [3]; *Hunt* v. *Hunt*.[4]

Hodson L.J. This is an appeal from Mr. Registrar Forbes, who made an order on May 7, 1959, under section 17 of the Married Women's Property Act, 1882, in a dispute between husband and wife. The order which he made was for delivery of certain chattels (set out in schedules), in both directions—some to be delivered by the wife to the husband and some by the husband to the wife. He further declared, pursuant to the provisions of section 7 of the Matrimonial Causes (Property and Maintenance) Act, 1958 (which for the first time enabled the court to deal with money claims between husband and wife and extended the powers conferred by the Act of 1882), that the wife was beneficially entitled to the sum of £135 which the husband had had in his possession or under his control; and ordered that the husband should pay to the wife that sum by instalments of £5 a month. Against that order the wife has appealed, her submission being that the articles in question and the money involved in this case originally consisted of wedding presents, and it is submitted on behalf of the wife that there is a presumption of law that wedding presents ought to be regarded as gifts jointly to the spouses and that, in making an order which admittedly is a discretionary order under the section, the court ought to start with the presumption which I have mentioned, then exercising its discretion after having employed the presumption of law.

I might perhaps deal with the exercise of discretion first. It does not arise in this case; but assuming that the argument for the appellant is right, namely, that a sum of money (it is the money of which I am particularly thinking) was given jointly to the husband and the wife by way of a wedding present or by way of an engagement present before the wedding, it would not necessarily follow that, in the exercise of its discretion, the court would make an order for the repayment of such money. If the money had (as here), for example, been expended in part in the purchase of a home or in obtaining the assignment of a tenancy

[1] [1951] Ch. 572; [1951] 1 T.L.R. (Pt. 1) 700; [1951] 1 All E.R. 802.
[2] [1955] 1 W.L.R. 731; [1955] 2 All E.R. 696.
[3] [1957] 1 W.L.R. 384; [1957] 1 All E.R. 357.
[4] (1908–9) 25 T.L.R. 132.

of a flat, and time had elapsed, it might well be that the court would hold its hand in ordering the repayment of the money.

In dealing with the matter of discretion generally, I think it is worth while to refer to the language of Jenkins L.J. in a case in which he gave a dissenting judgment, *In re a Debtor.*[1] Although the judgment was a dissenting judgment on the matter which had to be decided, the passage which I propose to read is of general application and does not, in my opinion, run counter to anything else that has been said in this court upon this topic. He said: "The other cases bearing upon section 17 of the Married "Women's Property Act, 1882, to which we were referred were "cited on the question how far the making of any order under "section 17 of the Married Women's Property Act, 1882, and "the terms of any order so made were matters for the discretion "of the court. It was agreed in discussion that none of these "cases by any means goes the length of saying that the judge "charged with dealing with such an application can disregard a "claim of legal right, but admittedly the cases do show that in "matters concerning property jointly acquired or jointly used, "the court may have a wide discretion to deal with it in such "manner as will be fair and equitable as between the parties "having regard to the whole history as to the acquisition and "use of the chattels in question, and, indeed, to all the surround-"ing circumstances of the matrimonial life of the parties." He then went on to refer to another decision of this court, *Rimmer* v. *Rimmer*,[2] where the Master of the Rolls cited an unreported case, *Newgrosh* v. *Newgrosh*,[3] in which Bucknill L.J., affirming a decision of Willmer J., said: "That gives the judge a wide "power to do what he thinks under the circumstances is fair and "just. I do not think it entitles him to make an order which is "contrary to any well-established principle of law, but, subject "to that, I should have thought that disputes between husband "and wife as to who owns property which at one time, at any "rate, they have been using in common are disputes which "may very well be dealt with by the principle which has been "described here as 'Palm Tree Justice.' I understand that to "be justice which makes orders which appear to be fair and just "in the special circumstances of the case." That passage again refers to the respect which must be paid to principles of law.

The whole argument for the appellant in this case depends on her being able to satisfy the court that there is some principle of law which has not been observed by the registrar, the principle being the principle that wedding presents belong to both spouses jointly. I will refer to the history of this matter shortly. The marriage was of short duration. The parties were married in October, 1956. Before the marriage, some gifts in kind and

[1] [1958] Ch. 81, 91; [1957] 3 W.L.R. 184, 191; [1957] 2 All E.R. 551.

[2] [1953] 1 Q.B. 63, 68; [1952] 2 T.L.R. 767; [1952] 2 All E.R. 863.

[3] (1950) 100 L.J. 525.

C. A.
1960
Samson
v.
Samson.
Hodson L.J.

money were given to both, and £100 in cash went into the husband's banking account. There was never more than one banking account, although the wife had power to draw upon it after the marriage. The total amount of the money that went into the banking account, including the engagement gifts, was £1,023, out of which the honeymoon expenses of £135 were paid—that was with the concurrence of both parties. They lived in furnished flats at first, and eventually obtained a flat in a house at St. John's Wood at a rental of £300 a year. The husband then drew out £725 from the banking account, which was in his name, as a premium for the assignment of the tenancy. The wife (as the registrar found) knew nothing about that.

The contention of the wife is that prima facie she is entitled now, on the basis which I have stated, to half the money in the banking account and half the wedding presents. The finding of the registrar in which this matter is dealt with is as follows: "The total"—that is, the total in the bank—"amounted to "£1,023 of which £175 came from the relatives and friends of "the wife, and the balance from the relatives and friends of the "husband. There is no evidence that any of the donors knew "both spouses equally well. . . . So far as the items contained "in the respective lists of the husband and wife are concerned, "there will be an order that the presents received by the hus-"band from his relatives and friends are his property, and those "received by the wife from her relatives and friends are the "property of the wife, and particulars thereof will be set out in "the order. I do not consider there is sufficient evidence to "support the view that any particular present came from a donor "who knew both the spouses."

No doubt it is a principle of law that a gift must be considered by reference to the intention of the donor; but there is no authority in this country for the further proposition that there is some particular principle of law applicable to wedding presents. We were referred to one American decision of a New York court (we were told it was the equivalent of the English county court) which appears to lay down such a principle.[4] But apart from that there is no guidance in that direction to be obtained, so far as the researches of counsel go, from decisions in this country. The matter was mentioned by Lord Goddard in a decision of *Hichens* v. *Hichens*,[5] where, upon an inquiry ordered on a summons under section 17 of the Married Women's Property Act, 1882, the question of jurisdiction to hear the summons arose; and obiter in his judgment Lord Goddard said this about wedding presents: "As everybody knows, it is often difficult to decide questions of "property between husband and wife according to their strict "rights. The matter very often comes up with regard to wed-"ding presents, which in one sense are given to both spouses. "One often has to solve the problem by saying that if a present

[4] *Avnet* v. *Avnet* (1952) 124 N.Y. Supp. (Pt. 2) 517.

[5] [1945] P. 23, 26; 61 T.L.R. 302; [1945] 1 All E.R. 451.

"was given by a friend or relation of the wife's, the property "should be given to the wife, and that it should be given to the "husband if it was a present from a friend or relation of his." If I may say so, with respect, that seems to be eminently sound sense, but it does not purport to be a declaration of law. The part which is relied upon by Mr. Owen, for the appellant, is the phrase "which in one sense are given to both spouses." But I do not regard that relative clause as detracting from the general drift of what Lord Goddard was saying in the passage which I have read.

The guidance which Lord Goddard gave in that case was followed by one of the county court judges, Judge Cave, in a more recent case, which is referred to in the Law Journal,[6] and the registrar has cited in his judgment the report of what the judge is said to have done. There, there were proceedings of this character, and the wife "sought an order for the return of "articles given to her as wedding presents and other articles "claimed as having been bought out of her pre-war savings." The claim included a silver tea service and linen. "His Honour, "without wasting time over argumentative details, expressed the "view" (which was described by the Journal as a "common "sense" view) "that a wedding present is usually given to a "relative and not to the stranger marrying the relative. He "dissented from the view that wedding presents became the "joint property of husband and wife." That is to say, he dissented from the view that they so became as a matter of law.

I entirely agree with the observations which purport to have fallen from the judge's lips. I do not think that, as a matter of law, any intention is to be attributed to the donor. Where there is evidence of intention on the part of the donor, it may well be that wedding presents may be found to have been given either to one spouse or to the other, or to both; but where no intention is clear the court is fully entitled, in my judgment, to draw the inference (which was drawn in this case) that money and gifts in kind originating from one side of the family were intended for the husband and those from the other side, from friends of that party, were intended for the wife.

Mr. Owen has rested, here and below, on the omnibus submission to which I have referred, and has not sought to say that in any particular case the evidence indicated that the gift was intended for joint use or for the use of his client in particular. He relied—and, in my judgment, was unable successfully to rely—on the proposition of law that the inference which I have stated should be drawn in his favour. He has recognised that there is another possible position which does not arise in this case but which may arise in other cases—that property which is given at the time of the wedding to one spouse or the other may become joint property by the subsequent conduct of the parties. That position is illustrated by the *Newgrosh* case,[7] to which I have

[6] (1945) 95 L.J. 222. [7] 100 L.J. 525.

C. A.
1960
Samson v. Samson.
Hodson L.J.

made reference. There it appears from the material which is available from the report (and it is very little) that there was in dispute a suite of furniture for a bedroom and another for a sitting room or drawing room: one was said to have been given to the one spouse and one to the other. The parties lived together: they used that furniture for both rooms: and the judge decided, in the circumstances of that case, that the order which he would make would be made upon the basis that this was mixed property which had become joint property.

I have said what I have in order to indicate that what has been said in this case does not cover every case. I am only at pains to reject the supposed proposition of law that wedding presents are joint wedding presents to both spouses. So far as this case is concerned, I see no reason to suppose that there is any criticism to be levelled at the registrar for the way in which he dealt with this matter—either the way in which he drew the inference from the origin of the gifts or the way in which he disposed of the chattels and the money in question in this case. I would, therefore, dismiss this appeal.

Willmer L.J. I have reached the same conclusion, and for the same reasons; and I desire to add nothing further.

Devlin L.J. I also agree.

Appeal dismissed, with costs.

Solicitors: *Millward, Ladsky & Co., Wembley; Philip Taylor & Co.*

F. R. D.

[COURT OF APPEAL.]

C. A.
1960
Feb. 4, 9.
Lord Goddard, Upjohn L.J. and Diplock J.

* LOWE *v.* LOMBANK LTD.

[Plaint No. P. 5.]

Hire-Purchase—Hire-purchase agreement—Implied statutory condition—Fitness for purpose—Acknowledgment by hirer of fitness of car—Whether hirer estopped from alleging that implied statutory condition broken—Hire-Purchase Act, 1938 (1 *&* 2 *Geo.* 6, *c.* 53), *s.* 8 (2), (3).

Estoppel—Conduct, by—Motor-car—Hire-purchase—Signature of hire-purchase documents unread—Effect.

The plaintiff, a widow of 65 years of age, agreed to purchase a motor-car on hire-purchase terms for £223, the sum of £158 8s. being obtained from the defendants, a hire-purchase company. The hire-purchase agreement dated June 9, 1958, entered into between the defendants and the plaintiff, consisted of a printed form and provided for the repayment of the sum advanced to the defendants by 24 monthly instalments. Clause 8 provided that the only warranties

should be those implied under the Hire-Purchase Acts, 1938 and 1954, in respect of hire-purchase transactions within the Acts. Clause 9 (ii) provided that the hirer acknowledged that he had examined the goods and that they were of merchantable quality and, further, that he had "not made known to the owners expressly "or by implication the particular purpose for which the goods are "required," and that the goods were fit for the purpose for which they were in fact required. When the plaintiff signed the hire-purchase agreement she did not read it and had not seen the car, but the salesman assured her that it was "perfect" or nearly so. The car was brought round to her later that day but not left with her. When it was delivered she signed a delivery receipt which contained a statement that she asknowledged that she had read the hire-purchase agreement "made" between the defendants and herself and, further, that she had examined the goods and that they were in good order and condition. The car, in fact, was not roadworthy, and the plaintiff claimed damages for breach of the implied condition of fitness for purpose in section 8 (2) of the Hire-Purchase Act, 1958 [1]:—

Held, (1) that on the true construction of the hire-purchase agreement the plaintiff had by implication made known to the defendants that she required the car for the purpose of driving about in, and that the defendants were not entitled to rely on clause 9 (ii) of the agreement, which was an attempt to evade the provisions of section 8 (2) and (3) of the Hire-Purchase Act, 1938 (post, p. 204).

(2) That the plaintiff was not estopped by signing the delivery receipt from relying on the breach of the implied condition that the car was reasonably fit for use as a means of transport, since the defendants had failed to prove the three requirements necessary to establish estoppel, namely: that the statement in the receipt was clear and unambiguous; that the plaintiff had intended that the defendants should act upon it; and lastly, that the defendants had believed the representation in the receipt to be true and had acted upon it.

(3) The plaintiff was accordingly entitled to damages.

APPEAL from Judge Harold Brown sitting at Southport County Court.

[1] Hire-Purchase Act, 1938, s. 8 (1): "In every hire-purchase agreement there shall be—(*a*) an implied warranty that the hirer shall "have and enjoy quiet possession of "the goods; . . . (*d*) except where "the goods are let as secondhand "goods, and the note or memorandum "of the agreement made in pursuance "of section 2 of this Act contains a "statement to that effect, an implied "condition that the goods shall be of "merchantable quality, so, however, "that no such condition shall be "implied by virtue of this paragraph "as regards defects of which the "owner could not reasonably have "been aware at the time when the "agreement was made, or, if the "hirer has examined the goods or a "sample thereof, as regards defects "which the examination ought to "have revealed.

"(2) Where the hirer expressly or "by implication makes known the "particular purpose for which the "goods are required, there shall be "an implied condition that the goods "shall be reasonably fit for such "purpose.

"(3) The warranties and conditions set out in subsection (1) of "this section shall be implied notwithstanding any agreement to the "contrary, and the owner shall not be "entitled to rely on any provision in "the agreement excluding or modifying the condition set out in sub-"(2) of this section unless he proves "that before the agreement was made "the provision was brought to the "notice of the hirer and its effect "made clear to him."

C. A.
1960
Lowe
v.
Lombank
Ltd.

The plaintiff, Mrs. Nancy Lowe, a widow of 65 years of age, in the summer of 1958 wanted to purchase a motor-car, her own being too old for use. Her son got in touch with a motor-car dealer, one Charles Brown, who said that he had a Standard motor-car which she could have for £223, and that he would allow her £45 for her old car and arrange hire-purchase finance. Charles Brown's brother, George Brown, called on the plaintiff and assured her that the Standard car was in perfect or almost perfect condition. She had not then seen the car but on that assurance she agreed to purchase it. The next day, June 9, 1958, George Brown called on the plaintiff bringing with him a printed form of hire-purchase agreement. The plaintiff at the time was busy preparing luncheon. She signed the agreement without reading it and paid to George Brown £40 which, with other payments she had made and the allowance for the old car, brought her initial payment to £95. A balance was left due of £158 8s., which sum included the hire charge and purchase fee of £30 8s.

The hire-purchase agreement dated June 9, 1958, was expressed to be made between the defendants, Lombank Ltd., called "the "owners," of the one part and the plaintiff, called "the hirer," of the other part. Thereby the owners agreed to let and the plaintiff to hire the goods in the schedule, being the Standard car. Provision was made for the payment of the sum of £158 8s. by 24 monthly instalments, and there were other clauses usual in a hire-purchase agreement of this character. It was provided by clauses 8 and 9 as follows:

"8. The owners do not let or supply the goods or any part "thereof with or subject to any condition or warranty express "or implied by statute or otherwise as to the capacity, age, "quality, description, state, condition or fitness for any purpose "or otherwise whatsoever save in the case of the hire-purchase "price in the schedule hereto, not exceeding £300 when the only "warranties shall be those implied under the Hire-Purchase Acts, "1938 and 1954, in respect of hire-purchase transactions within "the provisions of those Acts but subject to the exclusion of "warranties by reason of clause 9 hereof.

"9. If the hire-purchase price shown in the schedule hereto "does not exceed £300 but not otherwise the following provisions "shall take effect: . . . (ii) The hirer acknowledges that he has "examined the goods prior to the signing of this agreement and "that there are no defects in the goods which such examination "ought to have revealed and that the goods are of merchantable "quality. The hirer further acknowledges and agrees that he "has not made known to the owners expressly or by implication "the particular purpose for which the goods are required, and "that the goods are reasonably fit for the purpose for which "they are in fact required."

On the same day the car was brought round to the plaintiff's house but it was not left, because she was told some adjustment was required. The car was handed over at a later date when

the plaintiff signed a delivery receipt in the following terms: "Delivery receipt. Lombank Limited, Lombank House, Curzon "Street, Park Lane, London, W.1. I/We acknowledge and "agree that I/We have read the hire-purchase agreement made "between us and fully understand the terms and conditions "thereof before signing. I/We confirm and I/We have examined "the goods described in the schedule to the agreement and ack-"nowledge that the same is/are in good order and condition and "to my/our satisfaction in every respect and that I/We have "taken delivery of the said goods at this date." At the foot of the form there were the words: "This form should not be signed "until delivery of the goods has been taken."

When the plaintiff used the car she found, and the county court judge held, that the car was unroadworthy. The car's defects would not have been apparent to a layman. The plaintiff spent considerable sums on trying to put the car into good condition.

On November 6, 1958, she wrote complaining to the defendants that they had warranted that the car was perfect, and asking for damages. The defendants by letter of November 12, 1958, replied stating that: "We would, however, point out that "in this instance we are acting purely as bankers, and have at "no time either expressed or implied any warranty in respect "of the vehicle concerned in our contract." The defendants required the plaintiff to continue her payments under the agreement. The facts are more fully stated in the judgment of the court.

On January 5, 1959, the plaintiff started these proceedings in which she claimed rescission of the agreement and the return of the moneys she had paid, alternatively, damages.

The defendants in their defence denied that the Browns were their agents, and alleged that under the terms of the agreement any express or implied condition, statement or warranty was excluded, except warranties implied under the Hire-Purchase Acts, 1938 and 1954, but subject to the exclusion of warranties by clause 9 of the agreement.

The judge held that nobody explained the hire-purchase agreement to the plaintiff when she signed it. It was too late for her to claim rescission of the agreement; if she was to obtain relief it must be in damages. He held that the Browns were not the defendants' agents to make representations on their behalf. He further held that since the plaintiff's attention had never been drawn to the provisions of clauses 8 and 9 of the agreement, she was not estopped from relying on the implied condition of reasonable fitness imported by section 8 (2) of the Hire-Purchase Act, 1938, but he held that the plaintiff was estopped by the receipt which she had signed from complaining of the condition of the car. He, accordingly, entered judgment for the defendants. If he were wrong he assessed the damages at £160.

The plaintiff appealed. The defendants by a cross-notice

C. A.
1960
Lowe
v.
Lombank
Ltd.

sought to support the decision on the ground that the plaintiff was estopped from saying that she had made known, expressly or impliedly, the purpose for which she required the car.

R. M. Bingham Q.C. and *J. Jaffé* for the plaintiff.
T. G. Roche Q.C. and *Stephen Terrell* for the defendants.

The following cases were cited in argument and are not referred to in the judgment: *Karsales (Harrow) Ltd.* v. *Wallis* [2]; *Wallis, Son & Wells* v. *Pratt and Haynes.*[3]

Cur. adv. vult.

February 9. Lord Goddard. Diplock J. will deliver the judgment of the court.

Diplock J. This is an appeal by the plaintiff from a judgment of Judge Harold Brown in the Southport County Court dismissing her claim against the defendants, a hire-purchase finance company, for damages for breach of the statutory condition, enacted in section 8 (2) of the Hire-Purchase Act, 1938, that a car which she acquired on hire purchase from the defendants was reasonably fit for the purpose for which it was required.

The plaintiff, who was a widow aged 65, was minded to buy a second-hand car to replace an ancient vehicle which she then owned. She got in touch through her son with a motor-dealer, Charles Brown, who owned a 1947 Standard car. On June 8, 1958, Charles Brown's brother, who was acting on his behalf, offered the Standard car to her at the price of £223 and told her that he could get hire purchase and would allow £45 for the car she then owned. He assured her that the Standard car was in perfect or almost perfect condition, and on this assurance she agreed to proceed with the transaction. The name of the hire-purchase finance company with whom the hire purchase was to be arranged was not at this stage mentioned. She gave George Brown, at his suggestion, £10 to clinch the bargain.

On the following day, June 9, George Brown came when the plaintiff was busy preparing lunch. She did not see the car, but was presented by George Brown with a printed form of hire-purchase agreement issued by the defendants, which, no doubt like many other hirers, she signed without reading. It will be necessary for this court to read it with some care later. She paid him £40, which, together with the £10 already paid and the allowance of £45 on her old car, made up the initial payment of £95 referred to in the hire-purchase agreement, and undertook to pay the balance of £158 by 24 monthly instalments. On the same evening the Standard car was brought round by George and Charles Brown to the plaintiff's house, when she saw it for the

[2] [1956] 1 W.L.R. 936; [1956] 2 All E.R. 866.
[3] [1911] A.C. 394.

first time. They did not leave it with her, but took it away on the excuse that some minor adjustment was required. It was handed over to her at some later date, which the county court judge was not able to fix with certainty, and the plaintiff then signed a document headed "Delivery receipt," which was presented to her for signature by one of the Browns. This document, which bears the date June 9, 1958, although it was signed at a later date, will also require careful scrutiny.

The judge accepted the evidence of a motor-engineer called by the plaintiff that so far from being "perfect" or "almost "perfect" the car was utterly unroadworthy and indeed a danger to its occupiers and other road users at the time of this transaction. The principal defects were in the engine, steering and brakes. There was evidence that these were defects which would not be apparent to a layman upon inspection and, although there is no specific finding to this effect, it would appear, from the fact that the county court judge acquitted George Brown of fraud, that he accepted this.

These defects became progressively apparent after the car had been delivered, but it was not until November 6, 1958, that the plaintiff through her solicitors complained to the defendants, to be met with the reply that the defendants were "acting purely "as bankers" and "have at no time either expressed or implied "any warranty in respect of the vehicle concerned in our con-"tract." They concluded with a demand for continued payment of current instalments.

On January 5, 1959, the plaintiff started proceedings against the defendants claiming damages for fraud, based on the misrepresentations of George Brown or, alternatively, for breach of the implied condition of fitness under section 8 (2) of the Hire-Purchase Act, 1938. She claimed in the alternative rescission of the hire-purchase agreement of June 9, 1958, but this claim, in view of the delay, was not pressed at the trial. The county court judge was not prepared to find that George Brown was fraudulent. He described him as a "careless optimist," and we have not been asked to reverse this finding. The only questions on this appeal are: (1) whether the hire-purchase agreement was subject to the implied condition that the car should be reasonably fit for the purpose for which it was required, that is, for use as a means of transport, and (2) if so, whether the plaintiff is estopped from relying upon the defects which in fact existed in the car as constituting a breach of that implied condition.

The county court judge answered the first question in the affirmative, and the second also in the affirmative, and, accordingly, gave judgment for the defendants, but, in case he were wrong, assessed the damages at £160.

The common law, as Mr. Roche points out, subject to some restrictions based on public policy, permits persons to make whatever contractual bargains they please and will enforce those bargains. This general principle, of which the underlying

C. A.
1960
Lowe
v.
Lombank
Ltd.

assumptions are that persons entering into contracts are of equal bargaining power and read and understand what they sign, ignores the fact that under modern conditions many transactions, particularly of hire purchase, are entered into by ignorant persons whose only choice is either not to enter into the transaction at all or to enter into it upon the terms of a standard agreement drafted by the hire-purchase company containing numerous clauses, printed in minuscule characters, which the hirers do not in fact read and, if they did, would be incapable of understanding. To meet this abuse of bargaining power by hire-purchase finance companies Parliament in 1938 enacted the Hire-Purchase Act, 1938, containing a number of provisions for the protection of the small hire-purchaser, that is, the hire-purchaser of goods whose hire-purchase price did not exceed £100. In 1954, with the fall in the value of money, this protection was extended to goods whose hire-purchase price did not exceed £300. It applies, therefore, to the hire-purchase agreement under consideration in the present appeal.

Section 8 (2) of the Act of 1938 reads as follows: "Where the "hirer expressly or by implication makes known the particular "purpose for which the goods are required, there shall be an "implied condition that the goods shall be reasonably fit for such "purpose."

Subsection (3), so far as is relevant, reads ". . . the owner "shall not be entitled to rely on any provision in the agreement "excluding or modifying the condition set out in subsection (2) "of this section unless he proves that before the agreement was "made the provision was brought to the notice of the hirer and "its effect made clear to him."

The judge has found as a fact—indeed it was undisputed on the evidence—that no provision in the hire-purchase agreement excluding or modifying the implied condition was brought to the notice of the plaintiff. Prima facie, therefore, if the hirer did expressly or by implication make known that she required the Standard car for use as a means of transport, the statutory condition applies and, upon the facts as found by the county court judge, was manifestly breached.

Mr. Roche's first contention, which does not appear to have been advanced before the county court judge, so that no cross-examination was directed to it, is that the plaintiff did not make known either expressly or by implication to the defendants that she required the Standard car for use as a means of transport. She made it known expressly to Brown, the dealer, but the county court judge held, in our view rightly, that, in view of an express clause in the hire-purchase agreement, Brown was not the agent of the defendants for the purpose of receiving this information.

It is at first sight a bold contention that, when a widow, for she is so described in the hire-purchase agreement, negotiates with a motor-dealer for the hire-purchase of a second-hand car,

she does not by implication make known that she requires it as a means of transport, and such contention is even bolder when the hire-purchase agreement proferred by the defendants for her signature requires her by clause 2 (d) "to keep and maintain "the goods and all parts thereof in good order repair and condi- "tion and to replace all missing or unfit parts of the goods," by clause 2 (j) "to pay punctually all licence duties, taxes, fees, "registration charges and all other payments in respect of the "goods or the user thereof," and by clause 3 provides that the plaintiff may terminate the hiring upon returning with the goods "all necessary licences, registration books or certificates, "insurance policy or certificate and other documents relating to "the goods." Furthermore, the delivery receipt, of which more anon, which on their own evidence the defendants require their hirers to sign before they themselves sign the hire-purchase agreement, contains an acknowledgment that the goods are in good order and condition. We agree with the county court judge that the plaintiff in fact plainly made known to the defendants by implication that she required the car for the purpose of driving about. Notwithstanding this, it is contended by Mr. Roche that clauses 8 and 9 of the hire-purchase agreement negative this implication.

Clause 8 reads as follows: "The owners do not let or supply "the goods or any part thereof with or subject to any condition "or warranty express or implied by statute or otherwise, as to "the capacity, age, quality, description, state, condition or fit- "ness for any purpose or otherwise whatsoever save in the case "of the hire-purchase price in the schedule hereto not exceeding "£300 when the only warranties shall be those implied under "the Hire-Purchase Acts, 1938 and 1954, in respect of hire- "purchase transactions within the provisions of those Acts but "subject to the exclusion of warranties by reason of clause 9 "hereof."

This clause draws a distinction between condition and warranty. It excludes both, whether express or implied by statute or otherwise, where the hire-purchase price in the schedule exceeds £300, but does not purport to exclude any conditions, as distinguished from warranties, where the hire-purchase price in the schedule does not exceed £300. Section 8 of the Hire-Purchase Act, 1938, draws a like distinction between conditions referred to in subsection (1), paragraphs (*b*) and (*d*), and subsection (2) to be implied by statute, and warranties referred to in subsection (1), paragraphs (*a*) and (*e*), to be implied by statute, and clause 8 of the hire-purchase agreement does not, upon its true construction, purport to exclude the condition implied by section 8 (2) of the Act of 1938, upon which the plaintiff in this case relies. Even if it did, it would be ineffective to do so, because it was never brought to the notice of the plaintiff.

Clause 9 of the hire-purchase agreement, so far as is relevant, reads as follows: "If the hire-purchase price shown in the

C. A.
1960
Lowe
v.
Lombank
Ltd.

"schedule hereto does not exceed £300 (but not otherwise) the "following provisions shall take effect: . . . (ii) The hirer ack-"nowledges that he has examined the goods prior to the signing "of this agreement and that there are no defects in the goods "which such examination ought to have revealed and that the "goods are of merchantable quality. The hirer further acknow-"ledges and agrees that he has not made known to the owners "expressly or by implication the particular purpose for which "the goods are required, and that the goods are reasonably fit "for the purpose for which they are in fact required."

This curiously drafted clause was never brought to the notice of the plaintiff and its effect was not made clear to her. Nor, despite Mr. Roche's efforts, has it been made clear to us. It is expressed to be an acknowledgment, that is to say, a representation, by the plaintiff that she had not made known by implication that the car was required for a particular purpose, that is, as a means of transport, and also an agreement that she had not made that purpose known to the defendants. In so far as it was a representation, it could operate only as an estoppel preventing the plaintiff from asserting the contrary, but Mr. Roche expressly disclaims reliance upon it as an estoppel, no doubt for the very good reason that there was no evidence (and it is difficult to see how there could have been truthful evidence) that the defendants believed in the truth of the representation. To call it an agreement as well as an acknowledgment by the plaintiff cannot convert a statement as to past facts, known by both parties to be untrue, into a contractual obligation, which is essentially a promise by the promisor to the promisee that acts will be done in the future or that facts exist at the time of the promise or will exist in the future. To say that the hirer "agrees" that he has not done something in the past means no more than that the hirer, at the request of the owner, represents that he has not done that thing in the past. If intended by the hirer to be acted upon by the person to whom the representation is made, believed to be true by such person and acted upon by such person to his detriment, it can give rise to an estoppel: it cannot give rise to any positive contractual obligation. Although contained in the same document as the contract, it is not a contractual promise.

There lies the fallacy in Mr. Roche's contention. Whether or not the plaintiff made known to the defendants by implication the particular purpose for which she required the car is a pure question of fact as to the state of knowledge of the defendants to be inferred in the light of all the circumstances, including the terms of the contract itself. On this issue, the rule of construction relied on by Mr. Roche that you cannot imply in a contract a promise, which is inconsistent with an express promise, is irrelevant, for the inference to be drawn from the terms of the contract that the defendants knew the particular purpose for which the plaintiff required the car is not an implied promise, nor is the representation in clause 9 (ii) of the contract an express promise.

We reach this conclusion without reluctance, for clause 9 (ii) is clearly an attempt, which only the size of the print in which it is set out prevents one calling blatant, to evade the provisions of section 8 (2) and (3) of the Hire-Purchase Act, 1938.

We turn now to the defence based on estoppel. As already mentioned, the plaintiff on some date after June 9, 1958, signed a so-called "delivery receipt" at the request of Brown, which was forwarded in due course by him to the defendants. It reads as follows: "Delivery receipt. Lombank Limited, Lombank "House, Curzon Street, Park Lane, London, W.1. I/We ack-"nowledge and agree that I/We have read the hire-purchase "agreement made between us and fully understand the terms "and conditions thereof before signing. I/We confirm that I/We "have examined the goods described in the schedule to the "agreement and acknowledge that the same is/are in good order "and condition and to my/our satisfaction in every respect and "that I/We have taken delivery of the said goods at this date." At the foot of the form there are the words: "This form should "not be signed until delivery of the goods has been taken."

This form, says Mr. Roche, when signed by the plaintiff constitutes a representation by her that the car was in good order and condition upon delivery and that the defendants are entitled to rely upon that representation as an estoppel.

In order to found an estoppel on this statement in the delivery receipt, which is in a printed form drafted and supplied by them, the defendants must show: (1) that it is clear and unambiguous; (2) that the plaintiff meant it to be acted upon by the defendants or at any rate so conducted herself that a reasonable man in the position of the defendants would take the representation to be true and believe that it was meant that he should act upon it (see *Citizens' Bank of Louisiana* v. *First National Bank of New Orleans* [1]); (3) that the defendants in fact believed it to be true and were induced by such belief to act upon it.

In our view the alleged estoppel fails to satisfy any of these requirements. It is not clear and unambiguous. Indeed, upon its true construction, an acknowledgment that goods are in good order and condition following immediately upon the statement that the person so acknowledging has examined the goods seems to us to be, at the very lowest against the defendants, at least capable of meaning that they are in good order and condition, so far as such inspection is reasonably capable of revealing, that is, free from patent defects. The defects relied upon by the plaintiff were latent, not patent, and thus not clearly covered by the representation.

As regards (2), it is not suggested that the plaintiff herself, who was described by the judge as having a very trustful disposition and not very businesslike, had any idea of the mechanics

[1] (1873) L.R. 6 H.L. 352.

C. A.
1960
Lowe
v.
Lombank
Ltd.

of hire purchase or intended the respondents to take any action as a result of the signature of the delivery receipt.

Did she then so conduct herself that a reasonable man would believe that it was meant that he should act on the representation as to the condition of the goods contained in the delivery receipt? The action in fact taken by the defendants after the delivery receipt had been sent them was to affix their signature to the hire-purchase agreement of June 9, 1958, and to purchase the car from Brown. The courts, both civil and criminal, are becoming familiar with the mechanics of hire purchase, though the legal relationship between the hirer, the dealer and the hire-purchase company at various stages in the transaction still involves many problems which have not been authoritatively solved; but no one would suppose that the ordinary small hirer like the plaintiff was aware of the mechanics of the transaction as between the dealer and the hire-purchase company or of the legal relationships involved, nor, indeed, were the defendants themselves, unless their letter of November 12, 1958, in which they said "in this "instance we are acting purely as bankers," was dishonest and not, as we prefer to think, merely ignorant.

The representation by the plaintiff as to the condition of the car was made in a document prepared by the defendants, addressed to them, referring expressly to a hire-purchase agreement made between them and the plaintiff—not an offer by the plaintiff which was yet to be accepted by them—and acknowledging receipt of the goods the subject-matter of the hire-purchase agreement. There is much to be said for the view that, in authorising the dealer to proffer upon delivery of the goods a document couched in these terms, the defendants, when the goods are in fact delivered against signature of the delivery receipt, accept by conduct the plaintiff's offer constituted by her signature of the hire-purchase agreement, so that a binding contract is thereupon made; or at least that the defendants by their conduct are estopped from denying that such a contract then exists. If so, there is no further action apart from what they are already contractually bound to do that the defendants can take on the faith of the representation. It is not, however, necessary to reach a final decision on this point. It is sufficient for the purposes of the present case to say that, having regard to the terms of the delivery receipt with its reference to a hire-purchase agreement already made by the defendants and to the fact, known to the defendants, that it was obtained upon delivery of the goods, a reasonable man in the position of the defendants would not believe that the representation as to the condition of the goods contained in the delivery receipt was meant to be acted upon by him by entering into the very agreement referred to as having been already concluded or by taking steps to acquire from the dealer a right to possession of or title to the goods of which possession had already been delivered up to the plaintiff.

Finally, the defendants have, in our view, failed to establish that they in fact signed the hire-purchase agreement on the faith of the truth of the plaintiff's representation as to the condition of the car. The defendants' area manager, who was called, never said so. He did give evidence that the hire-purchase agreement was not in fact signed until after the delivery receipt had been forwarded to them and that this was the usual practice. Mr. Roche, however, relies upon a finding by the county court judge that "the defendants would not have made any advance to the "dealer or execute the hire-purchase agreement unless and until "the delivery receipt had been signed by the plaintiff." We will assume, since the notes of evidence are compressed, that there was evidence to justify this finding. But it is far from being a finding that the defendants acquired the car from the dealer or executed the hire-purchase agreement because they believed the representation as to the condition of the goods in the delivery receipt was true. It is consistent with the view, which we regard as much more probable, that the defendants required the delivery receipt to be signed by the plaintiff, before the hire-purchase agreement was executed by them, because of their belief that the obtaining of such a receipt enabled them to evade the provisions of section 8 (2) and (3) of the Hire-Purchase Act, 1938, irrespective of whether the statement in it as to the condition of the car was true or not.

For all these reasons we are of opinion that the county court judge was right in holding that the hire-purchase agreement was subject to the implied condition that the car was reasonably fit for use as a means of transport, and that there was in fact a breach of such condition, but that he was wrong in holding that the plaintiff was estopped from relying upon that breach.

The appeal will be allowed and, in lieu of judgment for the defendants, judgment will be entered by the plaintiff for £160, being the damages as assessed by the county court judge.

LORD GODDARD. The appeal will be allowed with costs here and below.

Appeal allowed with costs.

Solicitors: *Mawby, Barrie & Letts for John P. Bonney & Adler, Southport; Victor Mishcon & Co.*

B. A. B.

[COURT OF APPEAL.]

C. A.

1960
Feb. 2.

Hodson, Willmer and Harman L.JJ.

* CORFE *v.* CORFE.

PRACTICE NOTE.

Husband and Wife—Divorce—Evidence—Adultery—Denial of adultery in answer—Verified by affidavit—Not denied in evidence-in-chief—Whether cross-examination thereon permissible—Matrimonial Causes Act, 1950 (14 *Geo.* 6, *c.* 25), *s.* 32 (3).

Husband and Wife—Practice—Pleading—Affidavit in support—Whether evidence at hearing—Cross-examination—Matrimonial Causes Act, 1950, *s.* 32 (3).

Where a charge of adultery is denied in the answer to a petition for dissolution of marriage and verified by the affidavit in support thereof, the denial becomes "evidence in the proceedings" within the meaning of section 32 (3) of the Matrimonial Causes Act, 1950, and the party making it can be cross-examined on such denial notwithstanding that the adultery was not denied in the party's evidence-in-chief.

APPEAL from Wallington J.

A husband petitioned for the dissolution of his marriage on the ground of his wife's adultery and desertion. By her answer the wife denied the adultery and cross-petitioned for a decree on the ground of her husband's desertion. The wife's denial was verified by the affidavit in support of her answer. At the trial, the wife did not deny the adultery in her evidence-in-chief, but an objection on her behalf to cross-examination on the allegation of adultery was not sustained by the judge. In the Court of Appeal Hodson and Willmer L.JJ. made observations in their judgments in respect of that objection, which they held had been correctly disallowed. This Practice Note relates solely to those observations.

A. A. Edmondson for the wife.

N. A. Miscampbell for the husband.

HODSON L.J. The wife did not, in her evidence-in-chief, deny the adultery at all; and when she was cross-examined about certain letters, objection was taken on her behalf that she, not having given evidence in denial of her adultery, could not be cross-examined, by reason of the Matrimonial Causes Act, 1950. That objection was not sustained before the judge, and it now appears to me that it would not have been sustainable, for this reason: although the wife did not give any evidence-in-chief of her own denial of adultery, she had, in answer to the petition for divorce sworn an affidavit verifying the denial of adultery, and that is evidence "in the proceedings," so that the provision in section

32 (3) of the Matrimonial Causes Act, 1950, is not contravened. [His Lordship read section 32 (3) of the Act of 1950.[1]]

The wife, having sworn the affidavit, had given evidence "in "the same proceedings" denying the adultery; and the cross-examination upon the letters can only have been directed to establishing the proof of adultery. The wife, having been cross-examined, did not in terms deny the adultery, but maintained the position throughout that it could not have happened because the man in question was impotent.

WILLMER L.J. Counsel on behalf of the wife sought in the first instance to get rid of the finding of adultery which the judge made against the wife. In that he was not successful. Objection was taken to the judge having allowed the wife to be cross-examined about the letters which she had received from a man, on the ground that the answers to those questions might or would be such as to tend to show that she had committed adultery. The wife had not, in examination-in-chief, given any evidence in denial of adultery. The judge, however, allowed that cross-examination to take place, and it has been contended before us that he was in error in doing so. It seems to have been overlooked, however, that the wife had, by swearing to the truth of the statements made in her answer, already denied on oath the charge of adultery; and in those circumstances (although that is not the reason given by the judge) I find it hard to see how it would have been right to exclude that line of cross-examination. In the result, the wife having been so cross-examined, the judge came to the conclusion that she was not a witness of truth, and he did not accept her evidence.

Solicitors: *Baines & Baines for Edward A. Simans, Birkenhead; Gibson & Weldon for S. Leslie Black, Liverpool.*

I. G. R. M.

[1] Matrimonial Causes Act, 1950, s. 32 (3): "The parties to any proceedings instituted in consequence of adultery and the husbands and wives of the parties shall be competent to give evidence in the proceedings, but no witness in any such proceedings, whether a party thereto or not, shall be liable to be asked or be bound to answer any question tending to show that he or she has been guilty of adultery unless he or she has already given evidence in the same proceedings in disproof of the alleged adultery."

[HOUSE OF LORDS.]

H. L. (Sc.)† 1960 Jan. 20; Feb. 18.

* BROWN . . . . . Appellant;

AND

ROLLS ROYCE LTD. . . . . Respondents.

Negligence—Safe system of work—Dangerous substance—Standard of care—Dermatitis contracted—Contact with oil—Precautionary system—Onus of proof.

Negligence—Onus of proof—Safe system of work—Failure to follow usual precautions.

Fact or Law—Negligence—Standard of care—Always a question of fact.

Judicial Precedent—Question of fact—Jury question—Decision of judge on it not a precedent.

In an action for damages brought by an employee in a factory against his employers the following facts were found by the court: From 1952 to 1955 the employee worked as a machine oiler, so that his hands were constantly in contact with oil. In 1954 he contracted dermatitis as a result of this contact. The employers did not supply barrier cream, as to the value of which in regard to dermatitis there were strong differences in medical opinion. They relied on their medical officer for advice on the precautions to be taken against dermatitis, and, on his advice, barrier cream was not one of the precautions required in their system. He exercised proper care and skill in advising on the precautions to be taken and was not at fault in so doing. Rozalex No. 1 barrier cream was commonly supplied by employers to men doing work of this kind, but there was no evidence as to what, if any, other precautions they took. It was not proved that barrier cream was an effective precaution against dermatitis for men engaged in similar work to this employee, nor that it would probably have prevented him from contracting dermatitis:—

Held, that on these facts the employers had not failed in their duty to the employee, since their conduct satisfied the test of "the "conduct and judgment of a reasonable and prudent man." The onus was on the employee to show that they had been negligent and that their negligence had caused the injury. It was not right to create an artificial division of the onus of proof by taking some of the findings of fact separately so as to suggest that they raised a presumption of negligence which the employers must rebut.

Per Lord Denning. The *legal* burden of proof, properly so called, which is imposed by the law itself, must be distinguished from the *provisional* burden which is raised by the state of the evidence (post, p. 215).

Paris v. *Stepney Borough Council* [1951] A.C. 367; [1951] 1 T.L.R. 25; [1951] 1 All E.R. 42, H.L. applied.

Decision of the First Division of the Court of Session, 1959 S.L.T.(Notes) 73 affirmed.

Appeal from the First Division of the Court of Session.

In this appeal from the First Division of the Court of Session (Lord President Clyde, Lord Russell and Lord Sorn, Lord Carmont dissenting) the appellant, John Brown, sought to have

† *Present*: Lord Reid, Lord Radcliffe, Lord Cohen, Lord Keith of Avonholm and Lord Denning.

reversed an interlocutor pronounced by their Lordships on May 29, 1959, reversing an interlocutor pronounced by the Sheriff-Substitute at Glasgow (Mr. N. M. L. Walker) on November 10, 1958. The appellant raised an action of reparation against the respondents, Rolls Royce Ltd., on September 26, 1957. He contended that he had contracted industrial dermatitis in consequence of their negligence in failing to provide a barrier cream for his use while engaged in his employment with them. In their defence they contended that he had not in fact contracted industrial dermatitis. They also contended that they had taken all reasonable precautions to protect their employees against dermatitis and that there was no duty on them to provide barrier cream. Their second plea in law was that the appellant "not "having suffered loss, injury or damage through the fault of the "[respondents], the [respondents] should be assoilzied." After sundry procedure proof was heard before the Sheriff-Substitute on July 9, 10, 11, 14 and 28, 1958, he held that the appellant had contracted industrial dermatitis and that the respondents were at fault in not providing a barrier cream for his use. He assessed damages at £300. The respondents appealed against his interlocutor and the appeal was heard by the First Division on May 19, 20, 21 and 22, 1959. By interlocutor dated May 29, 1959, the First Division allowed the appeal and assoilzied the respondents.

The interlocutor of the First Division, so far as material, was in the following terms: "Edinburgh, 29th May, 1959. The Lords "having considered the Record in the Appeal: Find in fact (1) "that from 1952 till 1955 the pursuer was employed by the "defenders as a machine oiler; (2) that owing to the nature of his "work his hands were constantly in contact with oil; (3) that in "the spring of 1954, he contracted industrial dermatitis caused "by contact with oil; (4) that the defenders supplied ample "washing facilities; (5) that they did not supply barrier cream; "(6) that there are strong differences of opinion in the medical "profession as to the value of barrier cream in regard to derma-"titis; (7) that the defenders relied on their medical officer, "Dr. Collier, for advice on the precautions to be taken against "dermatitis; (8) that on the advice of the said Dr. Collier the "defenders did not include barrier cream as one of the pre-"cautions required in their system; (9) that the said Dr. Collier "exercised proper care and skill in advising on the precautions "to be taken against dermatitis, and was not at fault in so doing; "(10) that Rozalex No. 1 barrier cream is commonly supplied by "employers to men doing such work as the pursuer was doing, "but there is no evidence as to what, if any other precautions "their employers take; (11) that it is not proved that barrier "cream is an effective precaution against the contracting of der-"matitis by workmen engaged in similar work to the pursuer; "(12) that it is not proved that barrier cream would probably "have prevented the pursuer from contracting dermatitis; "(13) that the pursuer is still suffering from the disease and the

H. L. (Sc.)
1960
Brown
v.
Rolls Royce
Ltd.

"prospects of an early recovery are not good; and (14) that he "was off work owing to the disease from July 25 to September 19, "1955, and his net loss of wages during that period was approximately £39; Find in law that the defenders were not at fault "in not supplying barrier cream; sustain their 2nd plea-in-law, "recall the interlocutor of the Sheriff-Substitute dated September 10, 1958, except in so far as it certifies witnesses and the "employment of counsel, allow the appeal, assoilzie them from "the crave of the initial writ and decern."

F. C. Watt Q.C. and *J. R. Hamilton* (both of the Scottish Bar) for the appellant.

M. Kissen Q.C. and *J. A. Forsyth* (both of the Scottish Bar) for the respondent company were not called on to address their Lordships.

Besides the cases referred to in their Lordships' opinions, *Morris* v. *West Hartlepool Steam Navigation Co. Ltd.*[1] was cited in argument.

Their Lordships took time for consideration.

Feb. 18. Lord Reid. My Lords, I have had an opportunity of reading the speeches which my noble and learned friends are about to deliver. I agree with them and I find it unnecessary to add anything. I move, your Lordships, that this appeal be dismissed.

Lord Radcliffe. My Lords, for my own part, I take the same view. I have had the opportunity of reading the speeches prepared by my noble and learned friends, who will deliver them later, and I am in full agreement.

Lord Cohen. My Lords, the appellant contracted industrial dermatitis caused by contact with oil while he was in the employment of the respondents and he avers that the said dermatitis was caused or aggravated by the fault and negligence of the respondents. He instituted proceedings in the sheriffdom of Lanarkshire at Glasgow claiming £500 damages, and on September 10, 1958, recovered judgment for damages assessed at £300. The respondents appealed to the Court of Session and the matter came before their Lordships of the First Division. On May 29, 1959, they pronounced their interlocutor reversing by a majority the decision of the Sheriff-Substitute.

[His Lordship read the interlocutor and continued:]

The first point to be noted is that since the interlocutor appealed from reviewed the judgment of an inferior court founded on proof allowed and taken, section 40 of the Judicature (Court

[1] [1956] A.C. 552; [1956] 1 W.L.R. 177; [1956] 1 All E.R. 385, C.A.

of Session) Act, 1825, makes it final as to findings of fact; it is subject to appeal only on points of law.

Mr. Watt, for the appellant, accepts that this is the position, but he submits that findings (1), (2), (3), (5) and (10), which I have quoted, discharge what he calls the preliminary onus of proof of the respondents' negligence, which he admits rests on the appellant, and alleges that the onus then passed to the respondents to show that they were not negligent. He says that the respondents have not discharged that onus.

I cannot think it is right to take some of the findings of fact in this way apart from the others and thus create an artificial division in the onus of proof. It seems to me that the authorities clearly show that it is for the pursuer in an action founded on negligence to show that the defenders have been negligent and that their negligence has caused the injury of which the pursuer complains. As Lord Keith of Avonholm said in *Cavanagh* v. *Ulster Weaving Co. Ltd.*[1]: "The ruling principle is that an "employer is bound to take reasonable care for the safety of his "workmen and all other rules or formulas must be taken subject "to this principle." Applying this ruling principle to the facts as found by the First Division, I arrive at the conclusion that the respondents have not failed in their duty to the appellant.

Mr. Watt relied on the first part of the well-known rule laid down by Lord President Dunedin in *Morton* v. *William Dixon Ltd.*[2] But that rule is only a prima facie guide, and as Lord President Clyde said in the present case: "There is no evidence "to prove that barrier creaming effective to prevent dermatitis. "Moreover, as Lord Normand said in *Paris* v. *Stepney Borough* "*Council*,[3] the rule does not detract from the test of the conduct "and judgment of a reasonable and prudent man." It seems to me impossible in face of findings (7), (8) and (9) to say that the respondents did not pass this test.

I have arrived at my conclusion on the facts found and stated in the interlocutor. If it were permissible to look at the judgments of the majority of the Court of Session, this conclusion would be reinforced by further facts stated by the Lord President and Lord Russell. The Lord President said that before Dr. Collier came on the scene in 1940 the respondents supplied barrier cream, and Lord Russell said the number of dermatitis cases had fallen from 353 in 1941 to three or four by 1957.

I would dismiss the appeal.

LORD KEITH OF AVONHOLM. My Lords, the appellant, who is pursuer in this action, appeals against an interlocutor of the First Division of the Court of Session which recalled an interlocutor of one of the Sheriff-Substitutes of Lanarkshire at Glasgow, pronounced in the appellant's favour, after proof in the sheriff

[1] [1959] 3 W.L.R. 262, 273; [1959] 2 All E.R. 745, H.L. (N.I.).
[2] 1909 S.C. 807, 809.
[3] [1951] A.C. 367, 382; [1951] 1 T.L.R. 25; [1951] 1 All E.R. 42, H.L.

H. L. (Sc.)
1960
Brown
v.
Rolls Royce
Ltd.
Lord Keith
of Avonholm.

court. The case is thus one to which section 40 of the Judicature (Court of Session) Act, 1825, applies and appeal to your Lordships' House is competent only on points of law. It is unnecessary to refer to the record in the action further than to say that the action is one of damages by the pursuer against his employers for negligence in failing to supply him with barrier cream as a protection against the risk of getting industrial dermatitis through contact with oil, in the course of his employment.

[His Lordship read the interlocutor of the First Division and continued:]

The findings of fact contained in this interlocutor are, in my opinion, fatal to the success of this appeal. The argument for the appellant was that findings (1), (2), (3), (5) and (10) necessarily raised a presumption of negligence which the defenders had had to rebut. The keystone in this argument seemed to be the finding of common practice to supply barrier cream stated in finding (10). But I can draw no such inference from this finding. A common practice in like circumstances not followed by an employer may no doubt be a weighty circumstance to be considered by judge or jury in deciding whether failure to comply with this practice, taken along with all the other material circumstances in the case, yields an inference of negligence on the part of the employers. Reference was made to Lord Dunedin's well-known dictum in *Morton* v. *William Dixon Ltd.*[4] As has been said before in this House, Lord Dunedin was laying down no proposition of law; nor did he say that, if a practice was averred and proved which might have avoided the accident, this was necessarily conclusive of negligence on the part of an employer who had not followed the practice. The ultimate test is lack of reasonable care for the safety of the workman in all the circumstances of the case. That there were other material circumstances in this case is clear from findings (6) to (9) inclusive, with, in addition, findings (11) and (12). Your Lordships are not entitled to go beyond these findings, but it is clear from the opinions of the majority of the judges of the First Division, which were read to your Lordships, that these findings were not reached without a most careful examination of the evidence in the case. No doubt, as urged by counsel for the pursuer, it is not the care and skill of Dr. Collier that is directly in issue, but the care of the defenders for the safety of the pursuer. But absence of proper care on the part of Dr. Collier might have involved the defenders in vicarious liability. To put it at its lowest, their employment of Dr. Collier and reliance on his advice was material evidence to be weighed on the question of the care exercised by the defenders for the safety of their workmen.

The appellant's (pursuer's) counsel also challenged findings (11) and (12) as having placed the onus on the wrong party. It was not for the pursuer, he said, to prove the efficacy of barrier

[4] 1909 S.C. 807, 809.

cream, but for the defenders to disprove its efficacy. Here, again, his submission turned on the finding with reference to common practice by other employers. But it is impossible, in my opinion, to affirm that this finding per se must shift the onus. It is an element to be considered with the whole other evidence in the case. The whole evidence was before their Lordships of the First Division and it was for them to draw conclusions on how matters of onus lay. The pursuer's action was based on negligence and the primary onus lay on him. The findings in question have a direct bearing on the question of negligence and, in my opinion, cannot be disturbed by your Lordships. The findings in fact in the interlocutor appealed against, in my opinion, amply support the finding in law that the defenders were not in fault in not supplying barrier cream.

I would dismiss the appeal.

LORD DENNING. My Lords, the difference between the judges of the Court of Session turned on the onus of proof. The majority of them (the Lord President, Lord Russell and Lord Sorn) thought that the burden was on the pursuer to prove that the defenders were negligent and that, looking at the case at the end of the day, the pursuer had not discharged that burden. The minority (Lord Carmont) thought that, once the pursuer proved that the defenders had not followed the common practice of the trade in supplying barrier cream, the burden shifted to the defenders, so that they would not escape liability unless they proved (not as a mere probability but as matter of reasonable certainty) that, even if they had adopted the common practice and supplied barrier cream, it would have done no good.

This difference of opinion shows how important it is to distinguish between a *legal* burden, properly so called, which is imposed by the law itself, and a *provisional* burden which is raised by the state of the evidence. The *legal* burden in this case was imposed by law on the pursuer. In order to succeed he had to prove that the defenders were negligent and that their negligence caused the disease, see *Bonnington Castings Ltd.* v. *Wardlaw*, Lord Reid[5] and Lord Tucker.[6] In order to discharge the burden of proving negligence, the pursuer proved that "barrier cream was com-"monly supplied by employers to men doing such work as the "pursuer was doing." This was a cogent piece of evidence and raised no doubt a "presumption" or a "prima facie" case, in this sense, that, if nothing more appeared, the court might well infer that the defenders were negligent, and in that sense it put a burden on the defenders to answer it. But this was only a *provisional* burden which was raised by the state of the evidence

[5] [1956] A.C. 613, 620; [1956] 2 W.L.R. 707; [1956] 1 All E.R. 615, H.L.

[6] [1956] A.C. 613, 624, H.L.

H. L. (Sc.)
1960
Brown
v.
Rolls Royce
Ltd.
Lord Denning.

as it then stood. The defenders might answer it by argument, as indeed they did, by pointing out that "there is no evidence as "to what, if any, other precautions these employers take": or the defenders might answer it by calling evidence themselves, as indeed they did, by proving that they "relied on their medical "officer, Dr. Collier, who exercised proper care and skill" and they carried out the precautions advised by him. In this way a provisional burden may shift from one party to the other as the case proceeds or may remain suspended between them. But it has no compelling force. At the end of the day the court has to ask itself—not whether the provisional burden is discharged—but whether the legal burden has been discharged, that is to say: Has the pursuer proved that the defenders were negligent?

If the view of Lord Carmont were right it would mean that, once the pursuer proved that the defenders had not followed a precaution usually observed in the trade, there was a compelling presumption that they were negligent, and there was a legal burden of the defenders to rebut it. This would introduce a new proposition of law for which I find no warrant in the judgment of Lord Dunedin in *Morton* v. *William Dixon Ltd.*[7] As my noble and learned friend, Lord Keith of Avonholm said in *Cavanagh* v. *Ulster Weaving Co. Ltd.*[8]: "Lord Dunedin was laying down . . . "no principle of law but stating the factual framework within "which the law would fall to be applied." Nor do I find any warrant for it in the speech of Lord Normand in *Paris* v. *Stepney Borough Council.*[9] Lord Normand there said that "if there is "proof that a precaution is usually observed by other persons, a "reasonable and prudent man will follow the usual practice in the "like circumstances." That is not a proposition of law at all, but only a proposition of good sense. It is on a par with the propositions about protective clothing discussed by your Lordships in *Qualcast (Wolverhampton) Ltd.* v. *Haynes.*[10] If the defenders do not follow the usual precautions, it raises a prima facie case against them in this sense, that it is evidence from which negligence *may* be inferred, but not in the sense that it *must* be inferred unless the contrary is proved. At the end of the day the court has to ask itself whether the defenders were negligent or not. It is sufficient if there is a greater probability on one side or the other: but if at the end of the case the evidence is so evenly balanced that the court cannot come to a determinate conclusion, the *legal* burden comes into play and requires the court to reject the case of negligence alleged against them. The majority of the Court of Session here held that the defenders were not at fault

[7] 1909 S.C. 807.
[8] [1959] 3 W.L.R. 262, 274, H.L. (N.I.).
[9] [1951] A.C. 367, 382.
[10] [1959] A.C. 743; [1959] 2 W.L.R. 510; [1959] 2 All E.R. 38.

in not supplying barrier cream: and I can see no error of law in their findings.

I would therefore dismiss the appeal.

Appeal dismissed.

Solicitors: *Evill & Coleman for Thos. J. Addly, Son & Co., S.S.C., Edinburgh, and L. & L. Lawrence, Glasgow; Claremont, Haynes & Co. for Simpson & Marwick, W.S., Edinburgh, and Gartshore, Scott, Sons & Co., Glasgow.*

F. C.

[BRISTOL ASSIZES.]

* QUINTAS *v.* NATIONAL SMELTING CO. LTD.

1959
Nov. 17, 18, 26.

Devlin J.

[1956 Q. 1532.]

Factory—Dangerous machinery (fencing)—Fence, extent of duty to—Handrail three feet high—Gap of 18 *inches—Overhead travelling cable way—Buckets suspended from cable—Whether cable way "machinery" requiring to be fenced—Factories Act,* 1937 (1 *Edw.* 8 *&* 1 *Geo.* 6, *c.* 67), *s.* 14 (1).

Words and Phrases—"Machinery"—Factories Act, 1937 (1 *Edw.* 8 *&* 1 *Geo.* 6, *c.* 67), *s.* 14 (1).

The defendants were the occupiers of a factory in which they operated an overhead travelling cable way, known as the ropeway, for the purpose of transporting material from one part of the factory to another. The ropeway was supported by stanchions, on each side of which there ran a cable, and along these cables, one going one way and the other the reverse, there were large buckets constantly in motion. The buckets were spaced at intervals of 110 feet and travelled at a maximum speed of 3 miles per hour. When they were travelling at that speed, a given spot on the route of the ropeway would be passed by a bucket about twice in a minute. For most of its route the ropeway was sufficiently high above the ground to obviate the need for any protection for men working or passing underneath. But at one point it crossed the flat roof of a building, containing a crushing plant, which was 18 feet above ground level. The bottom of the bucket passed 4 feet above the level of that roof and so persons on the roof were in danger. Part of the flat roof of the crushing plant was occupied by a small building known as the magnet house. Access to the magnet house was obtained by a door which opened on to a corner of the flat roof. A man emerging from this door and turning left had to walk only a few paces to get to the door of the magnet house, and this walking space was fenced in by a handrail about 3 feet high and consisting of posts and two rails. At the material time there was a gap of 18 inches in this handrail. It had been cut to allow some equipment through and never replaced. Just before the accident the plaintiff, who was employed by the defendants, and who had finished a job in the magnet house, walked through the gap out to the edge of the roof to attract attention so that he could send a message to

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[Reported by A. D. RAWLEY, Esq., Barrister-at-Law.]

1959

Quintas
v.
National
Smelting
Co. Ltd.

his foreman and, standing in the route of the ropeway, he was struck by a bucket and thrown from the flat roof to the ground below, sustaining injuries. In an action against his employers for damages for, inter alia, breach of statutory duty, the plaintiff contended that the ropeway was "machinery" within the meaning of section 14 (1) of the Factories Act, 1937, and that the part of it which crossed the roof of the crushing plant was dangerous and was not securely fenced as required by that section:—

Held, (1) that the whole of the ropeway must be regarded as one piece of apparatus and as machinery within the meaning of the Act. Accordingly, such parts of it as were dangerous to persons beneath it required to be fenced.

(2) That the fence must not merely guard against accident but must be such as took into account human weaknesses which included, as well as forgetfulness and inadvertence, an inclination sometimes to run minor risks and to take short cuts. The fence need not, however, be constructed so as to keep out a determined man. In this case the fence was not of proper construction, even without the gap of 18 inches which had been cut in it, and was not in compliance with section 14 (1) of the Act.

Dicta of Lord Porter in *Carroll* v. *Andrew Barclay & Sons Ltd.* [1948] A.C. 477, 486; 64 T.L.R. 384; [1948] 2 All E.R. 386; and Lord Morton in *John Summers & Sons Ltd.* v. *Frost* [1955] A.C. 740, 758; [1955] 2 W.L.R. 825; [1955] 1 All E.R. 870 applied.

(3) That on the facts, the plaintiff's own negligence was the main cause of the accident, and his contributory negligence was to be assessed at 75 per cent.

Action.

The facts are fully stated in the judgment.

Dudley Collard and *W. J. Ward* for the plaintiff.

W. L. Mars-Jones Q.C. and *H. E. Park* for the defendants.

No cases, other than those cited in the judgment, were referred to in argument.

Cur. adv. vult.

November 26. Devlin J. read the following judgment: The plaintiff, Nicholas Quintas, is a Spaniard who has been resident for some time in this country. At the time of the accident to which this action relates he was a man in the late thirties and employed as a fitter by the defendants, the National Smelting Co. Ltd., at their works at Avonmouth. On June 28, 1955, he was thrown or flung from the flat roof on which he was standing down on to the ground below, a distance of about 18 feet. He landed on his heels and sustained very severe injuries to his feet, and also some injury to his elbow which aggravated an existing condition of osteo-arthritis.

This accident occurred because the plaintiff was struck by a large and heavy bucket which was being carried overhead on an apparatus which is known as a ropeway. It consists of an overhead cable, and to this cable buckets are attached at various intervals, 110 feet apart normally, and the buckets are pulled along the cable by means of another cable referred to as the pulley cable.

They go up loaded on one side of the pillars or supports that are erected to hold the cable, and come back on the other side. This is a system which runs for a considerable length through the defendants' factory, and it is used for moving materials to and fro for the purposes of their manufacturing process. The speed is not great, at a maximum speed it is 3 miles per hour, but if anyone were standing in the way of a bucket, a heavy bucket moving at 3 miles per hour, he would undoubtedly be knocked down, and if standing on the edge of the roof, as the plaintiff was, he would be knocked over the edge of the roof; and that is what happened to the plaintiff.

It is not at every point on the route of this ropeway that an accident of this sort could occur. The overhead ropeway, as one might expect, is some height above the ordinary ground level of the factory, so that the buckets ordinarily travel at a height where they are not likely to do injury to anybody. But at this particular point the overhead ropeway crossed a piece of flat roof, and that roof was 18 feet above the ground; the consequence was that the bottom of the bucket was only 4 feet above the top of the flat roof, and it was on that flat roof that the plaintiff was standing. It is the roof of a plant called the crushing plant. On top of that roof there is a sort of penthouse building which occupies only a part of it, and that building is called the magnet house. In order to get there you have to get up on top of the crushing house roof, and you do that by means of an internal staircase which allows you out on to the roof by means of a door. If you turn sharply left you enter the door of the magnet house. If you went straight on you would walk on the open piece of flat roof, and if you turned to the left after you got past the magnet house you would find another area of the flat roof, and it is across that area that the ropeway travels. It clearly was not intended that people should go out on to this flat roof unless they had some good reason for doing so, and the photographs show rails fitted. They are not very elaborate, but consist of posts and two rails, fitted at the corner where a man comes out on to the roof from the internal staircase and turns into the magnet house; those rails are fitted on the corner, and they rail off the route which a person will take to get to the magnet house.

I am satisfied that this part of the roof was dangerous, and therefore the defendants had a duty in respect of it which they owed to the plaintiff. They did, in fact, as I have indicated, erect a railing so that anybody who came up through the internal staircase going to the magnet house would be diverted, if I may put it that way, from walking on to the roof as a whole. It was a simple railing, it was not something that anybody could not cross with the utmost ease, but it was there more as a form of warning than anything else; it showed people that the roof was not something which was to be walked upon at large But at this time there was a gap in it. Some time previously, and it has not been clearly ascertained when, somebody wanted to get a heavy

1959

Quintas v. National Smelting Co. Ltd.

Devlin J.

piece of machinery up by the route I have described and found themselves impeded by the railing, and, accordingly, 18 inches of the railing was cut off so there was a gap of 18 inches between the wall of the magnet house and the end of the railing. That, of course, anybody could go through, and it might well have suggested to somebody who did not know what the position was, that there was no particular reason why he should not cross. In other words, it might well have destroyed the warning effect which the ordinary intelligent man would otherwise get from seeing the railway.

On the morning of the accident, June 28, 1955, the foreman fitter under whom the plaintiff worked, a Mr. Jakeways, had instructed the plaintiff to change a conveyor belt in the magnet house. The conveyor belt is an elaborate thing, it is fairly wide and it weighs 19 pounds. It had to be got up into the magnet house, and that work was given by the foreman to a rigger called Carter, who had two other men working under him. The job was done on the morning of the day in question, and the plaintiff then went down to report it to the foreman. He went to the foreman's office for that purpose and Mr. Jakeways sent him back again, according to the plaintiff, to await Mr. Jakeways' coming so that he could satisfy himself that the work had been properly done by inspecting it. According to Mr. Jakeways it was because there was something further to be done, and it was Mr. Jakeways' intention to inspect it after that had been done. There is a minor conflict of evidence about that, just as there is a minor conflict of evidence about how long Mr. Jakeways waited before he came out. The plaintiff said three-quarters of an hour and Mr. Jakeways said twenty minutes. I do not think it matters very much. The point is that Mr. Jakeways delayed long enough for the plaintiff to become rather impatient. It was getting past the middle of the day. Again there is a conflict of evidence as to precisely what time it was, and again I do not think it matters very much except to say that it was after a quarter to two. The plaintiff, having waited at least up to that time, and maybe the time was later, became impatient and he wanted to find out what the foreman was doing. Instead of going down as he might have done in the same way as he had when he reported to the foreman, by the internal staircase to which I have referred, he decided to go out on to the roof and look down over the edge and call someone and ask that someone to go and tell the foreman that he was still waiting. The foreman's office was about 90 feet away from this point. That is what the plaintiff did, and it was while he was standing on the edge calling to someone, perhaps after he had called someone, perhaps after that someone was already on the way, that he was struck on his back by a bucket, and knocked off the roof in the circumstances which I have already recounted.

It is in those circumstances that he brings his claim for damages.

[His Lordship, finding as a fact that the plaintiff knew that it was dangerous to work or stand under the ropeway at this point,

held that the main cause of the accident was the plaintiff's own negligence, and that the defendants were not in breach of any duty at common law, and continued:] But the plaintiff alleges a breach of section 14 (1) of the Factories Act, 1937. He contends that the ropeway was machinery within the meaning of that section, that the part of it which crossed the roof of the crushing plant was a dangerous part, and that it was not securely fenced as required by the section. The question of whether a ropeway of this sort is "machinery" within the meaning of the section appears to be a novel point upon which counsel were not able to find any clear authority, and I therefore reserved my judgment upon it.

The defendants submit that the ropeway is simply a means of transport which is to be compared with a railway, the only difference being that while in the case of a railway the vehicle moves on the rails, in the case of the ropeway it is suspended from them. The plaintiff submits that the ropeway is more justly to be compared with a conveyor belt, the only difference being that it operates over the whole factory instead of in a particular workshop. The only authority that counsel could find on the point is *Parvin* v. *Morton Machine Co. Ltd.*,[1] in which the House of Lords decided that the Factories Acts did not extend to machinery manufactured in the factory. Lord Normand, who gave the first speech, put the question[2] as being whether the Acts "apply to "machines or machinery manufactured in the factory or only "to machines or machinery for use in the factory in the processes "of manufacture or as ancillaries to these processes." While Lord Normand was not there giving a conclusive definition of the machinery to which the Acts apply, I have no doubt that he chose his words carefully. The transport of materials for use in the processes of manufacture is something ancillary to those processes. I do not think that it follows from this, as the defendants suggest, that every truck on a factory railway or every vehicle within the factory which is carrying material is a machine for the purposes of the Acts. Even if it did so follow, it does not also follow that the machine would have to be "fenced." No doubt a vehicle in motion may be a dangerous thing; but section 14 does not require that the machine as a whole should be securely fenced but that every dangerous part of it should be. Normally, the dangerous parts of a vehicle are covered in. The defendants invited me to regard the buckets as separate pieces of machinery and to compare them with any other form of vehicle; there was nothing dangerous about a bucket, they said, except its motion. But, in my judgment, the whole of the ropeway must be regarded as one piece of apparatus and as machinery within the meaning of the Act. This does not, of course, mean that every part of it has to be fenced, but only those parts, such as the one I am

[1] [1952] A.C. 515; [1952] 1 T.L.R. 682; [1952] 1 All E.R. 670.

[2] [1952] A.C. 515, 520.

1959

Quintas v. National Smelting Co. Ltd.

Devlin J.

considering in this case, where there is danger to those underneath.

Have the defendants discharged their obligation of securely fencing? It would be easy to say that as there was a gap in the handrail they clearly had not. But I think that that would be to take too superficial a view of the problem. The gap was really immaterial. If it had been made good, a man could still have got through the fence just as easily as if the gap was there. The real question is whether there was a duty on the defendants to erect a fence that would prevent, or at least seriously hinder, a man from going where he wanted to go. If the defendants could have discharged their duty by mending the handrail then I should hold that their failure to do so did not contribute to the damage, for I am sure that a complete handrail would not have kept the plaintiff out.

Here, again, there does not seem to be a wealth of authority. It is clear that by a secure fence is meant one which is designed to prevent contact. But does that mean accidental contact, whether or not involving some degree of carelessness, or does it extend to deliberate contact? In *Carroll* v. *Andrew Barclay & Sons Ltd.*[3] Lord Porter said[4]: "Fencing, in my opinion, means "the erection of a barricade to prevent any employee from "making contact with the machine." It must be remembered that his Lordship was speaking in a case in which the point was not the strength of the fence but whether it was necessary to fence against the ejection of dangerous materials from the machine. But the word "barricade" is not likely to have been chosen without thought, and the dictum affords valuable guidance as is shown by Lord Morton's reference to it in *John Summers & Sons Ltd.* v. *Frost*.[5] Lord Morton said that there must be[6] "complete protection against contact"; but he added: "I do "not suggest that the fence must be so constructed that it cannot "be climbed over, or broken down, by an employee who is deter-"mined to get at the machinery."

From these dicta it is clear, as it is clear also from the general principles that underly the interpretation of the Factories Acts, that the fence must not merely guard against accident but must be such as takes into account human weaknesses which include, as well as forgetfulness and inadvertence, an inclination sometimes to run minor risks and to take short cuts. Some degree of recklessness (as well as carelessness) has to be foreseen. The fence need not be constructed so as to keep out a determined man, but I think it must be such as will deter a man who, in pursuit of a short cut, is willing to run a minor risk. The fence in this case, whether complete or broken, was not of that construction;

[3] [1948] A.C. 477; 64 T.L.R. 384; [1948] 2 All E.R. 386.

[4] [1948] A.C. 477, 486.

[5] [1955] A.C. 740; [1955] 2 W.L.R. 825; [1955] 1 All E.R. 870; sub nom. *Frost* v. *John Summers & Sons Ltd.* [1954] 2 Q.B. 21; [1954] 2 W.L.R. 794; [1954] 1 All E.R. 901.

[6] [1955] A.C. 740, 758.

it was nothing more than a line that demarcated a dangerous or forbidden area and, as such, it was an insufficient compliance with the section.

I consider the plaintiff should himself bear three-quarters of the responsibility for his accident and there will, therefore, be judgment for him for one-quarter of the sum of £8,700 which I have already assessed as damages.

Judgment for the plaintiff for £2,175 with costs to the time of payment into court by the defendants.

Solicitors: *W. H. Thompson; Gascoin & Co.*

[PRIVY COUNCIL.]

* UNIVERSITY OF CEYLON . . . . APPELLANT;

AND

E. F. W. FERNANDO . . . . . RESPONDENT.

J. C.†
1960
Feb. 16.

ON APPEAL FROM THE SUPREME COURT OF CEYLON.

Natural Justice—Opportunity to meet charge—Whether accused entitled to question witnesses—University—Allegation of pre-knowledge of examination paper—Inquiry under domestic statute.
Education—University—Discipline—Domestic commission of inquiry—Duty to comply with natural justice.

After the respondent, a student of the appellant University of Ceylon, had sat for the final examination for the degree of Bachelor of Science, an allegation was made to the Vice-Chancellor that the respondent had had prior knowledge of the content of a passage in the German language which had to be translated in one of the papers. A commission of inquiry consisting of the Vice-Chancellor and two others, acting under clause 8 of the statute of the University, which required the Vice-Chancellor to be "satisfied," inter alia, that any candidate had prior knowledge of the content of any paper, found that the allegation against the respondent was substantiated and, as required by clause 8, reported their finding to the Board of Residence and Discipline, who suspended the respondent indefinitely from all University examinations.

In an action by the respondent for, inter alia, a declaration that the finding of the commission of inquiry and the decision of the Board of Residence and Discipline were null and void, he alleged that the finding of the commission was contrary to the principles of natural justice in that, inter alia, the evidence of the various witnesses, including that of the person who had made the allegation, was taken in his absence, and he was not aware of the evidence led against him or of the case he had to meet. He was questioned about the matter by the commission. In evidence he denied the allegation:—

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† *Present*: VISCOUNT SIMONDS, LORD TUCKER, LORD JENKINS, LORD MORRIS OF BORTH-Y-GEST and the RT. HON. L. M. D. DE SILVA.

J. C.

1960

Ceylon University v. Fernando.

Held, that in the absence in clause 8 of any express requirement as to the procedure to be followed at the inquiry, it must comply with the elementary and essential principles of fairness, which must as a matter of necessary implication be treated as applicable in the discharge of the Vice-Chancellor's admittedly quasi-judicial functions under clause 8, or, in other words, with the principles of natural justice. The Vice-Chancellor was not bound to treat the matter as a trial, but could obtain information in any way he thought best, and it was open to him, if he thought fit, to question witnesses without inviting the respondent to be present, but a fair opportunity must have been given to him to correct or contradict any relevant statement to his prejudice. That last condition had on the facts of this case been complied with, in that the respondent had, by letter from the Vice-Chancellor and at interviews with the commission of inquiry, been adequately informed of the case he had to meet, and had been given at the interviews an adequate opportunity of meeting the case alleged against him (post, p. 234).

The fact that the commission failed to volunteer the suggestion that the respondent might wish to question the person who had made the allegation against him—or to tender her unasked for cross-examination by the respondent—was not an omission sufficient to invalidate the proceedings of the commission as failing to comply with the requirements of natural justice in the circumstances of the present case. Here the mode of procedure adopted by the Vice-Chancellor in bona fide exercise of the wide discretion as to procedure reposed in him under clause 8 sufficiently complied with those requirements (post, p. 235).

Dicta in *De Verteuil* v. *Knaggs* [1918] A.C. 557, at 560; 34 T.L.R. 325; *Local Government Board* v. *Arlidge* [1915] A.C. 120, at 132; *Byrne* v. *Kinematograph Renters Society Ltd.* [1958] 1 W.L.R. 762, at 784; [1958] 2 All E.R. 579, and *Board of Education* v. *Rice* [1911] A.C. 179, at 182; 27 T.L.R. 378 applied.

Osgood v. *Nelson* (1872) L.R. 5 H.L. 636 considered.

Judgment of the Supreme Court of Ceylon (1956) 58 N.L.R. 265 reversed.

Appeal (No. 17 of 1958) from a judgment of the Supreme Court of Ceylon (Weerasooriya and T. S. Fernando JJ.) (November 28, 1956) reversing a judgment of the District Court of Colombo (Kariapper A.D.J.) (August 31, 1954) which had dismissed the claim of the present respondent for a declaration (and other relief) that the appellant University of Ceylon had wrongfully suspended him from all examinations.

The following facts are taken from the judgment of the Judicial Committee: This appeal arose out of an action brought by the respondent E. F. W. Fernando as plaintiff against the appellant University of Ceylon as defendant for (inter alia) a declaration to the effect that a decision of the Board of Residence and Discipline of the University to suspend the plaintiff (a student of the University) from all University examinations for an indefinite period, and the finding of a commission of inquiry set up by the Vice-Chancellor, on which such decision was based, were null and void.

The action was heard in the District Court of Colombo by Kariapper A.D.J., who by a judgment and decree dismissed it with costs. The plaintiff appealed to the Supreme Court of

Ceylon, and that court (Weerasooriya and Fernando JJ.), by a decree dated December 13, 1956, giving effect to a judgment delivered on November 28, 1956, allowed his appeal and granted the declaratory relief claimed with costs. From that judgment and decree the University now appealed to the Board.

The circumstances leading up to the plaintiff's suspension from all University examinations, and the unfortunate litigation which had ensued, were as follows: The examinations procedure of the University was prescribed by its "General Act" No. 1, Chapter VIII, Part I, clause 8 of which Part provided that "where the "Vice-Chancellor is satisfied that any candidate for an examina- "tion has acquired knowledge of the nature or substance of any "question or the content of any paper before the date and time "of the examination, or has attempted or conspired to obtain "such knowledge, the Vice-Chancellor may suspend the candi- "date from the examination or remove his name from any pass "list, and shall report the matter to the Board of Residence and "Discipline for such further action as the Board may decide to "take." By clause 14: "Where any matter is reported to the "Board of Residence and Discipline under this Part, the Board "may (1) remove the name of the candidate from any pass list; "or (2) suspend the candidate from any University examination "for such period as the Board may decide, or indefinitely; or "(3) order that the candidate be suspended from the University "for such period as the Board may decide, or indefinitely; or "(4) do all or any of these acts." These clauses may conveniently be referred to as clause 8 and clause 14 respectively.

The plaintiff, who had been a student in the faculty of science in the University since 1948, presented himself at the end of March, 1952, as an examinee for the final examination in science, section B, Zoology, for the degree of Bachelor of Science, and completed the full examination in both theory and practical work. There were five papers in theory and two in practical work, and the plaintiff sat for Zoology Paper V, the last theoretical paper, on April 4, 1952. That paper was in two sections, consisting of (1) an essay, and (2) a passage in German and a passage in French, one of which the candidate was required to translate into English with comments thereon, 10 marks being allotted for the translation of and comments upon the selected passage, and 90 marks for the essay. The plaintiff chose the passage in German for his translation and comments, for which he was awarded eight marks. He appeared to have done well in all his papers and to have attained in the examination as a whole a standard which would normally have been held sufficient to place him in the first class.

After the examination was over, a woman student, Miss Balasingham, who had also been reading Zoology and had taken the examination at the same time as the plaintiff, made to Mr. Sivaprakasapillai, a lecturer in the engineering faculty and Miss Balasingham's brother-in-law, certain allegations concerning the

J. C.
1960
Ceylon University v. Fernando.

plaintiff which, if true, were only explicable on the footing that the plaintiff had acquired knowledge of the German passage in Zoology Paper V before the examination. Those allegations were passed on by Mr. Sivaprakasapillai to Sir Ivor Jennings, the Vice-Chancellor, it would seem in the first instance through Professor Pereira and Mr. Keerthisinghe, the senior lecturer in Zoology, though that was not important.

The Vice-Chancellor took a serious view of Miss Balasingham's allegations, which not only implicated the plaintiff but also suggested the possibility of negligence or misconduct on the part of some member or members of the staff of the University. On that aspect of the matter some embarrassment was caused by the circumstance that Professor Fernando, who was responsible for the German passage in Zoology Paper V, was the plaintiff's uncle. In those circumstances the Vice-Chancellor decided (as their Lordships thought quite rightly) that the matter called for action under clause 8.

To assist him in satisfying himself of the truth or falsity of the allegations the Vice-Chancellor set up a commission of inquiry, consisting of himself, Professor Mylvaganam, Dean of the Faculty of Science, and Mr. Keuneman Q.C., a member of the Council of the University, who was to lead the inquiry. That body seemed to have met on three occasions, viz., on May 21 and June 3, 1952, and on one other occasion between those two dates. The plaintiff attended on two of those three occasions, viz., on May 21 and June 3. Prior to the first meeting the Vice-Chancellor wrote to the plaintiff a letter dated May 16, 1952, which, omitting formal parts, was in these terms: "Dear Mr. Fernando, An allegation "has been made to me in writing that you had acquired know-"ledge of the content of one or more of the papers set at the "Final Examination of Science, Section B, Zoology, before the "date of the examination. Since this is a very serious allegation "which may affect not only you but also one or more of the "members of the University staff, I have consulted Mr. A. E. "Keuneman Q.C., who agrees that the allegation is sufficiently "circumstantial to justify a formal inquiry.

"I have therefore appointed a commission consisting of Mr. "Keuneman, the Dean of the Faculty of Science, and myself, "and have asked Mr. Keuneman to take the lead in the inquiry. "He has asked that a meeting be held in the Board Room, "College House, on Wednesday, 21st May, at 5 p.m., and that "you be requested to attend. I should be glad if you would "attend on this occasion and would report to Mr. Blok, who is "acting as secretary to the commission. Yours sincerely, Sgd. "Ivor Jennings, Vice-Chancellor."

The reference in this letter to "one or more" of the papers set at the final examination appeared to have been due to the fact that Miss Balasingham had alleged fore-knowledge on the part of the plaintiff of the contents of another paper besides Zoology Paper V. At the outset of the inquiry the commission

came to the conclusion that there was no substance in this additional charge, which accordingly was not pursued.

In the course of their meetings the commission questioned (in addition to the plaintiff himself) Miss Balasingham and a number of other persons, including Professor Fernando and various lecturers and students, but none of them in the presence or hearing of the plaintiff. The second appearance of the plaintiff before the commission, that was, his appearance on June 3, was in response to a letter from the Vice-Chancellor inviting him to attend on that day and to bring with him all the exercise books he had used during his course, which he accordingly did. There seemed to have been a good deal of discussion regarding one particular book, in which Dr. Cruze (one of the lecturers in Zoology) had corrected drawings of the veinous system of rats, but in the end the commission decided that it threw no light on the matter.

Miss Balasingham appeared to have adhered before the commission to the story she had originally told to Mr. Sivaprakasapillai, which, to quote from the Report made by them at the conclusion of their inquiry, was to this effect: "3. Miss Balasingham states that, owing to Mr. Fernando's behaviour, she suspected that there was something in one of his notebooks which he did not wish the other students to see. On one occasion he left the book on the bench in the Section B laboratory and went out of the room. She seized the opportunity to glance through the book and saw a list of German words, in some cases with English equivalents. There were about 30 words and she copied nine of them into her own notebook, which she produced. She could remember only one of the words which she had not copied, *Zitronensaft*, a word which appeared almost at the end of the list. This word appears at the end of the German passage in Paper V. The other nine words appear in the passage, and in the order in which they are shown in the list in Miss Balasingham's book, except that the order of the eighth and ninth words is changed. The passage, with the ten words underlined, was as follows:—"

After setting out the German passage, with the crucial words underlined, the Report continued: "4. This list in Miss Balasingham's book was apparently not shown to anyone until our inquiry began. It was then shown to Mr. Sivaprakasapillai and was produced to us at our request. A large part of our inquiry was necessarily directed towards ascertaining whether the list really was in the notebook before the examination began. In our opinion it was. The following factors are relevant:

"(1) Miss Balasingham was able to describe the copying with a wealth of circumstantial detail, of no direct relevance to the story as such, which carried conviction. If the story was invented, it was a remarkably successful invention.

"(2) Another student, Miss Y. de Silva, was sitting next to Miss Balasingham on the occasion when the copying is said

J. C.
1960
Ceylon University v. Fernando.

"to have been done. Miss de Silva denies that she saw Miss "Balasingham copying, but she admits that Miss Balasingham "told her about the list before the examination. Miss de Silva "is a second-year student in Zoology, and we believe that she "could have told us more. Another student, Mr. C. H. Fernando, also admits that Miss Balasingham told him about the "list before the examination."

The Report went on to say: "(3) Miss Balasingham's "behaviour immediately after the examination was entirely consistent with her story . . ." and to give reasons for that view.

Satisfied as they were of the truth of Miss Balasingham's story, the commission of inquiry at the end of the Report expressed their findings to be to the effect that: "(1) Mr. E. F. W. Fernando "acquired knowledge of the nature or substance of the German "question in Zoology Paper V before the date and time of the "examination and must therefore be reported to the Board of "Residence and Discipline . . . under clause 8; (2) There was "no evidence as to the manner in which this knowledge came "to Mr. E. F. W. Fernando."

By a letter dated July 21, 1952, the Vice-Chancellor informed the plaintiff that the Board of Residence and Discipline had found him guilty of an examination offence in connection with the Final Examination in science held in 1952 and had suspended him indefinitely from all University examinations.

After considerable correspondence between the plaintiff and the Vice-Chancellor in which the plaintiff sought without success a review of the decision of the Board of Residence and Discipline, the plaintiff on May 19, 1953, began the present action, in which, as already mentioned, he failed at first instance but succeeded on appeal.

1960. Jan. 11, 12. *Dingle Foot Q.C.* and *C. Fletcher-Cooke Q.C.* for the appellant University.

The respondent did not appear and was not represented.

The following cases, in addition to those referred to in the judgment, were cited in argument: *Weinberger* v. *Inglis* [1]; *Rex* v. *Electricity Commissioners* [2]; *Maclean* v. *The Workers' Union* [3]; *Nakkuda Ali* v. *Jayaratne* [4]; *Errington* v. *Minister of Health.* [5]

February 16. The judgment of their Lordships was delivered by Lord Jenkins, who said: To their Lordships' regret, the plaintiff, it may be for financial reasons, has not appeared to support the decision in his favour pronounced by the Supreme Court, and although counsel for the University have done their best to make up for this by presenting the plaintiff's side of

[1] [1919] A.C. 606; 35 T.L.R. 399.
[2] [1924] 1 K.B. 171; 39 T.L.R. 715.
[3] [1929] 1 Ch. 602; 45 T.L.R. 256.
[4] [1951] A.C. 66; 66 T.L.R. (Pt. 2) 214.
[5] [1935] 1 K.B. 249, 264; 51 T.L.R. 44.

the matter as well as their own, their Lordships have felt some anxiety in dealing with this not altogether easy case in the plaintiff's absence. [His Lordship then stated the facts set out above and continued:] In his amended plaint dated July 24, 1953, the plaintiff alleged that the decision of the commission of inquiry was null and void for a number of reasons. He claimed that the decision was contrary to the principles of natural justice on five grounds, two of which consisted of allegations of bias or disqualification against Professor Mylvaganam by reason of his alleged relationship to Miss Balasingham and Mr. Sivaprakasapillai, and the fact that he was a member of the board of examiners and of the scrutinising committee. The third ground was to the effect that by reason of the first "the maxim that justice should not "only be done but also appear to be done" had been violated. The fourth ground comprised the substance of the plaintiff's case and was to the effect that the evidence of the various witnesses who appeared before the commission of inquiry, including the evidence of Miss Balasingham, was taken in the absence of the plaintiff, who was not aware of what evidence was led against him, and that in the circumstances one of the essential elements of natural justice was not observed, inasmuch as the plaintiff was not aware of the case he had to meet. The fifth ground was to the effect that the evidence of the various witnesses was not taken entirely before all the three members of the commission of inquiry, and that such evidence was acted on by the commission, and that this circumstance was also a violation of the elementary principles of justice. The plaintiff further alleged that there was no evidence upon which the commission of inquiry could reasonably find the charge against the plaintiff proved, that the finding arrived at against the plaintiff was one which had not been arrived at in conformity with clause 8, and that the finding and decision were therefore void and of no effect.

The allegations of bias or disqualification against Professor Mylvaganam as a member of the commission of inquiry were rejected in both courts as without substance. The allegation to the effect that there was no evidence upon which the commission could reasonably find the charge against the plaintiff proved was (so far as open to the court) clearly ill-founded. The allegation to the effect that the finding was not arrived at in accordance with clause 8 turned on the fact that the Vice-Chancellor appointed two other persons to sit with him as a commission of inquiry to investigate the matter, instead of proceeding to investigate it alone. It was held in both courts that this procedure was not open to objection, inasmuch as this was merely a method, which the Vice-Chancellor was free to adopt if he chose to do so, of satisfying himself of the truth or falsity of the charge, and the Report was a report by him for the purposes of clause 8 although signed by the two other members of the commission as well as himself. The plaintiff having taken no steps to appeal against

J. C.
1960
CEYLON UNIVERSITY v. FERNANDO.

the decision of the court below on these matters of complaint, their Lordships need say no more about them.

There remain the complaints to the effect that the evidence, including that of Miss Balasingham, was taken in the absence of the plaintiff who was not aware of the evidence led against him or of the case he had to meet; and that the evidence of certain witnesses was taken by the Vice-Chancellor in the absence of the other members of the commission.

As to these, it is not in dispute that the plaintiff was not present, and was not invited to be present, at the examination of any of the witnesses, or that the Vice-Chancellor did in fact interview two witnesses, namely, Professor Fernando and Dr. Cruze, in the absence of the other members of the commission. Their Lordships may add that it is also admitted that the plaintiff did not at any stage question Miss Balasingham and was never offered an opportunity of doing so.

On the other hand, it is not in dispute that the plaintiff was interviewed and questioned at length about the matter by the three members of the commission on May 21 and June 3, 1952.

Before the trial judge and in the Supreme Court it was argued for the University that the Vice-Chancellor's functions under clause 8 were administrative and not of the kind described, for want of a better term, as "quasi-judicial," and, accordingly, that the Vice-Chancellor's action in the matter was not open to review by the court. It was, however, argued further that if, contrary to this contention, the Vice-Chancellor's functions under clause 8 were quasi-judicial, the Vice-Chancellor's letter of May 16, 1952, coupled with the information given to the plaintiff at the two interviews, sufficiently apprised him of the nature of the complaint, that he was at these interviews given sufficient opportunity to state his case in rebuttal of it, and, accordingly, that there had been no such breach of the so-called principles of natural justice as was necessary to warrant the intervention of the court in such a case.

The trial judge was of opinion that the functions of the Vice-Chancellor in the matter were administrative and not judicial, and consequently that the court had no jurisdiction to interfere, but went on to hold that if he was wrong in this, and such functions were of a quasi-judicial character, the principles of natural justice had been sufficiently complied with by the commission.

The Supreme Court took the opposite view, holding that the Vice-Chancellor's functions were not administrative but quasi-judicial, and that the mode of inquiry adopted had violated the principles of natural justice, with the result that the court could and ought to declare the Report of the commission of inquiry, and the consequential decision of the Board of Residence and Discipline under clause 14, to be null and void.

At the hearing before their Lordships Mr. Dingle Foot, for the University, disclaimed the contention that the Vice-Chancellor's

functions under clause 8 were administrative and not quasi-judicial, but submitted that, on the footing that these functions were quasi-judicial, the claims of natural justice had been fully satisfied.

Accordingly (apart from a subsidiary question as to the jurisdiction of the courts in Ceylon to grant declaratory relief in such a case), the present appeal resolves itself into the question whether this inquiry was conducted with due regard to the rights accorded by the principles of natural justice to the plaintiff as the person against whom it was directed.

These rights have been defined in varying language in a large number of cases covering a wide field. Their Lordships do not propose to review these authorities at length, but would observe that the question whether the requirements of natural justice have been met by the procedure adopted in any given case must depend to a great extent on the facts and circumstances of the case in point. As Tucker L.J. said in *Russell* v. *Duke of Norfolk* [1]: "There are, in my view, no words which are of universal "application to every kind of inquiry and every kind of domestic "tribunal. The requirements of natural justice must depend on "the circumstances of the case, the nature of the inquiry, the "rules under which the tribunal is acting, the subject-matter "that is being dealt with, and so forth." In the earlier case of *General Medical Council* v. *Spackman* [2] Lord Atkin expressed a similar view in these words: "Some analogy exists, no doubt, "between the various procedures of this and other not strictly "judicial bodies, but I cannot think that the procedure which "may be very just in deciding whether to close a school or "an insanitary house is necessarily right in deciding a charge "of infamous conduct against a professional man. I would, "therefore, demur to any suggestion that the words of Lord "Loreburn L.C. in *Board of Education* v. *Rice* [3] afford a com-"plete guide to the General Medical Council in the exercise of "their duties."

With these reservations as to the utility of general definitions in this branch of the law, it appears to their Lordships that Lord Loreburn's much quoted statement in *Board of Education* v. *Rice* [3] still affords as good a general definition as any of the nature of and limits upon the requirements of natural justice in this kind of case. Its effect is conveniently stated in this passage from the speech of Viscount Haldane L.C. in *Local Government Board* v. *Arlidge*,[4] where he cites it with aprpoval in the following words: "I agree with the view expressed in an analogous case "by my noble and learned friend Lord Loreburn. In *Board of* "*Education* v. *Rice* [5] he laid down that, in disposing of a ques-"tion which was the subject of an appeal to it, the Board of

[1] (1948) 65 T.L.R. 225, 231; [1949] 1 All E.R. 109, 118.
[2] [1943] A.C. 627, 638; 59 T.L.R. 412; [1943] 2 All E.R. 337.
[3] [1911] A.C. 179, 182.
[4] [1915] A.C. 120, 132–133.
[5] [1911] A.C. 179, 182.

J. C.
1960
Ceylon University v. Fernando.

"Education was under a duty to act in good faith, and to listen "fairly to both sides, inasmuch as that was a duty which lay on "every one who decided anything. But he went on to say that "he did not think it was bound to treat such a question as though "it were a trial. The Board had no power to administer an oath, "and need not examine witnesses. It could, he thought, obtain "information in any way it thought best, always giving a fair "opportunity to those who were parties in the controversy to "correct or contradict any relevant statement prejudicial to their "view."

From the many other citations which might be made, their Lordships would select the following succinct statement from the judgment of this Board in *De Verteuil* v. *Knaggs*[6]: "Their "Lordships are of opinion that in making such an inquiry there "is, apart from special circumstances, a duty of giving to any "person against whom the complaint is made a fair opportunity "to make any relevant statement which he may desire to bring "forward and a fair opportunity to correct or controvert any "relevant statement brought forward to his prejudice."

The last general statement as to the requirements of natural justice to which their Lordships would refer is that of Harman J. (as he then was) in *Byrne* v. *Kinematograph Renters Society Ltd.*,[7] of which their Lordships would express their approval. The learned judge said this: "What then are the requirements of "natural justice in a case of this kind? First, I think that the "person accused should know the nature of the accusation made; "secondly, that he should be given an opportunity to state his "case; and, thirdly, of course, that the tribunal should act in "good faith. I do not myself think that there really is anything "more."

Turning now to the actual terms in which the Vice-Chancellor is invested with the quasi-judicial function here in question, it is to be observed that all that clause 8 provides is that where the Vice-Chancellor is satisfied that any candidate has acquired knowledge of the nature or substance of any question or the content of any paper before the date and time of the examination "the "Vice-Chancellor . . . shall report the matter to the Board of "Residence and Discipline . . ." The clause is silent as to the procedure to be followed by the Vice-Chancellor in satisfying himself of the truth or falsity of a given allegation. If the clause contained any special directions in regard to the steps to be taken by the Vice-Chancellor in the process of satisfying himself he would, of course, be bound to follow those directions. But as no special form of procedure is prescribed it is for him to determine the procedure to be followed as he thinks best, but, to adapt to the present case the language of the judgment of this Board in *De Verteuil* v. *Knaggs*,[8] subject to the obvious implication that

[6] [1918] A.C. 557, 560; 34 T.L.R. 325.

[7] [1958] 1 W.L.R. 762, 784; [1958] 2 All E.R. 579.

[8] [1918] A.C. 557, 560.

some form of inquiry must be made, such as will enable him fairly to determine whether he should hold himself satisfied that the charge in question has been made out.

As was said by Lord Shaw of Dunfermline in *Local Government Board* v. *Arlidge*,[9] of the authority there concerned, it "must do its best to act justly, and to reach just ends by just "means. If a statute prescribes the means it must employ "them. If it is left without express guidance it must still act "honestly and by honest means." In the present case no shadow of doubt is cast upon the honesty and bona fides of the Vice-Chancellor or of those who sat with him in the commission of inquiry.

So far as the plaintiff is concerned, it appears to their Lordships that he must be taken to have agreed, when he became a member of the university, to be bound by the statutes of the university, including clause 8, and in the event of clause 8 being put in operation against him could not insist on the adoption by the Vice-Chancellor of any particular procedure beyond what the clause expressly or by necessary implication requires. In the absence of any express requirement he is thrown back on the necessary implication that the Vice-Chancellor's procedure will be such as to satisfy the requirements indicated in the passages from *De Verteuil* v. *Knaggs*,[10] *Local Government Board* v. *Arlidge*,[11] and *Byrne* v. *Kinematograph Renters Society Ltd.*,[12] to which their Lordships have just referred, and thus to comply with those elementary and essential principles of "fairness" which must as a matter of necessary implication be treated as applicable in the discharge of the Vice-Chancellor's admittedly quasi-judicial functions under clause 8, or in other words, with the principles of natural justice.

The question then is whether the Vice-Chancellor did in the course he took satisfy those principles.

The plaintiff's contention to the effect that he was not adequately informed of the case he had to meet, and was not given any adequate opportunity of meeting it, and that the course taken by the Vice-Chancellor or the commission of inquiry in these respects failed to satisfy the requirements of natural justice, depended almost entirely on the admitted fact that Miss Balasingham and the other witnesses were not questioned in the presence and hearing of the plaintiff, who consequently was not able to question them on the statements they made. The further admitted fact that two witnesses were questioned by the Vice-Chancellor alone and not by all three members of the commission does not, their Lordships think, add anything to this basic complaint.

But this did not, in their Lordships' view, in itself involve any violation of the requirements of natural justice. To adapt Lord

[9] [1915] A.C. 120, 138.
[10] [1918] A.C. 557, 560.
[11] [1915] A.C. 120, 132.
[12] [1958] 1 W.L.R. 762, 784.

J. C.
1960
CEYLON UNIVERSITY v. FERNANDO.

Loreburn's words in *Board of Education* v. *Rice*,[13] the Vice-Chancellor was not bound to treat the matter as if it was a trial, had not power to administer an oath, and need not examine witnesses, but could obtain information in any way he thought best.

It seems to their Lordships to follow that inasmuch as the Vice-Chancellor, when the alleged offence under clause 8 was brought to his notice, was not bound to treat the matter as a trial but could obtain information about it in any way he thought best, it was open to him, if he thought fit, to question witnesses without inviting the plaintiff to be present.

But, while there was no objection to the Vice-Chancellor informing himself in this way, it was undoubtedly necessary that before any decision to report the plaintiff was reached, he should have complied with the vital condition postulated by Lord Loreburn, which adapted to the present case may be stated as being to the effect that a fair opportunity must have been given to the plaintiff to correct or contradict any relevant statement to his prejudice.

The university's contention is that this condition, which resolves itself into the two requirements that the plaintiff should be adequately informed of the case he had to meet, and given an adequate opportunity of meeting it, was complied with in its first branch by the letter of May 16, 1952, and what plaintiff was told at the first interview on May 21, 1952, and in its second branch by what passed at that interview and at the second interview on June 3.

As to what took place at the two interviews, the trial judge accepted the evidence of the Vice-Chancellor in preference to that of the plaintiff. The Vice-Chancellor's evidence, and indeed the plaintiff's own admission, make it abundantly plain that at the outset of the first interview the plaintiff was told that Miss Balasingham had made this charge against him and the nature of the charge was explained to him in detail.

[His Lordship then referred to relevant passages from the Vice-Chancellor's and the respondent's evidence, and continued:] Their Lordships are satisfied that there is no substance in the complaint made by the plaintiff to the effect that the reference in the letter of May 16, 1952, to "one or more of the papers set "at the final examination" left him under the impression that some additional charge was being made against him, the precise nature of which was not sufficiently explained. Apart from the fact that (according to the plaintiff) Mr. Keuneman asked him towards the end of the first day "how he had fared in his practical "examination?" nothing was said to suggest that the commission was in any way concerned with anything other than the German translation. It must, therefore, have been clear to the plaintiff (as the fact was) that the only charge which was being pursued related exclusively to that matter.

[13] [1911] A.C. 179, 182.

Their Lordships are, accordingly, satisfied that the plaintiff was adequately informed of the case he had to meet.

As to the adequacy of the opportunity of meeting the case alleged against him afforded by the two interviews, the plaintiff in his evidence complained that the interviews were not fairly conducted in the respects that he was plied with questions which he was not given a chance of answering fully and was prevented from saying all he wanted to say. The trial judge rejected these complaints and accepted the Vice-Chancellor's evidence to the effect that the two interviews were fairly conducted. Their Lordships see no reason for dissenting from this finding.

Their Lordships are therefore satisfied that the interviews, so far as they went, were fairly conducted and gave the plaintiff an adequate opportunity of stating his case. But it remains to consider whether in the course they took the interviews must be held to have fallen short of the requirements of natural justice on the ground that the plaintiff was given no opportunity of questioning Miss Balasingham. She was the one essential witness against the plaintiff, and the charge in the end resolved itself into a matter of her word against his. In their Lordships' view this might have been a more formidable objection if the plaintiff had asked to be allowed to question Miss Balasingham and his request had been refused. But he never made any such request, although he had ample time to consider his position in the period of 10 days or so between the two interviews. There is no ground for supposing that if the plaintiff had made such a request it would not have been granted. It therefore apears to their Lordships that the only complaint which could be made against the commission on this score was that they failed to volunteer the suggestion that the plaintiff might wish to question Miss Balasingham, or, in other words, to tender her unasked for cross-examination by the plaintiff. Their Lordships cannot regard this omission, or a fortiori the like omission with respect to other witnesses, as sufficient to invalidate the proceedings of the commission as failing to comply with the requirements of natural justice in the circumstances of the present case.

Counsel for the university very properly referred their Lordships to passages in *Osgood* v. *Nelson* [14] and in other authorities which tend at first sight to state the requirements of natural justice more favourably to the party charged than do the authorities to which their Lordships have so far referred; see in particular the references to cross-examination in *Osgood* v. *Nelson*.[15] But their Lordships are satisfied that when the facts and circumstances of these cases are looked into they contain nothing to justify the conclusion that the requirements of natural justice were not sufficiently observed on the facts and in the circumstances of the case now before them.

In conclusion, their Lordships would observe that they are at

[14] (1872) L.R. 5 H.L. 636. [15] Ibid. 646, 660.

J. C.
1960
CEYLON UNIVERSITY v. FERNANDO.

a loss to understand how the Supreme Court, while apparently accepting the trial judge's favourable assessment of the reliability of the evidence of the Vice-Chancellor, found it possible to reach the conclusion that not even the gist of Miss Balasingham's evidence was communicated to the plaintiff. Their Lordships would also venture the criticism that the Supreme Court tended to regard the case much as if it involved an appeal from or rehearing of a trial held before the commission rather than an invocation of the limited jurisdiction of the court to restrain the abuse of quasi-judicial proceedings, where the sole issue is whether the result, be it right or wrong, was arrived at with due regard to the principles of natural justice.

The plaintiff might have fared better if the charge against him had been tried in accordance with the more meticulous procedure of a court of law, which would have included as of course the tendering of Miss Balasingham for cross-examination. But that is not the question. The question is whether, on the facts and in the circumstances of this particular case, the mode of procedure adopted by the Vice-Chancellor, in bona fide exercise of the wide discretion as to procedure reposed in him under clause 8, sufficiently complied with the requirements of natural justice. In their Lordships' opinion it has not been shown to have fallen short of those requirements.

Their Lordships' conclusion on the merits of the case makes it unnecessary for them to consider the university's submission to the effect that the court had no jurisdiction to grant the declaratory relief sought by the plaintiff.

For these reasons their Lordships are of opinion that this appeal should be allowed, the decree of the Supreme Court of Ceylon dated December 13, 1956, set aside and the decree of the District Court of Colombo dated August 31, 1954, restored, and they will humbly advise Her Majesty accordingly.

The plaintiff must pay the costs of the present appeal and also the costs of the action in the District Court and of the appeal to the Supreme Court.

Solicitors: *Stephenson, Harwood & Tatham.*

C. C.

[PROBATE, ETC., DIVISION.]

1960
Feb. 8, 9, 10.

Hewson J.

* JODLA *v.* JODLA.

Husband and Wife — Nullity — Wilful refusal to consummate — Just excuse—Husband aware that subsequent religious ceremony an essential pre-condition to matrimonial cohabitation—Refusal to arrange ceremony.

The parties entered into a ceremony of marriage at a register office. They were both Roman Catholics and fully appreciated that

their faith did not countenance matrimonial relations between them until there had been a religious ceremony, which the husband, therefore, promised to arrange. In fact he did not arrange such a ceremony although repeatedly requested by the wife, who was at all times, subject to the ceremony taking place, willing to render the husband his full matrimonial rights. On proceedings by both parties for a decree of nullity on the ground of the other's wilful refusal to consummate the marriage:—

Held, that by his refusal to proceed with the arrangements for the religious ceremony the husband had given the wife just excuse to refuse to have sexual intercourse with him; the wife's requests to him to make such arrangements constituted an implied request for sexual intercourse which the husband had refused without just excuse, thereby wilfully refusing to consummate the marriage; the wife was, therefore, entitled to a decree.

Horton v. *Horton* (1948) 64 T.L.R. 62; [1947] 2 All E.R. 871, H.L. applied.

DEFENDED PETITION for nullity of marriage.

In October, 1957, the husband, who although of Polish nationality was at all material times domiciled in England, met the wife, who was also Polish, and who had come to England from Poland on a visit to her brother, and, after the introduction, the two parties became friendly and continued to meet each other. About November 23, 1957, the wife's visa was due to expire; she was distressed at the prospect of an almost imminent departure from England, and as the husband wanted her to stay, they discussed marriage and the prospects of marrying before the expiration of the visa.

They were both Roman Catholics and, according to the evidence, the husband was a devout and practising member of the Roman Catholic Church. A day or two later they consulted a Roman Catholic priest, who informed them that no church wedding would be possible within the few days remaining, and suggested that they should be married by licence in a register office, and as soon as convenient after that ceremony, they should see him about arranging a church ceremony. It was completely understood between the parties that there could be neither cohabitation nor consummation of the marriage pending that ceremony. Some days before the register office wedding which, in fact, took place on November 28, 1957, the husband said that he would ask for two weeks' holiday, and the church ceremony would take place. The intention of the parties appeared to be that this ceremony should take place somewhere about Christmas, to be followed by two weeks' holiday together. As the parties left the register office after the ceremony the husband told the wife's brother that a church ceremony would take place. In fact the husband never made arrangements for such a ceremony.

After the ceremony at the register office the parties spent the evening at the home of a mutual friend, where the husband had, in anticipation of the marriage, rented a double room. At the end of the evening the wife said she was returning to her brother's house, where she had been living. The husband did not demur to

1960

JODLA
v.
JODLA.

that, nor did he request intercourse then, nor did he ask her to stay with him in the double room. He accompanied his bride to her brother's and made no attempt to dissuade her from going in.

In the event, although during the following months the husband visited the wife frequently, the parties never cohabited or shared a bed. The husband, according to the evidence, seemed to have accepted that situation and never expressly asked the wife to have sexual intercourse with him. On several occasions the wife taxed the husband with not making arrangements for the church ceremony. On one such occasion in early January, 1958, when the husband complained to the wife that she was not looking after him as a wife should, she replied that he had not arranged the church ceremony so that they could live together. Thereafter the parties drifted apart.

By his petition the husband prayed for a decree that the marriage be declared null and void on the ground of the wife's wilful refusal to consummate the marriage. The wife, by her answer, denied the charge and cross-prayed for a decree on the ground of the husband's wilful refusal. It was common ground that the marriage had not been consummated.

D. N. Keating for the husband.
Norman Lermon for the wife.

HEWSON J. referred to the facts and continued: In all the circumstances I find it quite impossible to believe that the husband was unaware of the Roman Catholic view that marriage is a sacrament in the church of which he is a professed member, and did not countenance consummation even where there had been a register office ceremony until there had also been a church ceremony. I am further convinced that he well knew his wife's views on that matter, that there would be no consummation until after such church ceremony as the Roman Catholic church provides to follow a register office wedding, and accept the wife's evidence that after the church service had been performed in accordance with the rites of the Roman Catholic church, she was fully prepared to live with her husband as man and wife in the fullest sense.

There is no doubt that the wife's behaviour during the months following the ceremony of marriage was consistent with her professed principles, and to some degree the husband's omission expressly to request intercourse is significant in the light of his professed religion.

The real point in this case is that each says that the other wilfully refused to consummate the marriage, and to be a wilful refusal there must, in my view, be a refusal without just excuse, and for this proposition I was referred by both counsel to *Horton* v. *Horton*.[1] Unfortunately, neither counsel has been able to

[1] (1948) 64 T.L.R. 62; [1947] 2 All E.R. 871, H.L.

assist me with any other authority or refer me to any authority that would help me in deciding this point, and I must do the best I can on the realities of the particular circumstances of this case.

By his refusal to proceed with the church ceremony, the necessity for which as a pre-condition to matrimonial cohabitation was understood by both, the husband in the particular circumstances of this case, made it impossible for the wife, with a good conscience, to live with him as husband and wife, and this refusal, or this failure to proceed with the church ceremony, was, in this case, a just excuse for her to refuse sexual intercourse, even if it had ever been requested. There is no evidence that the husband ever requested intercourse in terms, and it seems to me, on the facts, that it is really unnecessary to find that one way or the other because if he had, or if it could be implied that he had requested intercourse, she, nevertheless, had a just excuse for refusing until there had been a church ceremony.

I will now turn to the other side of the picture. By his own refusal to proceed with the church service, the husband put it out of the power of the wife to request intercourse. He expressed no intention of ever making it possible. She, as I have found, on several occasions, requested him to do something about the church service, after which she would have been willing to have intercourse, and they would have lived together as husband and wife in the fullest sense. Such requests in the circumstances of this case, in my view, constitute an implied request for intercourse, and to live wholly as husband and wife. These requests were refused without any just excuse on the part of the husband. It, therefore, follows that the wife is entitled to a decree of nullity on the ground of wilful refusal on the part of the husband to consummate the marriage.

Decree nisi.

Solicitors: *S. Z. Kmiecik & Co.; Martin, Nicholson, Hortin & Nash.*

E. J.

[PRIVY COUNCIL.]

J. C.†
1959
Dec. 16.

* WILFRED ISAAC . . . . . APPELLANT;

AND

HOTEL DE PARIS LTD. . . . . RESPONDENT.

ON APPEAL FROM THE FEDERAL SUPREME COURT OF TRINIDAD.

Licence or Tenancy—Exclusive occupation—Payment of rent—Whether conclusive of tenancy—Hotel premises—Permissive occupation under business arrangement.

† *Present*: LORD DENNING, LORD BIRKETT, the RT. HON. L. M. D. DE SILVA.

J. C.

1959

Isaac
v.
Hotel de
Paris Ltd.

The respondent company, who owned an hotel, were also the lessees of two floors of premises on the other side of the street which they called the P. hotel and used in connection with their hotel. The company subsequently let the appellant, who had helped with the running of their hotel, into occupation of the first of the two floors of the P. hotel in order to establish a night bar. The appellant took out a licence for the bar in his own name and put in a stock of liquor at his own expense. Differences having arisen as to the position of the appellant, some of the terms of a proposed contract—which was never in fact concluded—were that the appellant was to pay the outstanding balance of the price of certain shares in the respondent company which he had contracted to buy; was to remain in occupation of the first floor of the P. hotel where the night bar was being operated; was to pay all expenses in connection with the running of the P. hotel, including the monthly rent which the respondent company had to pay to its lessor, and was to retain for himself all profits he made from the business carried on at the P. hotel in lieu of the dividends on his shares in the respondent company if he acquired them.

Some of those terms were acted upon, and the appellant remained in occupation, the rent being paid to the respondent company expressly as "rent," and accepted without acknowledgment or receipt by the company. Thereafter, no contract having been executed as anticipated, and the balance due on the shares not having been paid, and the appellant having failed to remove his stock and other materials from the P. hotel on seven days' notice, the respondent company began proceedings claiming possession of the P. hotel. The appellant pleaded that he was a tenant of both floors of the P. hotel at a monthly rent:—

Held, that the respondent company was entitled to possession. The appellant was originally put into occupation of the first floor of the P. hotel for the purpose of establishing and managing a night bar as a servant or agent on behalf of the company, with no right or interest of his own. The relationship between the parties after the terms of the unconcluded contract had been acted upon was not that of landlord and tenant but that of licensor and licensee. The circumstances and conduct of the parties showed that all that was intended was that the appellant should have a personal privilege of running a night bar on the premises, with no interest in the land at all, and the notice requiring him to remove his stock was sufficient to end the licence.

Neither exclusive possession nor payment and acceptance of rent was, in the case of premises not subject to rent restriction legislation (as in this case) conclusive of the existence of a tenancy where they could be otherwise explained.

Errington v. *Errington and Woods* [1952] 1 K.B. 290; [1952] 1 T.L.R. 231; [1952] 1 All E.R. 149, C.A.; *Cobb* v. *Lane* [1952] 1 T.L.R. 1037; [1952] 1 All E.R. 1199, C.A.; and *Clarke* v. *Grant* [1950] 1 K.B. 104; 65 T.L.R. 241; [1949] 1 All E.R. 768, C.A. considered.

Further, the appellant, in remaining in possession, as he was permitted to, after the expiry of the notice to remove his stock, was there at sufferance liable to be turned out whenever the respondent company thought fit to do so, and during that period acceptance of the payments of rent did not in the circumstances evince any intention on the part of the company to waive its right to immediate possession.

Judgment of the Federal Supreme Court of the West Indies affirmed.

APPEAL (No. 37 of 1958) from a judgment of the Federal Supreme Court of Trinidad (May 27, 1958), dismissing an appeal by the present appellant from a judgment of the Supreme Court of Trinidad and Tobago (December 6, 1957).

The following introductory statement is taken from the judgment of the Judicial Committee, where the facts are fully set out: In the City of the Port of Spain in the Island of Trinidad there was an hotel called the Hotel de Paris. It was situate at No. 7, Abercrombie Street, and it was owned by the plaintiff company, Hotel de Paris Ltd. (respondent). On the other side of the street at No. 10, Abercrombie Street, there was a building which was owned by Manoel Fernandez. He let the ground floor of it to a bank. But he let the two floors above it on a lease to the plaintiff company at a rent of $250 a month. The plaintiff company used those two floors for some time as bedrooms in connection with their hotel. They called it the Parisian Hotel. In or about December, 1955, the plaintiff company let the defendant Isaac (appellant) into occupation of the Parisian Hotel, or part of it, and they now sought to get him out. The Supreme Court of Trinidad and Tobago (Clement Phillips Ag.-J.) made an order for possession against the defendant. The Federal Supreme Court (Hallinan C.J., Rennie and Archer JJ.) affirmed the decision. The defendant now appealed to Her Majesty in Council.

1959. Nov. 16, 17, 18. *Dingle Foot Q.C.* and *Ralph Millner* for the appellant.

Bernard Gillis Q.C. and *J. Lloyd Eley* for the respondent.

The following cases, in addition to those referred to in the judgment, were cited in argument: *Addiscombe Garden Estates Ltd.* v. *Crabbe* [1]; *Winter Garden Theatre (London) Ltd.* v. *Millenium Productions Ltd.*[2]; *Connecticut Fire Insurance Co.* v. *Kavanagh* [3]; *Greene* v. *Chelsea Borough Council.*[4]

Dec. 16. The judgment of their Lordships was delivered by LORD DENNING. The contest before their Lordships turned mainly on what was the correct legal relationship between the plaintiff company and the defendant. Was the defendant a tenant? or was he in the premises merely under a licence to be there? Had his interest, whatever it was, been validly determined? And if it had been determined by a proper notice, had it been revived by subsequent acceptance of rent?

All these issues will not become clear until their Lordships have stated the facts. The plaintiff company has an issued capital of 64 shares. In September, 1955, one Attie Saffie Joseph bought

[1] [1958] 1 Q.B. 513; [1957] 3 W.L.R. 980; [1957] 3 All E.R. 563, C.A.

[2] [1948] A.C. 173; 63 T.L.R. 529; [1947] 2 All E.R. 331, H.L.

[3] [1892] A.C. 473; 8 T.L.R. 752.

[4] [1954] 2 Q.B. 127; [1954] 3 W.L.R. 12; [1954] 2 All E.R. 318, C.A.

J. C.
1959
Isaac
v.
Hotel de
Paris Ltd.

all these 64 shares and thus gained control of the company. He was acquainted with the defendant Isaac and agreed to sell him 15 of these shares (roughly a quarter interest in the company) for $4,687.50. The agreement was put into writing dated October 1, 1955. Under it the defendant was to pay a deposit of $1,000 down and the balance by six monthly instalments of $614.59 each. It contained a provision that, if the defendant made default, he was to forfeit his deposit of $1,000 together with any further instalments not exceeding $2,000 in all.

The defendant duly paid the $1,000 and he also paid near enough the first two monthly instalments due on November 1 and December 1, 1955. So it looked at this time as if he would acquire a fair stake in the company. He had had some experience in the hotel trade and he helped with the running of the Hotel de Paris. Then he suggested that repairs should be done to the Parisian Hotel on the other side of the road, that a night bar should be established in the Parisian Hotel and that he should be put in charge of it on behalf of the plaintiff company. Joseph agreed.

Accordingly, about December, 1955, the plaintiff company let the defendant into occupation of the first floor of the Parisian Hotel. The defendant got a licence to use it as a night bar. He took the licence in his own name and put in a stock of liquor at his own expense. He put up a signboard with the words "Wilfred "Isaac and Hotel de Paris Annexe—Night Bar." This looked as if the defendant was proposing to operate it on his own account. Joseph remonstrated. The defendant thereupon promised to account to the company for his expenditure and receipts from the night bar: and he did so account. The position at this time, as the trial judge found, was that the defendant was installed at the Parisian Hotel for the purpose of managing a night bar on the company's behalf.

In February, 1956, the relations between Joseph and the defendant Isaac became strained: and on February 17, 1956, the two men with their lawyers met to try to settle their differences. At this meeting the parties agreed upon terms which were afterwards to be embodied in a written contract between them. Their Lordships are of opinion that no concluded contract was reached at the meeting. Everything was subject to a contract later being signed. A draft contract was prepared by Joseph's lawyer, but it was not approved by the defendant's lawyer. So it never materialised.

Nevertheless, although no concluded contract was reached, some of the terms of the proposed contract were acted upon: and their Lordships must draw attention to them. They accept for this purpose the findings of the trial judge. The first term was an important term which was never implemented: "(*a*) The defen-"dant was to pay the balance due for the purchase of the shares." But the next three terms were acted upon. They were these: "(*b*) The defendant was to remain in occupation of the first floor

" of the Parisian Hotel where the night bar was being operated. " (*c*) The defendant agreed to pay all expenses incurred in connec- " tion with the running of the Parisian Hotel, *including the " monthly rent of* $250 *which the plaintiff company paid its land- " lord, Manoel Fernandez.*" (These words were under-lined by the trial judge.) " (*d*) The defendant would retain for himself all " profits he made from the business carried on at the Parisian Hotel, in lieu of the dividends on his shares if he acquired them."

It was no doubt anticipated by both parties that a contract would be drawn up and that the defendant would then pay the balance due on the shares. Meanwhile, the defendant remained in occupation and acted just as if a contract had been concluded. He ran the night bar. He paid all expenses. He took all the profits. And he paid $250 a month to the plaintiff company. It was expressly paid as " rent." For instance, on April 3, 1956, the defendant sent " the sum of $250.00 being the rent to April 1, " 1956, for Parisian Hotel." No receipt or acknowledgment was ever given, but it was undoubtedly accepted by the plaintiff company.

Towards the end of April, 1956, however, seeing that no contract had been executed and the balance due on the shares had not been paid, Joseph gave notice to the defendant that he intended to forfeit the sums of money already paid for the shares. And by a letter dated May 7 or 8, 1956, he wrote to the defendant: " Re Agreement for purchase of shares in Hotel de Paris Limited. " I have to refer to previous correspondence passing between us " on the above-mentioned subject and to inform you that your " deposits made under the above agreement have been forfeited. " You are required to remove and take away such stock and other " materials as you have at the Parisian Hotel within seven (7) " days of the date hereof, and I am to warn you that if you fail " to do so I shall be obliged to take such steps as may be neces- " sary to have them removed therefrom." (A question was raised before their Lordships whether this letter was ever properly proved. Joseph said he served it on the defendant. He kept a copy of it. The original should have been in the possession of the defendant. But no notice to produce had been given. This might have raised a nice point, but for the fact that the copy formed one of a bundle of agreed documents which were tendered and admitted in evidence without objection. That is enough to overcome the want of notice to produce.)

Notwithstanding that notice, the defendant did not remove his stock or other materials. But the plaintiff company took no steps to have them removed. Everything went on as before. The defendant remained in occupation, paying the expenses and taking the profits. And he paid $250 a month to the plaintiff company. These were expressly paid as " rent due at Parisian Hotel." The plaintiff company accepted the payments but gave no receipts.

On October 19, 1956, the plaintiff company issued a writ asking for a declaration that they were entitled to possession of the

J. C.
1959
Isaac
v.
Hotel de
Paris Ltd.

Parisian Hotel and an order for possession. The defendant in his defence claimed that he was a tenant at a monthly rent of $250.00. Even after the issue of the writ, everything went on as before. The defendant remained in occupation and paid $250 a month to the plaintiff company. These were expressly paid as "rent for the Parisian Hotel," but no receipts were given.

On December 6, 1957, the Supreme Court of Trinidad made an order for possession, but still the defendant stayed on. On May 27, 1957, the Federal Supreme Court affirmed the order, but still he stayed on. The order has not yet been executed. Their Lordships were told that the defendant is still there awaiting the outcome of this appeal.

At the trial the defendant alleged that in December, 1955, there was an oral agreement whereby Joseph, on behalf of the plaintiff company, sublet both floors of the Parisian Hotel to the defendant at a rent of $250.00. The judge rejected the evidence of the defendant and his witness on this point. He held that originally the defendant was put into occupation of the first floor for the purpose of establishing and managing a night bar on behalf of the company; in other words, as a servant or agent on behalf of the company, with no right or interest of his own. The Federal Supreme Court upheld this finding and their Lordships think it clearly right.

But what was the position after February 17, 1956? It was submitted by Mr. Dingle Foot that there were all the indicia of a monthly tenancy. There was not only exclusive possession but there was also the payment and acceptance of rent. (Furthermore, the defendant paid the disbursements, and so forth.) Mr. Dingle Foot admitted that these would not be decisive to establish the tenancy in the case of premises within the Rent Restriction Acts such as *Marcroft Wagons Ltd.* v. *Smith* [1] and *Murray Bull & Co. Ltd.* v. *Murray*,[2] but it was altogether different, he said, in the present case where the premises were not subject to rent restriction legislation. The only proper inference here was a monthly tenancy. Their Lordships cannot accept this view. There are many cases in the books where exclusive possession has been given of premises outside the Rent Restriction Acts and yet there has been held to be no tenancy. Instances are *Errington* v. *Errington and Woods* [3] and *Cobb* v. *Lane*,[4] which were referred to during the argument. It is true that in those two cases there was no payment or acceptance of rent, but even payment and acceptance of rent—though of great weight—is not decisive of a tenancy where it can be otherwise explained, see *Clarke* v. *Grant*.[5] As Lord Greene M.R. said in *Booker* v. *Palmer* [6]: "There is one

[1] [1951] 2 K.B. 496; [1951] 2 All E.R. 271.

[2] [1953] 1 Q.B. 211; [1952] 2 T.L.R. 1003; [1952] 2 All E.R. 1079.

[3] [1952] 1 K.B. 290; [1952] 1 T.L.R. 231; [1952] 1 All E.R. 149, C.A.

[4] [1952] 1 T.L.R. 1037; [1952] 1 All E.R. 1199, C.A.

[5] [1950] 1 K.B. 104; 65 T.L.R. 241; [1949] 1 All E.R. 768, C.A.

[6] [1942] 2 All E.R. 674, 677, C.A.

"golden rule which is of very general application, namely, that the "law does not impute intention to enter into legal relationships "where the circumstances and the conduct of the parties negative "any intention of the kind."

It appears to their Lordships that the law on this matter was correctly interpreted and applied by Archer J. in the Federal Supreme Court when he said: "It is clear from the authorities "that the intention of the parties is the paramount consideration "and while the fact of exclusive possession together with the "payment of rent is of the first importance, the circumstances in "which exclusive possession has been given and the character in "which money paid as rent has been received are also matters "to be considered. The circumstances in which Isaac was "allowed to occupy the Parisian Hotel show that Joseph never "intended to accept him as a tenant and that he was fully aware "of it. The payments he made were only part of the disburse-"ments for which he made himself responsible and the so-called "rent was in the nature of a reimbursement of the rent payable "by the plaintiff."

Their Lordships are therefore of opinion that the relationship between the parties after February 17, 1956, was not that of landlord and tenant, but that of licensor and licensee. The circumstances and conduct of the parties show that all that was intended was that the defendant should have a personal privilege of running a night bar on the premises, with no interest in the land at all. It was at first only a privilege to be there pending the execution of a formal contract. Later, when the contract fell through, and notice was given to him to remove his belongings, even that privilege came to an end. The notice of May 7 or 8, 1956, would not, of course, have been sufficient to end a tenancy, but it was quite sufficient to end a licence, see *Ministry of Health* v. *Bellotti*.[7]

But what about the position after May 15, 1956, when the notice expired? The defendant remained in possession carrying on as before. He was still permitted to be there both before and after the issue of the writ. He was in a sense still a licensee. But he was not, in the opinion of their Lordships, in such a privileged position that he could demand or expect yet another notice before being turned out. He was there at sufferance liable to be turned out whenever the plaintiff company thought fit to execute its right to do so: just as in the old days a tenant by sufferance was. And during this period it should not be taken against the company that it accepted his monthly payments of so-called rent. Better to have something in hand than lose all in the long-drawn course of court proceedings. True it is that, a year after the issue of the writ, on October 23, 1957, when giving evidence on an application by the defendant for a licence, Joseph said: "Hotel de Paris are subletting to Isaac. Isaac pays $250

[7] [1944] K.B. 298; 60 T.L.R. 228; [1944] 1 All E.R. 238, C.A.

J. C.
1959
Isaac v. Hotel de Paris Ltd.

"a month rent. He is not in default." But it must be remembered that a layman may in cases of this kind easily put the wrong label on to a legal relationship. Joseph put it better later in his evidence on that occasion when he said: "I do not know "how long the case will last so I must cash his cheques." The acceptance of the payments did not in these circumstances evince any intention to waive the company's right to immediate possession.

Their Lordships find themselves in full agreement with the Supreme Court of Trinidad and the Federal Supreme Court. They will humbly advise Her Majesty that this appeal should be dismissed. The appellant must pay the costs.

Solicitors: *T. L. Wilson & Co.; Malcolm Slowe & Co.*

C. C.

[COURT OF APPEAL.]

* *In re* LANGTON, DECD.

C. A.
1960
Feb. 12.
Hodson, Willmer and Devlin L.JJ.

LANGTON *v.* LLOYDS BANK LTD. AND ANOTHER.

[1957 L. 1159.]

Practice and Procedure—Pleadings—Amendment—Red ink—Whether necessary—R.S.C., Ord. 19, *r.* 10; *Ord.* 28, *r.* 8.

In an amended pleading the amendments need not be indicated in red.

In a Probate action the plaintiff, acting in person, delivered an amended statement of claim printed in black. A registrar, who considered that the amendments should have been in red, made an order directing the plaintiff to deliver his amended statement of claim "in proper amended form" within 28 days. The plaintiff refused to do this, considering that his pleading complied with the requirements of Order 28, r. 8.[1] Later, another registrar made an order dismissing the action for want of prosecution, "the plaintiff "having refused and continuing to refuse to deliver an amended "statement of claim." This order was affirmed by the judge in chambers. On appeal:—

Held, allowing the appeal, that the plaintiff was not in default in delivering an amended pleading in black.

Appeal from Stevenson J. in chambers.

In a Probate action the plaintiff, acting in person, delivered an amended statement of claim which was printed in black. On

[1] R.S.C., Ord. 28, r. 8: "An indorsement or pleading may be "amended by written alterations in "the copy which has been delivered, "and by additions on paper to be "interleaved therewith if necessary, "unless the amendments require the "insertion of more than 144 words in "any one place, or are so numerous "or of such a nature that the making "them in writing would render the "document difficult or inconvenient to "read, in either of which cases, the "amendment must be made by "delivering a print of the document "as amended."

October 28, 1958, Mr. Registrar Russell made an order directing the plaintiff to "deliver his amended statement of claim in proper "amended form within 28 days," on the ground that the amendments were not indicated in red. The plaintiff having failed to comply, an application was made by the fourth defendant, a beneficiary, to have the action dismissed for want of prosecution, and on April 20, 1959, Mr. Registrar Wilkinson made an order to that effect, "the plaintiff refusing and continuing to refuse to "deliver an amended statement of claim." Stevenson J. in chambers affirmed this order. The plaintiff appealed.

The plaintiff in person. The matter is governed by Ord. 28, r. 8, which does not require that amendments should be in red.

J. A. Armstrong for the executors. I can only refer to Ord. 19, r. 10,[2] which requires that pleadings should be delivered "in "the manner now in use." There can be no doubt that in 1883 the practice was to deliver amendments in red, as has always been the constant practice. The plaintiff has also held up the proper prosecution of the action by repeated and premature applications for discovery.

H. S. Law for the fourth defendant.

No cases were cited in argument.

HODSON L.J. This is an appeal from an order of Stevenson J. made in chambers on May 8, 1959. He dismissed an appeal from an order of Mr. Registrar Wilkinson, dated April 20, 1959, which was framed in this way: "It is ordered that this action be and "the same is hereby dismissed with costs, the plaintiff having "refused and continuing to refuse to deliver an amended state-"ment of claim." The order of the registrar was made upon a summons issued by the fourth defendant for dismissal of the action for want of prosecution, the plaintiff not having delivered his amended statement of claim "in proper amended form" as required by an order of Mr. Registrar Russell in chambers on October 28, 1958. So the basis upon which this action was dismissed was not the basis that the plaintiff had not prosecuted his action, except in the sense that he had refused and continued to refuse to deliver an amended statement of claim.

Mr. Registrar Wilkinson was, no doubt, in a difficult position, because on October 28, 1958, Mr. Registrar Russell had ordered that "The plaintiff do deliver his amended statement of claim in "proper amended form within 28 days from today." So far as the jurisdiction of the court is concerned, and the rules as to amendment, the plaintiff was not in default. It is true that under Ord. 28, r. 2 (which provides for a plaintiff amending his statement of claim "once at any time before the expiration of the

[2] R.S.C., Ord. 19, r. 10: "Every "pleading or other document required "to be delivered to a party, or be-"tween parties, shall be delivered in "the manner now in use to the solici-"tor of every party who appears by a "solicitor. . . ."

C. A.
1960
Langton, decd., *In re.*
Hodson, L.J.

"time limited for reply"), the rules only provide for such an amendment once without leave. But the point was never taken that the plaintiff required leave to amend his statement of claim; and the parties—all of them, the first and second defendants, who are the executors of the will of the deceased whose estate is the subject-matter of this action, and the fourth defendant, who issued the summons—have never taken the point that the plaintiff's statement of claim was in any sense out of order or that the amendment was wrongly made: the point was taken by the registrar himself. In my judgment (and, indeed, it is conceded in this court), there was no power to the registrar to make such an order. There is nothing in the statement of claim (which I need not read) which involves a departure from the rules; and, as I have said already, no point was taken by either party to that effect.

The order of Mr. Registrar Wilkinson was appealed to the judge, the plaintiff asking for the order of the registrar to be set aside, but apparently not directing his argument to the point which he raised in this court. The order of Mr. Registrar Russell being, as I think, in so far as it directed the plaintiff to "deliver "his amended statement of claim in proper amended form within "28 days from today," a nullity, and the subsequent orders having sprung from that, it seems to me that this appeal must be allowed. It is quite true that the plaintiff must prosecute this action. He has, we are told (we have not heard him about this), delayed the action by repeated applications for discovery, which have been refused owing to their having been made prematurely; but unless the action is prosecuted by the plaintiff it will be, on an application to the court for that purpose, dismissed for want of prosecution. But the ground upon which this dismissal was made was wrong: the action must therefore proceed, and the order of the judge reversed.

The appeal will therefore be allowed.

Willmer L.J. I agree; and I desire to add nothing beyond this, namely, to express the hope that the order we are now making will enable the parties to get the dispute between themselves settled with expedition.

Devlin L.J. I also agree.

Appeal allowed. Fourth defendant to pay appellant's costs here and below. First and second defendants' costs to be costs in the action.

Solicitors: *Baker & Nairne; Barlow, Lyde & Gilbert.*

F. R. D.

[COURT OF APPEAL.]

* ROSSAGE *v.* ROSSAGE AND OTHERS.

C. A.

1959
Jan. 21.

Hodson, Ormerod and Willmer L.JJ.

Practice—Interlocutory proceedings—Meaning—Infant—Application to suspend access by mother—Whether interlocutory proceeding—Admissibility of hearsay evidence in affidavits—Scandalous matter—Discretion of court to strike out—R.S.C., Ord. 38, *rr.* 3, 11.

Evidence—Affidavit—Scandalous hearsay allegations—Admissibility on application to suspend mother's access to child—R.S.C., Ord. 38, *rr.* 3, 11.

Some years after divorce proceedings the father made an application that the access of the mother to the child of the marriage should be suspended. The application was supported by certain affidavits consisting largely of scandalous imputations against the mother based on hearsay. The mother applied to have these affidavits removed from the file as being scandalous and irrelevant, and in breach of the Rules of the Supreme Court.[1] Barnard J. refused this application, stating that he could put irrelevant matters out of his mind. On appeal:—

Held, allowing the appeal, (1) that for the purposes of R.S.C., Ord. 38 the proceeding was not interlocutory, so that hearsay evidence was irrelevant.

Dicta of Cotton L.J. in *Gilbert* v. *Endean* (1878) 9 Ch.D. 259, 269 (C.A.) applied.

(2) That the proportion of irrelevant matter, which was also scandalous, was so great that the court ought not to be embarrassed by its presence on the file, nor ought the party implicated to be embarrassed by having to deal with it.

APPEAL from Barnard J.

Some years after the parties had been divorced the father made an application that the mother's limited right of access to the child of the marriage should be suspended. The application was supported by a number of affidavits, including one by the father and two by the managing clerk of his solicitors. These affidavits contained a number of imputations against the mother, much of which was hearsay, including as an exhibit the draft of an affidavit based on alleged statements of a man with a criminal record who claimed to have had immoral relations with the mother, but who, it was deposed, had refused to swear the affidavit unless he received a very substantial sum.

On an application by the mother to remove these affidavits from the file as scandalous and irrelevant, Barnard J. declined to do so, stating that he could put irrelevant matters out of his head when deciding the issue. The mother appealed.

[1] R.S.C., Ord. 38, r. 3: "Affidavits shall be confined to such facts as the witness is able of his own knowledge to prove. . . . Provided that on interlocutory proceedings . . . an affidavit may contain statements of information and belief, with the sources and grounds thereof."

R. 11: "The court or judge may order to be struck out from any affidavit any matter which is scandalous, and may order the costs of any application to strike out such matter to be paid as between solicitor and client."

C. A.
1959
Rossage
v.
Rossage.

Stephen Terrell for the mother. These affidavits are full of scandalous matter, and consist mostly of hearsay, which is inadmissible and irrelevant, as this is not an interlocutory proceeding for the purpose of Order 38: *Gilbert* v. *Endean.*[2] The proportion of inadmissible matter is so great that they should be removed from the file.

G. H. Crispin for the father. The judge did not find that the affidavits on the whole were scandalous and irrelevant; though they contained irrelevant matters, he was capable of putting such matters out of his mind when deciding the issue.

[Hodson L.J. That is the ordinary way of doing it, but this is a bit extreme.]

This is an interlocutory matter, so that such of the contents of the affidavits, being given on information and belief, is not irrelevant, and cannot be struck out.

The following cases, which were cited in argument, are not referred to in the judgment: *In re Anthony Birrell, Pearce & Co.*[3]; *Cracknall* v. *Janson*[4]; *Kernick* v. *Kernick*[5]; *Osmaston* v. *Association of Land Financiers*[6]; *Warner* v. *Mosses*[7]; *Bozson* v. *Altrincham Urban District Council*[8]; *Millington* v. *Loring.*[9]

Hodson L.J. This is an appeal from an order of Barnard J. dated December 17, 1958. The judge on that occasion had before him an application by a wife, the mother of the child concerned, to have removed from the file certain affidavits, the ground of the application being that those affidavits were scandalous and irrelevant to the issue before the court, and the issue before the court being whether the mother's access to this child (she not being the custodian of the child) should be suspended. The judge did not accede to the application.

The position with regard to affidavits is covered by the Rules of the Supreme Court. Order 38, r. 3, provides: "Affidavits "shall be confined to such facts as the witness is able of his own "knowledge to prove. The costs of every affidavit which shall "unnecessarily set forth matters of hearsay, or argumentative "matter, or copies of or extracts from documents, shall be paid "by the party filing the same. Provided that on interlocutory "proceedings or with leave under" (certain orders) "an affidavit "may contain statements of information and belief, with the "sources and grounds thereof."

There are five affidavits, which the court has read, and as to the last two there is, I think, no ground for saying that the contents of those affidavits are irrelevant—that is to say, the affidavits of a man called Smith and a man called Willis. The gist of the application really relates to the three other affidavits—an

[2] (1878) 9 Ch.D. 259.
[3] [1899] 2 Ch. 50.
[4] (1878) 11 Ch.D. 1 (C.A.).
[5] (1864) 12 W.R. 335.
[6] [1878] W.N. 101.
[7] [1881] W.N. 69 (C.A.).
[8] [1903] 1 K.B. 547.
[9] (1880) 6 Q.B.D. 190 (C.A.).

affidavit by the father of the child and two affidavits by the managing clerk to the firm of solicitors instructed by him, the position being that those affidavits contain material which is relevant, but they contain a great deal of material which is irrelevant—pure hearsay evidence which the court cannot take into account in the form in which it stands. The proportion of that material to the relevant material is so high that if this matter is to be disposed of with any regard to convenience it is clearly, I think, right that the matter should be dealt with by removing the whole of those affidavits from the file rather than by seeking, by expunging irrelevant matter, to put the affidavits in order.

I should say that in dealing with this rule it has been construed by the Court of Appeal in a way which draws a distinction between interlocutory proceedings generally and interlocutory proceedings where an issue has to be determined, such as arises in this case. The authority for that is contained in *Gilbert* v. *Endean*,[1] a decision of the Court of Appeal, which contains a passage from the judgment of Cotton L.J. which is in point. He is dealing with an earlier form of this rule: " . . . for the purpose " of this rule those applications only are considered interlocutory " which do not decide the rights of parties, but are made for the " purpose of keeping things in statu quo till the rights can be " decided, or for the purpose of obtaining some direction of the " court as to how the cause is to be conducted, as to what is to " be done in the progress of the cause for the purpose of enabling " the court ultimately to decide upon the rights of the parties. " Now many of the cases which are brought before the court on " motions and on petitions, and which are therefore interlocutory " in form, are not interlocutory within the meaning of that rule " as regards evidence. They are to decide the rights of the " parties, and whatever the form may be in which such " questions are brought before the court, in my opinion the " evidence must be regulated by the ordinary rules, and must " be such as would be admissible at the hearing of the cause. " In my opinion, therefore, on such applications, if an affidavit " on information and belief is made, the other side is not called " upon to answer it under the peril of its being said to him, ' You " ' have in fact admitted this by not denying it, and therefore " ' the court may act upon the admission.' But I must add this: " where in the court below the evidence not being strictly admis- " sible, not being that upon which the court can properly act, if " the person against whom it is read does not object, but treats " it as admissible, then before the Court of Appeal, in my " judgment, he is not at liberty to complain of the order on the " ground that the evidence was not admissible. But in such a " case the court does not act on the statement as being evidence " properly admissible, but because the party has by the course " which he adopted waived proof of the facts stated on informa- " tion and belief. I have said this because I think that the

[1] (1878) 9 Ch.D. 259, 268.

C. A.
1959
Rossage v. Rossage.
Hodson L.J.

"matter is one of very considerable importance, and that the habit "of introducing into applications to decide the rights of parties "evidence on information and belief has done great injury in "many ways in the Chancery Division."

In my judgment, the standard to be applied is indicated by the rule as explained by the passage to which I have referred; and the judge quite clearly, from what we have been told of the matter, recognised that the material to which I have drawn attention (without saying what it is) was matter which he could not consider for the purpose of arriving at a decision in this case. However, he said that he was not going to remove it from the file because he was quite capable of shutting his mind to the irrelevant matter. But I do not think that that is a sufficient answer to the application in this case. The peril of leaving the affidavits on the file is indicated by the passage in the judgment of Cotton L.J. which I have read; and, indeed, it makes it almost impossible for the mother in this case to answer the affidavits unless they are cleaned up by the purge of the irrelevant and, indeed, scandalous matter.

There has been some discussion as to what is meant by "scandalous." It is quite clear that we cannot strike out matters in a pleading or an affidavit simply because they are scandalous, because scandalous matter may be relevant, and may be the very matters which have to be investigated by the court. But if, as here, the matters are plainly irrelevant, it seems there is no doubt that the court can strike them out, either by virtue of its inherent power or by virtue of the power contained in Order 38, r. 11—"The court or judge may order to be struck out from any affidavit "any matter which is scandalous, and may order the costs of any "application to strike out such matter to be paid as between "solicitor and client."

Within the meaning of those two rules, I am clearly of opinion that these matters are irrelevant and scandalous, and therefore they ought to be struck out. The court ought not to be embarrassed by their presence on the file; nor ought the party whom these statement tend to implicate to be embarrassed by having to deal with them.

I therefore would allow this appeal so far as the three first affidavits are concerned.

Ormerod L.J. I agree, and there is nothing I wish to add.

Willmer L.J. I, too, am of the same opinion.

Appeal allowed, with costs as between solicitor and client.
Leave to appeal.

Solicitors: *Victor Mishcon & Co.; Nordon & Co.*

F. R. D.

[CHANCERY DIVISION.]

* *In re* J. (AN INFANT).

[1959 J. No. 5157.]

1960
Jan. 26;
Feb. 4.

Cross J

Practice—Interlocutory proceedings—Meaning—Infant—Ward of court—Application to take out of jurisdiction—Whether interlocutory proceeding—Admissibility of hearsay evidence in affidavits—Discretion of court to strike out—R.S.C., Ord. 38, *rr.* 3, 11.

Evidence—Affidavit—Hearsay—Ward of court—Statement of information and belief—Whether admissible in application to take ward out of jurisdiction—R.S.C., Ord. 38, *rr.* 3, 11.

The mother of a ward of court, in an affidavit in support of her application by summons for leave to take the ward out of the jurisdiction to live with her abroad, stated: "The statement . . . "now produced and shown to me marked 'B.J.1' is in so far as "the same consists of matters of fact true to my knowledge and "in so far as it consists of matters of information or opinion true "to the best of my knowledge and belief." On a summons by the father for an order that the words "and in so far as it consists of "matters of information or opinion true to the best of my know-"ledge and belief," and certain passages in the exhibited statement be struck out on the ground that they were scandalous, irrelevant and argumentative or otherwise oppressive, and were in breach of the Rules of the Supreme Court,[1] it being agreed that the statements contained hearsay evidence which would be inadmissible at the trial of an action between the father and the mother:—

Held, (1) that the mother's summons was not an interlocutory proceeding within the meaning of the proviso to R.S.C., Ord. 38, r. 3, and the hearsay evidence was, therefore, inadmissible.

(2) That, nevertheless, the court had a complete discretion whether or not to strike out hearsay evidence improperly included in an affidavit, so that it could properly refuse to do so if it considered that that course was not necessary to enable the mother's summons to be properly heard, and that, accordingly, the evidence would be considered on that basis at the hearing of the application.

Rossage v. *Rossage,* ante, p. 249 applied.

Dicta of Cotton L.J. in *Gilbert* v. *Endean* (1878) 9 Ch.D. 259, 269 considered.

SUMMONS.

The following statement of the facts is taken from the judgment: On November 19, 1959, the mother of a ward of court took out a summons asking that she should be at liberty to take the child out of the jurisdiction to live with her abroad. The summons was served on the father of the ward and on another person. In support of her application the mother, on November 26, 1959, swore an affidavit, paragraph 2 of which read as

[1] R.S.C., Ord. 38, r. 3: "Affi-"davits shall be confined to such facts "as the witness is able of his own "knowledge to prove . . . Provided "that on interlocutory proceedings ". . . . an affidavit may contain "statements of information and "belief, with the sources and grounds "thereof."

R. 11: "The court or judge may "order to be struck out from any "affidavit any matter which is scan-"dalous."

1960

J., *In re.*

follows: "The signed statement . . . now produced and shown "to me marked 'B.J.1' is in so far as the same consists of "matters of fact true to my knowledge, and in so far as it consists "of matters of information or opinion true to the best of my "knowledge and belief."

On November 30 the father applied to the court by summons for an order (1) that the words in paragraph 2 of the affidavit "and in so far as it consists of matters of information or opinion "true to the best of my knowledge and belief," and (2) a number of passages in the exhibited statement, should be struck out on the grounds that they "are scandalous, irrelevant and argumenta-"tive or otherwise oppressive and are in breach of the Rules of "the Supreme Court." The summons also asked for similar relief in connection with an affidavit sworn in support of the mother's application by another deponent and a statement exhibited to it. The master refused to make an order on the father's application and, at his request, adjourned it into court as a procedure summons.

Stephen Terrell for the father.
C. A. Settle for the mother.

The following cases, in addition to those referred to in the judgment, were cited in argument: *Osmaston* v. *Association of Land Financiers* [2]; *Kernick* v. *Kernick* [3]; *Warner* v. *Mosses* [4]; *In re Jessop (a Solicitor)*.[5]

Cur. adv. vult.

February 4, 1960. Cross J. read the following judgment which, after stating the facts, continued: It is common ground between the parties that the exhibited statements in question contain hearsay evidence which would be inadmissible at the trial of an action raising issues between the father and mother as evidence of the truth of the facts alleged. On that basis I have been asked by counsel for both sides to decide two questions of principle before considering in detail the statements to parts of which objection is taken.

The first question is whether the mother's summons is an interlocutory proceeding within the meaning of the proviso to R.S.C., Ord. 38, r. 3. If it is, then there would be no objection to the inclusion of hearsay evidence in the affidavits or exhibited statements provided that the sources and grounds were given. [His Lordship read Ord. 38, r. 3, and continued:] Mr. Terrell admitted that for some purposes an application such as the mother's application in this case was an interlocutory proceeding. He agreed, for example, that an order made on it would be an interlocutory and not a final order for the purposes of appeal. Directions given in infancy cases are never irrevocable

[2] [1878] W.N. 101.
[3] (1864) 9 L.T. 800.
[4] [1881] W.N. 69, 135.
[5] (1910) 54 S.J. 543.

but are always liable to be varied in the light of changed circumstances. The only final order in such proceedings would be one directing that the child should cease to be a ward of court. But he argued that a proceeding might well be interlocutory for the purposes of appeal while not being interlocutory for the purposes of the admission of hearsay evidence.

In this connection he referred to a passage in the judgment of Cotton L.J. in *Gilbert* v. *Endean*,[1] where the Lord Justice said,[2] in connection with an earlier form of a rule in question: "But for the "purpose of this rule those applications only are considered inter-"locutory which do not decide the rights of parties, but are made "for the purpose of keeping things in statu quo till the rights can "be decided, or for the purpose of obtaining some direction of the "court as to how the cause is to be conducted, as to what is "to be done in the progress of the cause for the purpose of "enabling the court ultimately to decide upon the rights of the "parties. Now many of the cases which are brought before "the court on motions and on petitions, and which are therefore "interlocutory in form, are not interlocutory within the meaning "of that rule as regards evidence. They are to decide the rights "of the parties, and whatever the form may be in which such "questions are brought before the court, in my opinion the "evidence must be regulated by the ordinary rules, and must be "such as would be admissible at the hearing of the cause." Mr. Terrell pointed out that the mother's application here was not made for the purpose of keeping matters in statu quo or for the purpose of obtaining directions as to procedure. Therefore, he submitted, it should not be considered to be an interlocutory proceeding for the purpose of the admission of evidence. Mr. Settle, on the other hand, argued that while it was true that the mother's application was not made for the purpose of keeping things in statu quo, or for directions with regard to procedure, it was not an application upon which any rights of any parties would be decided. The only question to be decided would be what, in all the circumstances, would be in the best interests of the infant who is not himself a party at all. The parties in such a case are not asserting rights but merely submit to the judge what, in their view, is for the infant's benefit. The observations of Cotton L.J., therefore, said Mr. Settle, do not touch such a case as this, and as the proviso to the rule (which up to 1933 was confined to motions) now extends to all forms of proceeding, there is no reason why such an application as the mother's in this case should not be considered to be interlocutory for the purposes of evidence as well as for the purposes of appeal. He submitted that it was desirable that the judge who had to decide what, in all the circumstances, was in the best interests of the child should be able to consider any material which either side chose to put before him, and that he could safely be trusted not to attribute to any part of it more weight than it deserved.

[1] (1878) 9 Ch.D. 259. [2] Ibid. 268.

1960

J., *In re.*

Cross J.

I have set out the rival contentions because the point is one of some general importance and the case may go further, but so far as I am concerned the question is, I think, answered by the recent decision of the Court of Appeal in *Rossage* v. *Rossage* [3] to which Mr. Terrell called my attention. In that case Barnard J. had granted the custody of the child of the marriage to the father, and granted the mother certain rights of access. Later, the father applied to the court to have the mother's rights of access suspended, and in support of his application certain affidavits were filed which contained hearsay evidence. The Court of Appeal took the view that such evidence was inadmissible and ordered the affidavits to be removed from the file. Mr. Settle suggested that I need not consider that decision to be binding on me in this case because proceedings in the Divorce Division relating to the custody of and access to the children of the parties to the divorce proceedings can more easily be viewed as contests between parties claiming adverse rights than can wardship proceedings in this Division. I cannot accept this suggestion. I have always understood—and Mr. Settle did not refer me to any decision suggesting the contrary—that in custody proceedings in the Divorce Division, just as in wardship proceedings in this Division, the paramount consideration is always the welfare of the child. It would be curious if the rules as to the evidence admissible in such cases were different in the two Divisions, and, if any such distinction is to be drawn, it should, I think, be drawn by the Court of Appeal and not by me. On the first point, therefore, I hold that Mr. Terrell is right.

On the footing that the mother's application in this case is not an "interlocutory proceeding" within the meaning of the proviso to Ord. 38, r. 3, the other question which has been argued is how the court should deal with any matter which has been improperly included in the affidavits or exhibited statements. In *Rossage* v. *Rossage* [4] Barnard J., while holding that the passages in the affidavits to which objection was taken were not admissible in evidence, refused to strike them out, as he considered that he would be able to put them out of his mind when he heard the application. The Court of Appeal reversed his decision, and as in that case the proportion of inadmissible material in the affidavits was very high, the court did not simply strike out the inadmissible passages but directed the affidavits to be taken from the file. The matter objected to in that case was not only inadmissible and so irrelevant, but was also "scandalous" in the sense that it contained allegations of misconduct by the mother. The Court of Appeal, however, I think, took the view that even if hearsay evidence improperly contained in an affidavit is not "scandalous" in the ordinary sense of that word, the court nevertheless can, if it thinks fit, strike it out either under Ord. 38, r. 11, or under its inherent

[3] Ante, p. 249.

[4] Ibid.

jurisdiction. But Mr. Terrell submitted to me not only that the court has jurisdiction to strike irrelevant matter out of an affidavit (which, indeed, Mr. Settle did not dispute) but that it ought always to strike out any matter the irrelevancy of which consists in the fact that it is inadmissible in evidence, however trivial the matter in question may be. He argued that if the records of the court are, as he put it, "defiled" by the presence of statements which are inadmissible in the evidence, court, on its attention being called to the fact, cannot properly refrain from striking it out. Mr. Settle, in his argument on this point, placed some reliance on the fact that in this case the evidence is in the form of statements exhibited to formal affidavits, and that such statements may be said not themselves to form part of the record of the court, but I do not propose to deal with Mr. Terrell's argument on any such narrow ground. Whether the material to which objection is taken on the ground that it is not admissible in evidence is contained in a statement exhibited to an affidavit, or in the affidavit itself, the court has, in my judgment, a complete discretion whether or not to strike it out, and a judge cannot be said to be exercising his discretion improperly merely because he decides not to strike out the matter in question. None of the cases cited by Mr. Terrell appears to me to support his submissions on this part of the case, and the case of *Rossage* v. *Rossage* [5] tells against it. In that case, when counsel for the father pointed out that Barnard J. had refused to strike out the passages in question because he thought that he was capable of putting them out of his mind when he came to decide the issue, Hodson L.J. said: "That is "the ordinary way of doing it; but this is a bit extreme." The hearsay evidence to which objection was there taken was most damaging to the mother, and one can well understand that the Court of Appeal should have thought that in the particular circumstances of that case it was desirable that it should be struck out altogether. But I find nothing in his judgment which suggests to me that Hodson L.J. went back on the view which is implicit in the interlocutory observation which I have quoted, namely, that there may be cases where the proper course for a judge to follow is to refuse to strike out hearsay evidence improperly included in an affidavit. It would, I think, be unfortunate if the law was otherwise. Inadmissible hearsay evidence may relate only to matters which are of little or no importance, even to matters the truth of which the other side may not dispute. Yet if Mr. Terrell's submission is right, the court would be bound to accede to an application to strike such matter out, and, I suppose, to give the applicants the costs of it, even though the application was quite unnecessary for the purpose of achieving justice in the case.

I propose, therefore, to deal with the present application on

[5] Ante, p. 249.

1960

J., *In re.*

Cross J.

the basis, first, that the mother's summons is not an interlocutory proceeding within the meaning of the proviso to Ord. 38, r. 3, but, secondly, that I can properly refuse to strike out any of the passages to which objection is taken by the father if I consider that that course is not necessary for the purpose of enabling the mother's summons to be properly heard.

Summons adjourned to chambers.

Solicitors: *Victor Mishcon & Co.; Jaques & Co.*

M. G. T.

[COURT OF APPEAL.]

C. A.

1960
Jan. 19, 20.

Ormerod and Devlin L.JJ.; Gorman J.

* JAQUIN *v.* HOLLAND.

[Plaint No. P. 76.]

Landlord and Tenant—Repairs—Covenant—Measure of damages for failure to yield up premises in "good and tenantable" repair—Diminution in value of reversion where premises immediately relet—Landlord and Tenant Act, 1927 (17 *&* 18 *Geo.* 5, *c.* 36), *s.* 18 (1).

On the termination of a tenancy containing a covenant to keep and yield up the demised premises "in good and tenantable repair," the landlord spent £19 10s. in putting the premises into a lettable condition and the premises were immediately relet at the same rent as in the earlier tenancy. The premises were situated in an area where there was a high demand for houses to let. In an action by the landlord for damages for breach of the repairing covenant, the diminution in value of the reversion under section 18 (1) of the Landlord and Tenant Act, 1927,[1] was found to be £50, this sum being based upon the estimated reduction in selling value of the premises. It would have cost about £100 to put the premises in good and tenantable repair. It was contended for the tenant that in the circumstances the sum of £19 10s. represented the true measure of damage since the premises were immediately relet at the same rent subject to the payment of that sum or, alternatively, because the lettable value of the freehold should be taken into consideration:—

Held, (1) that the test for assessing the measure of damages for breach of a repairing covenant at common law was the amount that was necessary to put the house into a proper condition for letting in accordance with the terms of the covenant, so that it would be taken by a reasonable man wanting a house in reasonable condition, having regard to the nature and type of house involved.

Proudfoot v. *Hart* (1890) 25 Q.B.D. 42; 6 T.L.R. 305, C.A. applied.

[Reported by A. H. Bray, Esq., Barrister-at-Law.]

[1] Landlord and Tenant Act, 1927, s. 18: "(1) Damages for a breach of a "covenant or agreement to keep . . . or "to leave . . . premises in repair at "the termination of a lease, . . . shall "in no case exceed the amount (if "any) by which the value of the "reversion (whether immediate or "not) in the premises is diminished "owing to the breach. . . ."

(2) That the damages so assessed would have been over £50, and, applying section 18 (1) of the Act of 1927, £50—the amount by which the value of the reversion was diminished—was the sum to which the landlord was entitled. Even if one lease immediately succeeded another, there must always be a notional moment of time when the unincumbered freehold estate was vested in the landlord and the value of the reversion was therefore the value of the freehold as it had come back into the hands of the landlord before he let it again (post, pp. 266, 267).

Dictum of Lawrence L.J. in *Hanson* v. *Newman* [1934] Ch. 298, 304; 50 T.L.R. 191, C.A. applied.

Quaere, whether in determining the diminution in value of the reversion it was right to take into consideration the fact that there was a shortage of houses in the area.

APPEAL from Judge Glazebrook sitting at Sevenoaks County Court.

The plaintiff, Ursula Hope Jaquin, was the owner of a bungalow, 49, Oakdene Road, Sevenoaks, which, by a tenancy agreement dated March 18, 1958, she let to the defendant, Edward William Holland, for a period of one year at a rent of £265 per annum. By the agreement, the tenant agreed to "keep "the interior of the said premises . . . in good and tenant-"able repair (damage by accidental fire, storm or tempest "excepted) and to cultivate the garden in a proper manner," and also to "yield up the said premises at the end of the tenancy . . . "in good and tenantable repair. . . ."

The tenant entered into occupation of the bungalow in accordance with the terms of the agreement, but at the end of eight months of his tenancy, he wished to vacate the premises. This he was allowed to do, the landlord having found another tenant who was willing to take over the premises. The tenant vacated the premises on November 28, 1958.

After the premises were vacated, one Coles, a surveyor appointed on behalf of the landlord, inspected the premises and made a schedule of dilapidations which totalled £102 16s. The tenant employed one Platts as surveyor, who also prepared a schedule of dilapidations, but the two surveyors were unable to agree the amount of dilapidations. As a result the landlord commenced proceedings in the county court claiming damages for breach of the covenant to repair, the particulars given being those set out in the schedule of dilapidations. The defence was a denial that there was a breach of covenant, but that if there was, the schedule was unreasonable and the cost of doing the required work was excessive. Further, the tenant pleaded section 18 of the Landlord and Tenant Act, 1927, claiming that the value of the reversion had not been diminished by the tenant's alleged breach of covenant.

The county court registrar (Mr. Registrar Leon) found that the tenant had been in breach of his covenant and that the proper sum to award in damages was £29 10s., being £19 10s. for repairs to the bungalow and £10, a sum which was not in issue on

C. A.
1960
Jaquin
v.
Holland.

appeal, being the amount required to put the garden into proper order. The landlord appealed to the county court judge under Order 37, r. 5, of the County Court Rules, 1936, who varied the finding of the registrar and held that the landlord was entitled to £60, being £50 in respect of damages for breach of covenant for non-repair of the bungalow and £10 for the garden. The tenant appealed.

John Drinkwater for the tenant.
John Gower for the landlord.

The following cases were cited in argument, in addition to those referred to in the judgments: *Smiley* v. *Townshend*[2]; *Anstruther-Gough-Calthorpe* v. *McOscar*[3]; *Jones* v. *Herxheimer*.[4]

Ormerod L.J. stated the facts, read section 18 (1) of the Landlord and Tenant Act, 1927, and continued: The effect of that provision, shortly, appears to be that, whatever may be found to be the cost of doing the repairs rendered necessary by the failure of the tenant to observe his covenant for repair, the damages which the landlord is entitled to recover shall be limited to the diminution in the value of the reversion of the premises.

When the matter came before the registrar, the evidence which was called, apart from the evidence of the plaintiff herself, was the evidence of the two surveyors, and, according to the findings of the registrar, set out in his judgment, the evidence of Coles, the surveyor called on behalf of the landlord, was that there was a want of repair which would cost £102 16s. to put right. According to the judgment, Coles said that he prepared his schedule on what he regarded as proper grounds, that is, on the footing that the premises be put into good and tenantable repair on his understanding of the covenant, and he said that he had put into the schedule every possible defect, and that, in his view, that was a correct interpretation of the covenant. Then the note of his evidence goes on: "He also said that with regard to selling the "property he would not advise any abatement in the asking price "in view of the condition of the house but he might so advise "during negotiations for a sale. He also said that the property "was lettable in the condition it was left because the demand was "so high." This was the registrar's summary of the evidence of Coles on these matters. The evidence of Platts, according to the registrar, was that in Platts' view no damages at all were payable by the tenant in respect of want of repair, because there had been no diminution in the value of the freehold reversion. According to the registrar, Platts came to that conclusion for two reasons: first,

[2] [1950] 2 K.B. 311; 66 T.L.R. (Pt. 1) 546; [1950] 1 All E.R. 530, C.A.
[3] [1924] 1 K.B. 716; 40 T.L.R. 223, C.A.
[4] [1950] 2 K.B. 106; 66 T.L.R. (Pt. 1) 403; [1950] 1 All E.R. 323, C.A.

that the items of non-repair were trivial in themselves, and therefore not likely to affect the value, and secondly, that the demand for houses was so great in Sevenoaks that these matters were not likely to affect any price which might be procured for the sale of the house. But, according to the registrar again, Platts agreed that, if damages were to be paid, and if there had been liability on the tenant for these various items of non-repair, there were a number of items for which he would be liable, and those items are set out in the registrar's judgment by number in reference to the schedule of dilapidations. According to the registrar, the total of those items is £91 13s. 6d. Mr. Drinkwater, on instructions, has submitted that that figure of £91 13s. 6d. is not the correct figure, and that there is no evidence to justify it. But, whatever the figure was, it was certainly a substantial figure which may or may not have been as much as the registrar calculated it to be, £91 13s. 6d. In effect, according to the registrar, what Platts was saying was: "Here no damages should be paid because there has "been no diminution in the value of the reversion of the property. "But, if I am wrong about that, and there has been diminution, "then the amount of items for which I am responsible, I admit, "are the items set out by the registrar" which, according to the registrar, amount to £91 13s. 6d. That is the evidence of the two surveyors.

In addition, the landlord herself had said that she had spent the sum of £25 11s. 2d. (which is, as a matter of fact, a wrong figure, the correct figure being £19 10s.), on work on the house to put the house in what she called "presentable" condition, and that, after that, she had let the house in that condition for the same rent to the new tenant.

That is how the matter stood when the registrar had to consider his findings. He appears to have directed himself correctly on the rule he had to consider whether or not there had been a breach of the covenant in this case. That was the first matter to which he had to direct his attention. He founded his consideration of that point on *Proudfoot* v. *Hart*.[1] The rule, as expressed by Lord Esher M.R., is set out in the headnote which reads: "Under an "agreement to keep a house in 'good tenantable repair,' and so "leave the same at the expiration of the term, the tenant's "obligation is to put and keep the premises in such repair as, "having regard to the age, character, and locality of the house, "would make it reasonably fit for the occupation of a tenant of "the class who would be likely to take it." Both parties agreed that the present covenant came within that rule, and that before the registrar and the county court judge that rule was the one to be considered in deciding whether there had been a breach of this covenant. The registrar said: "I am quite satisfied on the "authorities that the test is the cost of putting the property "into a condition in which a reasonable tenant would be likely

[1] (1890) 25 Q.B.D. 42; 6 T.L.R. 305, C.A.

C. A.
1960
Jaquin v. Holland.
Ormerod L.J.

"to take the house having regard to its class, character and "locality." As to that, I think there can be no quarrel, and I do not think anybody has quarrelled with that part of the registrar's judgment. But he then goes on to say: "Here we "find a reasonable tenant actually taking the premises but with "certain work actually done. The cost of this work I calculate "at £25 11s. 2d., but I will hear the parties later as to the exact "amount of this calculation." A little later in his judgment he says: "But I have come to the conclusion that the tenant is only "liable for the work necessary to make the house lettable"—again, perhaps, that is a short way of putting the rule in *Proudfoot* v. *Hart*[2]—"I calculate the figure from the account at "£25 11s. 2d.; accordingly, that is the amount the defendant is "liable to pay to the plaintiff." What, in fact, the registrar did was to say: "Some work has been done on this house by the "landlord herself. That work having been done, she was able to "let the house. Therefore, the amount which she has spent on "the house has been sufficient to put it in a condition which "would enable it to be let to a reasonable tenant." So far as I know, there was no evidence before the court whether the tenant was a reasonable man or was not, or as to the considerations which had affected the mind of the tenant when he took the house. But the registrar appears to have taken the view that, if £25 was all that was necessary to put the premises into repair so that they could and would be taken by a tenant, the fact that a tenant had taken them was evidence that all that was necessary had been done, and, in those circumstances, that was all the tenant was liable to pay.

It has been contended on behalf of the landlord with considerable force that what the registrar has done is to take into account the property market, not at what might be regarded as a normal time, but at the present time when, as the evidence showed, there was a very great demand for houses, particularly houses to let, in this particular district. In consequence, the registrar found that the sum of £25 11s. 2d., which was later altered to £19 10s., was the figure which he should award as being the cost of putting these premises into repair.

The registrar then had to consider the further question whether that sum was a larger sum than the diminution in the value of the freehold reversion. It was contended on the one hand that the diminution in value was the sum of £102 contended for by the landlord's surveyor, and on the other hand, that there had been no diminution in value at all, and that was contended by the tenant's surveyor on the ground that the property would be sold whether this work was done or not for the same price. The registrar did not agree with either of the parties. He said: "My own view is that the truth lies somewhere between the two "views. I think the purchaser might ask for a reduction or the

[2] (1890) 25 Q.B.D. 42, C.A.

"vendor ask for something less. My view is that £50 is the proper "figure for the reduction in the selling price at the time of Mr. "Coles's inspection."

Mr. Drinkwater submitted that that was not a finding that there had been a diminution in the value of the reversion to the extent of £50, as in this case it was never intended that this should go on the market. But that, I think, is not a proper view. It appears to me that there must be a moment of time when the freehold reversion, unincumbered, is vested in the landlord, and the question is: What is the value of the freehold reversion at that time? It appears to me that the finding of the registrar that there would be a reduction in the selling price of £50 at that time means that there would be a diminution of £50 in the value of the freehold reversion.

In those circumstances, the registrar having come to the conclusion that £19 10s., plus £10, was the proper figure, and that that was within the maximum sum of £50 which he found was the diminution in the value of the reversion, he gave judgment for that figure of £29 10s.

The county court judge varied the order of the registrar, and came to the conclusion that the proper figure to which the plaintiff was entitled was the sum of £50, plus the £10 for the damage to the garden. He said: "The registrar further found that the "premises had been relet at the same rent. From a common sense "point of view there is a great deal to be said for what the "registrar found. He says that in this case after spending "£19 10s. the premises were relet at the same rent. That, how-"ever, is not the diminution in value. Somebody might have "taken the premises as they were, without anything being done. "I think that the registrar made a mistake in going on to consider "the letting which had been made."

Mr. Drinkwater has argued that the sum of £19 10s. is the proper sum in that it was all that was necessary to put the premises into a lettable condition—and that is what the registrar has found—and that, as this was a covenant to which the rule in *Proudfoot* v. *Hart*[3] applied, a proper application of that rule showed that only a sum of £19 10s. was due in respect of this breach of covenant. Mr. Gower, on the other hand, argued that there was no evidence to justify the registrar in coming to the conclusion that £19 10s. was the proper figure. It was true that that was the amount which had actually been spent by the landlord in doing such repairs as she considered necessary to make the house presentable, and that she was then able to let the house at the same figure. But that was not the proper way to apply the test. The test was not one of whether the house could be let in all circumstances and whatever the pressure for houses might be in that particular area at any particular time. The real test to apply was the test of the amount that was necessary to put

[3] 25 Q.B.D. 42, C.A.

C. A.
1960
Jaquin
v.
Holland.
Ormerod L.J.

the house into a proper condition for letting in accordance with the terms of the covenant so that it would be taken by a reasonable man wanting a home in reasonable condition, having regard to the nature and type of house involved. He argued that the surveyor called by the landlord has said that the sum of £102 is necessary to put the house in proper repair. The surveyor called by the tenant has said that a lesser sum of £91, or some other approximate sum, would be necessary, if any sum was necessary at all—and the reason why it was not necessary was because, in these particular circumstances, there has been no diminution in the value of the freehold reversion. But the registrar has held—and nobody has quarrelled with his finding—that in fact there has been a diminution to the extent of £50. In those circumstances, says Mr. Gower, the amount to which the landlord is entitled is the sum of £50. But he would be entitled to a larger sum—either £90 or £100; whatever the registrar found in the circumstances necessary—were it not for the restriction imposed by section 18 of the Act of 1927. In view of that restriction and the registrar's finding, £50 is the largest sum in the circumstances which can be claimed by the landlord.

I think that all I need say is that I accept that view. It is not correct in a case of this kind to take the circumstances of letting and say that, because any house can be let almost in any condition at the present time, then there is no obligation on a tenant to perform his covenant to repair. The rule in *Proudfoot* v. *Hart*[4] is a guide as to the extent of repair which may be necessary in order to comply with a covenant of this kind. But it is a guide which calls in that useful individual, the reasonable man, acting in reasonable circumstances. In those circumstances, I think it must be clear from the evidence that a larger sum than the sum which the registrar had awarded would be the sum which would be payable.

I am therefore of the view that the figure which the registrar should have found is some figure larger than the sum of £50—how much larger matters not for the purposes of this case—but reduced to the sum of £50 because that is the sum which has been found by the registrar to be the diminution in the value of the reversion. In those circumstances it follows that the county court judge was right in varying the order of the registrar, and ordering that the sum which should be paid should be the sum of £50 plus the undisputed sum of £10 for the garden. In my judgment, therefore, this appeal should be dismissed.

Devlin L.J. Where, at the end of a tenancy, there is a claim for dilapidations, clearly the first thing that has to be done is to draw up a list of the work that it is necessary to do in order to put the premises into good and tenantable repair, these words

[4] 25 Q.B.D. 42, C.A.

being the words of the covenant in this case. The test that is very frequently applied in order to ascertain exactly what is meant by "good and tenantable repair," and therefore to ascertain exactly what work it is necessary to do, is the test that was laid down in *Proudfoot* v. *Hart*,[5] to which Ormerod L.J. has referred. We need not go into the question of whether or not that is the universal test. It has not been disputed in this case as being the appropriate test. Accordingly, in accordance with that test, the surveyors on both sides, for the landlord and for the tenant, drew up their lists of dilapidations, and, as I read the judgment of the registrar, the conclusion he arrived at was that the work that it was necessary to do, according to the evidence of the landlord's surveyor, came out at £102 16s.; whereas, according to the evidence of the tenant's surveyor, it came out at £91 13s. 6d.

Having ascertained the amount of work that it is necessary to do in accordance with *Proudfoot* v. *Hart*,[6] and having put a figure on it, that does not necessarily conclude the matter, because section 18 of the Landlord and Tenant Act, 1927, provides that the damages are not to exceed the amount, if any, by which the value of the reversion in the premises is diminished. So that one has to go on to inquire to what extent the value of the reversion has been diminished. That inquiry the registrar made, and he came to the conclusion that the reduction in the selling price amounted to £50, that is to say, he appears to have held that, notwithstanding that it would cost at least £91 13s. 6d. in his view to put the premises into good and tenantable repair, the damage to the reversion did not amount to more than £50. He arrived at that conclusion because of the shortage of houses in Sevenoaks and the desirability of them from the point of view of buyers. Thus he was saying that a buyer who was making a bid for this house, if it were put on the market, would say to himself: "I will put up with £41 odd of damage to the house, which I "shall have to spend on repairs, because houses are short and it is "very desirable to get one." I am not at all sure—and I should like to guard myself against deciding it and reserve the point for consideration when it arises—whether that was the right thing to do. I can imagine, for example, a house that is worth £5,000, which is let, let us say, at a rental of £250 per annum, where at the end of the tenancy £50 worth of damage had been done, and £50 would have to be spent on it in order to put it into good and tenantable repair. That is an appreciable sum, if you look at it from the point of view of the rent the landlord is getting. It is 20 per cent. of the rent. On the other hand, if you look at it from the point of view of the capital value of the house, it may not matter very much. Even if there were no particular shortage or particular desirability of houses to be taken into consideration, I can still imagine that an auctioneer might be

[5] 25 Q.B.D. 42, C.A. [6] Ibid.

C. A.
1960
Jaquin
v.
Holland.
Devlin L.J.

found who would say: "Well, where the damage is so small a "figure as £50, a prospective buyer, in making his bid, is likely "to disregard it altogether." I do not think that it necessarily follows from that that it is the intention of this Act that it should be disregarded altogether, or that a landlord will just have to put up with what is in effect a real loss. As I say, I would desire to reserve my opinion on that question. It does not arise here, and it does not arise because Mr. Gower, for the landlord, is not asking for the higher figure of £91. He is content, very sensibly, with the figure of £50 which has been found by the registrar as the reduction in the selling price. I say "very sensibly" because these are small figures, and there has been a good deal of litigation about them already. Although he contended before the county court judge that £91 was the right figure, the county court judge rejected it, but gave him still something more than the registrar gave him, that is to say, the sum of £50, and he has taken that sum of £50. So the question does not arise here.

I have said that the county court judge gave the landlord something more than the registrar had given him, and that is because the registrar, although he found the reduction in selling price to be £50, did not accept that reduction in the selling price as being the true measure of damage. The test that he propounded is set out in his judgment in the following words: "The "test is the cost of putting the property into a condition in which a "reasonable tenant would be likely to take the house having "regard to its class, character and locality. Here we find a "reasonable tenant actually taking the premises but with certain "work actually done. The cost of this work I calculate at"—I substitute the figure which ultimately emerged as being the correct one—"£19 10s." Therefore, he limited the damage to £19 10s.

The issue between the parties before us, therefore, has been simply whether it should be the reduction in the selling price of £50 which the registrar found, and that the county court judge adopted, or whether it should be the lower sum of £19 10s. Mr. Drinkwater has supported the registrar's judgment, and is asking us to reverse the conclusion of the county court judge. He is supporting the registrar's judgment on two grounds. First, he submits, as I understand it, that, as the premises were actually relet, and as on the particular facts of this case the reletting was, so to speak, stipulated for before the tenancy ended, that is to say, the landlord said that he would not agree to a surrender of the tenancy unless he could succeed in reletting the premises, therefore what fell back into the landlord's hands, and what is properly described as the reversion, is the new lease, and that, as the new lease was let at the same rent, subject to the payment of £19 10s., £19 10s. is the diminution in the value of the reversion. I think that that argument is unsound. There must always be a notional moment of time, even if one lease

immediately succeeds the other, in which the estate finds its way back into the hands of the landlord, and the value of the reversion is therefore the value of the freehold as it has come back into the hands of the landlord before he lets it out again. That that is what is intended by the meaning of "reversion" in this section of the Act is, I think, made clear by the judgment of Lawrence L.J. in *Hanson* v. *Newman*.[7] He referred to the words of the Act—"shall in no case exceed the amount (if any) by which "the value of the reversion (whether immediate or not) in the "premises is diminished"—and he said[8]: "The expression "'whether immediate or not' in the above passage, is I think "explained by reference to the case of *Joyner* v. *Weeks*,[9] to which "our attention has been called. . . . A reversion may not be a "reversion in possession (i.e., it may not be immediate) by reason "of the freeholder having granted a reversionary lease, and in "that case the reversionary lease is to be disregarded in assessing "the damages." That is dealing with the position in which the landlord has already got a reversionary lease before the termination of the one which is being considered for the purpose of dilapidations. But, in my judgment, the position must be exactly the same whether the second lease is granted before the completion of the first lease or after it. It still has to be disregarded, and what has to be ascertained as the value of the reversion is the value of the freehold.

Alternatively, Mr. Drinkwater argued that, if "reversion" must be given this meaning as the value of the freehold, nevertheless the lettable value of the freehold is something which ought to be taken into account in valuing the reversion. That raises the point, although in a more acute form, which I have already referred to, as to how far market values ought to be taken into account in cases of this sort. In one sense it can be said that the lettable value of a house is a good enough guide to what its capital value is, and, if that is all that is meant by the argument, then I see no objection to it. But in this matter of repairs it may assume a very different aspect. Take again the example which I quoted, £5,000 being the value of a house with £50 to be spent on repairs. If one considered lettable value—and taking 5 per cent. of £50, it is only £2 10s.—it is extremely improbable that any tenant will say, if he is asked to take it again for £250: "No, I am only going to pay £247 10s., because I shall have "to spend £50 on repairs to it." Moreover, the length of the proposed tenancy might affect the rent. So I should have thought that in general the rent which could have been obtained for the house is not any very valuable guide to the value of the reversion. But clearly, in the way in which the test has been applied by the registrar in this case, it is a wrong one, because he has taken an actual letting which plainly—I think it is clear from the terms

[7] [1934] Ch. 298; 50 T.L.R. 191, C.A.

[8] [1934] Ch. 298, 304, C.A.

[9] [1891] 2 Q.B. 31; 7 T.L.R. 509, C.A.

C. A.
1960
JAQUIN v. HOLLAND.
Devlin L.J.

of his judgment—was only effected because of the shortage and desirability of houses in Sevenoaks. He has found in terms that the diminution of the selling price is £50. If he finds that, notwithstanding that, the house can be relet at an expenditure of only £19 10s., he must be finding that other considerations besides the diminution in the value of the reversion are affecting the tenant's mind, those other considerations being the shortage and desirability of a house in Sevenoaks. Those considerations, in my judgment, must be extraneous to the true principle on which the value should be arrived at.

Therefore, I agree that the county court judge took the right view, and that this appeal should be dismissed.

GORMAN J. I agree, and I desire to say this only. It is quite obvious that the registrar gave the most careful consideration to this matter. The registrar said: "I am quite satisfied on the "authorities that the test is the cost of putting the property into "a condition in which a reasonable tenant would be likely to "take the house having regard to its class, character and "locality." There is no question, therefore, that he correctly applied the test laid down in *Proudfoot* v. *Hart*.[10] But where, in my view, the registrar went wrong is in the next three or four lines of his judgment. He said: "Here we find a reasonable "tenant actually taking the premises but with certain work "actually done. The cost of this work I calculate at "£25 11s. 2d."—which was later reduced to £19 10s. In my view, the registrar, having stated correctly the principle to be applied, went wrong in restricting the figure, in the circumstances of this case, to the amount of work which had actually been done before the tenant would take possession of this house.

I have nothing further to add.

Appeal dismissed with costs.

Solicitors: *Neve, Beck & Co. for W. H. House & Son, Sevenoaks; Vallis & Struthers, Sevenoaks.*

[10] 25 Q.B.D. 42, C.A.

[COURT OF CRIMINAL APPEAL.]

C. C. A.
1959
May 26.
Lord Parker C.J., Cassels and Winn JJ.

* REGINA *v.* DANGERFIELD.

Justices—Quarter sessions—Jurisdiction—Sentence—Borstal training—Whether jurisdiction in addition to disqualify from driving—Criminal Justice Act, 1948 (11 *&* 12 *Geo.* 6, *c.* 58), *s.* 20 (5) (*a*)—*Magistrates' Courts Act,* 1952 (15 *&* 16 *Geo.* 6 *&* 1 *Eliz.* 2, *c.* 55), *s.* 28.

[Reported by Miss E. CARYL-THOMAS, Barrister-at-Law.]

C. C. A.
1959
REG.
v.
DANGERFIELD.

Justices—Committal to quarter sessions—Best method—Young person—Desirability of committal under section 29*—Magistrates' Courts Act,* 1952, *ss.* 28, 29.

The appellant, who was aged 17, was convicted by a magistrates' court on two charges of taking and driving away a motor-vehicle without authority, and on three charges of driving a motor-vehicle while uninsured, and was committed under section 28 of the Magistrates' Courts Act, 1952, to quarter sessions for sentence. He was sentenced under section 20 of the Criminal Justice Act, 1948, to Borstal training and disqualified from holding or obtaining a driving licence for five years, in effect, concurrently in respect of each of the five charges. On appeal:—

Held, that on a committal to quarter sessions for sentence under section 28 of the Act of 1952, the powers of quarter sessions under section 20 (5) (*a*) of the Act of 1948,[1] were limited to sentencing to Borstal training or, alternatively, to dealing with the offender in any manner in which the court of summary jurisdiction might have done; accordingly, quarter sessions could not sentence to Borstal training and disqualification at the same time; however, it was within the power of quarter sessions to provide that on four of the charges this offender should be sentenced to Borstal training concurrently, and on the fifth charge the sentence should be one that the magistrates could have imposed, namely, disqualification; the sentence should be varied accordingly.

Per curiam. In the case of an offender of not less than 17 years of age convicted on a summary trial under section 18 (3) or 19 of the Magistrates' Courts Act, 1952, of an offence triable by quarter sessions, it is simpler to commit him for sentence under section 29 of the Act of 1952, which is a general committal, rather than section 28, which is limited to committal for Borstal training.

APPEAL against sentence.

The appellant, Terence Edwin Dangerfield, aged 17, was convicted on December 31, 1958, at the Acton Magistrates' Court, on two charges of taking and driving away a motor-vehicle without the consent of the owner or other lawful authority, contrary to section 28 of the Road Traffic Act, 1930, and on three charges of using a motor-vehicle without insurance, contrary to section 35 of the Act. He was committed to Middlesex Quarter Sessions under section 28 of the Magistrates' Courts Act, 1952, and was sentenced under section 20 of the Criminal Justice Act, 1948, to Borstal training and disqualified from holding or obtaining a driving licence for five years. He appealed against that sentence, the main ground of appeal being that quarter sessions had no jurisdiction under section 20 (5) of the Act of 1948 to impose a sentence of disqualification in addition to a sentence of Borstal training.

M. D. L. Worsley for the appellant.

[1] Criminal Justice Act, 1948, s. 20 (5): "Where an offender is so committed for sentence as aforesaid, the following provisions shall have effect, that is to say:—(*a*) the appeal committee or court of quarter sessions shall inquire into the circumstances of the case and may—(i) if satisfied of the matters mentioned in subs. (1) of this section, sentence him to Borstal training; or (ii) in any case, deal with him in any manner in which the court of summary jurisdiction might have dealt with him; . . ."

C. C. A.

1959

Reg.
v.
Dangerfield.

No cases were cited in argument.

Lord Parker C.J. delivered the following judgment of the court: The appellant was convicted at the Acton Magistrates' Court of taking and driving away a motor-cycle without authority or insurance. He was committed to Middlesex Sessions under section 28 of the Magistrates' Courts Act, 1952, and was then sentenced by the chairman under section 20 of the Criminal Justice Act, 1948, to Borstal training and disqualified for five years.

Two points are taken by Mr. Worsley on an appeal against that sentence, first, a point of law that, in fact, the sentence was in a form which is not permissible, and secondly, that in any case Borstal training and disqualification for five years is too severe a sentence.

The court sees no reason to interfere with the sentence of Borstal training as a matter of principle. The appellant is a young man 17 years of age. He has been on probation for larceny. He has been to an approved school for two larcencies in dwelling-houses, fined for obstructing the police, fined for common assault and again fined in August, 1958, for obstructing the police. It appears that he is a man of very hot temper, and he must learn to control it. The chairman thought, and indeed the magistrates must have thought because they committed him under section 28 of the Act of 1952, that Borstal training was the appropriate sentence for him. The court, having considered the matter, sees no reason to interfere. That is the question of principle.

The point of law that arises is this: The magistrates committed the appellant to sessions under section 28 of the Magistrates' Courts Act, 1952. It is, the court thinks, perfectly clear that when that is done the powers of sessions under section 20 of the Act of 1948 are limited, as subsection (5) in effect says, to sentencing the man to Borstal training or—and it is an alternative—to dealing with him in any manner in which the court of summary jurisdiction might have dealt with him. Accordingly, it is said that sessions cannot at one and the same time sentence a man to Borstal training and disqualify him. That, the court feels, is perfectly clear; but in the present case there were no less than five charges, and although in form the sentence of the chairman is wrong because he, in effect, gave the sentence of Borstal training and disqualification in respect of each concurrently, yet it was within his power, and therefore within the power of this court, to provide that on four of the charges he should be sentenced to Borstal training concurrently, and that on the fifth charge the sentence should be one that the magistrates could have inflicted, namely, disqualification. Accordingly, this court will vary the sentence to one of Borstal training on four of the charges concurrently, and five years' disqualification on the other.

I would like to add one further matter which is so often overlooked. In the case of a young man of 17, as the appellant was,

it is possible for magistrates to commit him under section 29 of the Magistrates' Courts Act, 1952. That is a general committal, not merely for Borstal, and then under section 29 of the Criminal Justice Act, 1948, sessions will have complete power to deal with the matter and are not limited in the way they are where their powers are derived from section 20 of the Act. Accordingly, as this court has said before, magistrates should remember that in the case of a boy over 17 it is simpler to commit him under section 29, rather than under section 28, of the Magistrates' Courts Act, 1952.

Sentence varied.

Solicitor: *Registrar, Court of Criminal Appeal.*

[CHANCERY DIVISION.]

1960
Feb. 12, 16, 17.
Cross J.

**In re* ALFRED HERBERT LTD. PENSION AND LIFE ASSURANCE SCHEME'S TRUSTS.

ALFRED HERBERT LTD. *v.* HANCOCKS AND OTHERS.

[1959 A. No. 877.]

Pensions Scheme—Construction—Amendment—Reservation by employers of right to discontinue, suspend or amend in the event of "unforeseen circumstances"—Whether power to amend beneficial interests of employees.

Contract—Construction—Power to amend terms unilaterally—Pensions scheme—"Unforeseen circumstances."

In 1939 a company introduced a contributory scheme of pensions and life assurance for staff employees. In the booklet setting out the rules of the scheme, which was issued to all employees, it was stated: "Change of scheme. While the company has every hope "of maintaining its contributions to the scheme, the right is reserved "in the event of unforeseen circumstances to discontinue the "scheme . . . or suspend or amend it from time to time. . . ." It was provided that if a member of the scheme died while in the service of the company and before going on pension, the normal pension age being attained on March 1 nearest to the sixty-fifth birthday, the life assurance benefit would be paid and the whole of his contributions would be returned. By an amendment made in 1955 it was provided that on such event the life assurance benefit applicable immediately prior to normal pension age would be paid together with a cash sum equivalent in value to five years' payments of the pension which would have been payable had the employee retired on the date of death. Another amendment made in 1955, with a view to saving estate duty, enabled an employee to nominate a beneficiary to whom the death benefit might be paid if he survived the employee; if the employee left no nominated beneficiary surviving it would be payable to the widow or widower of the employee, and if the employee left neither nominated beneficiary nor widow or widower surviving it would be payable to the employee's estate. The nominated beneficiary was to be either the employee's wife, husband,

1960

Herbert (Alfred) Ltd. v. Hancocks.

ancestors, or descendants, or such other person as the company considered to have a moral claim on the employee.

An employee joined the company in 1897; he was married in 1907. He joined the scheme and after March 1, 1951, when he attained the normal pension age, he continued to work for the company, although he made no more contributions. He made no nomination under the amendment of 1955. On December 31, 1957, he stopped working for the company but it was agreed that he should be regarded as remaining in the company's employment until March 31, 1958, when he would begin to draw his pension. On February 3, 1958, he made a will appointing the second and third defendants as his executors and on March 28, 1958, he died. There thus became payable life assurance and pension benefits.

On a summons to determine, inter alia, whether on the true construction of the booklet the 1955 amendment as to nomination of beneficiaries was valid, and, if not, whether the benefits were payable to the widow, or to the executors of the deceased employee:—

Held, that, on its construction, the "Change of scheme" clause must be limited to the company's part of the contract and did not enable the company to vary the beneficial interests of the employees, and that, therefore, in the absence of a further contract between the company and the employee, the amendment of the scheme as to nomination of beneficiaries was not binding on the employee.

Adjourned summons.

On March 1, 1939, the plaintiff company, Alfred Herbert Ltd., introduced a contributory scheme of pensions and life assurance for staff employees. A booklet, dated February, 1939, was issued to employees setting out the rules of the scheme, in which it was stated: "Change of scheme. While the company has every hope "of maintaining its contributions to the scheme, the right is "reserved in the event of unforeseen circumstances to discontinue "the scheme after six months' notice, or suspend or amend it "from time to time on any anniversary of the starting date, "without prejudice, however to the pension benefits secured by "contributions already paid. Should the scheme be discontinued "no part of the benefits secured by the group policies shall be "retained by the company." The rules provided that if a member of the scheme died while in the service of the company and before going on pension, the normal pension age being attained on March 1 nearest to the sixty-fifth birthday, the life assurance benefit would be paid and the whole of the member's contributions would be returned. Each member was to receive a certificate of membership. On the back of the certificate were five paragraphs dealing with pension benefits, life assurance benefit, disability benefits, options and continuance of benefits, each paragraph containing a reference to the booklet. By an amendment made in 1955 it was provided that if a member died while in the service of the company at or after normal pension age and before going on pension, the life assurance benefit applicable immediately prior to normal pension age would be paid, together with a cash sum equivalent in value to five years' payments of the pension which would have been payable had the employee retired on the date of death. Another amendment made

in the same year provided that an employee might nominate a beneficiary to whom the death benefit described in the pension, death, disability, early retirement and late retirement clauses was to be payable, and, if the beneficiary survived the employee the benefit would be so paid; if the employee left no nominated beneficiary surviving the death benefit was to be payable to the employee's widow or widower, and if an employee left neither nominated beneficiary nor widow or widower surviving, to the employee's estate. The beneficiary for this purpose had to be one or more of the following persons: the employee's wife, husband, ancestors or descendants, or such other persons as the company considered to have a moral claim upon the employee. Nominations and revocations or alterations were subject to the consent of the company and had to be made on a special form. All employees who were members of the scheme were given copies of the amendments but they were not asked to sign any form of consent adopting them.

The deceased, Laurence Ambrose Hancocks, joined the service of the company in November, 1897. In August, 1907, he married the first defendant, Annie Manilla Hancocks, but they later became estranged and on May 22, 1931, she obtained an order against him for the restitution of conjugal rights. He joined the scheme at its commencement and received a certificate of membership; on March 1, 1951, he attained the normal pension age but he continued to work for the company although he made no further contributions to the scheme. He did not ask for a form of nomination under the amendment of 1955 and neither assented to nor dissented from the amendments. On December 31, 1957, he stopped working for the company but it was agreed between them that he should be regarded as remaining in the company's employment until March 31, 1958, when he would begin to draw his pension. On February 3, 1958, he made a will appointing the second and third defendants as his executors and he died on March 28, 1958. As a result of the scheme and the amendment there became payable sums representing the life assurance benefits derived exclusively from the company's contributions and the pension.

The company, as trustee of the scheme, took out a summons to determine whether, inter alia, on the true construction of the booklet and in particular of the "Change of scheme" paragraph, the 1955 amendment as to nomination of beneficiaries was valid, and, if not, whether the benefits were payable to the widow or to the executors of the deceased.

E. F. R. Whitehead for the company.
P. R. Oliver for the widow of the deceased.
A. C. Sparrow for the executors.

The following case was cited in argument: *Tatem Ltd.* v. *Gamboa.*[1]

[1] [1939] 1 K.B. 132; [1938] 3 All E.R. 135.

1960

Herbert (Alfred) Ltd. v. Hancocks.

Cross J. stated the facts substantially as set out above and continued: The problem I have to consider is whether the amendment in 1955 with regard to nomination and widows was binding on the deceased. This amendment was made partly, I think, in consequence of the decision in *In re J. Bibby & Sons Ltd. Pensions Trust Deed*,[1] when the company realised that if they made a change on these lines, the result would be that that part of the death benefit which resulted from the company's contribution would not be subject to estate duty if the deceased made a nomination or left a widow, as the deceased would not be competent to dispose of it, and there would be no benefit purchased or provided by the deceased accruing on his death under section 2 (1) (*d*) of the Finance Act, 1894. A further reason for the change was that under the practice of the Estate Duty Office, even part of the death benefit which had been purchased or provided by a member would not be aggregable with the rest of the estate in the event of his making a nomination or leaving a widow. Mr. Sparrow, on behalf of the executors, first argued that the scheme, that is to say, the contractual arrangement between the employees and the company, did not include the part of the booklet headed "Change of scheme." He argued that the terms of the scheme were to be found exclusively in the certificate issued and that only those parts of the booklet were incorporated in the scheme which were in fact referred to in the certificate. I cannot accept that argument. I cannot attach such paramount importance to the certificate which is merely evidence of the fact that the employee had become a member of the scheme. It is quite natural, I think, that it should have indorsed on the back of it some of the main provisions of the scheme. The mere fact that there is no reference on the back of the certificate to the "Change of scheme" clause in the booklet does not seem to me to be very striking or very important. After all, when the chairman and governing director sent out the booklet, he asked the employees to study it and fill in their forms of application after reading it. It sems to me that as there is no contradiction between the certificate and the booklet there is no reason whatever for saying that the "Change of scheme" provision in the booklet was not part of the scheme. Had there been a contradiction, had one found something in the certificate or in the policy which contradicted the booklet, very different considerations would have arisen; but as things are I see no reason for not holding that the "Change of "scheme" provision in the booklet applied to and bound the deceased.

On that footing, one has to consider whether on the true construction of this "Change of scheme" provision this amendment with regard to nominations and widows was binding on members who did not assent to it. It is to be remembered that the power of amendment under the "Change of scheme" provision

[1] [1952] W.N. 402; [1952] 2 T.L.R. 297; [1952] 2 All E.R. 483.

was only to arise "in the event of unforeseen circumstances." It might, I suppose, be argued on a strict construction of those words that the realisation by the company in 1955 that they could obtain estate duty benefits for the employees by making that change was not an unforeseen circumstance. It was not something new which had happened since 1939, but was a possibility which always existed although the company did not realise it. Mr. Sparrow, however, did not contend that the realisation that this estate duty advantage could be obtained was not an unforeseen circumstance. His argument on this branch of the case was that, though in the abstract it was an unforeseen circumstance, it was not the sort of unforeseen circumstance which is envisaged by the "Change of "scheme" provision. He argued that those provisions really were inserted for the benefit of the company, and were only intended to reserve a right to the company to get out of its obligations to continue the scheme or to contribute as much to the scheme if it became unable or unwilling to go on, and that, on their true construction, they were not intended to enable the company to vary the beneficial interest of the employees or the destination of their benefits against their will. The clause is loosely drawn, and the point is not entirely an easy one, but on the whole, my view is that Mr. Sparrow is right.

The clause starts: "While the company has every hope of "maintaining its contributions to the scheme"—that seems to me to strike the keynote of the clause. The company are saying: "We hope we shall be able to carry on with the scheme and to go "on contributing but perhaps we shall not be able or willing to do "so." The clause continues: "The right is reserved . . ." I attach some importance to those words. It seems to me that they are more apt to point to a right that the company is retaining for its benefit than a power of amendment in the general interest of the beneficiaries which is what Mr. Oliver says is covered by this provision. It proceeds: "the right is reserved in the event of unfore-"seen circumstances to discontinue the scheme after six months' "notice or suspend or amend it from time to time." Mr. Oliver says those words are wide enough to cover, for example, not only the reduction of the company's contributions but also an amendment of the beneficial interest. If one concentrates on the word "amend" alone, that is true enough; but the clause continues "amend it from time to time on any anniversary of the starting "date without prejudice, however, to the pension benefits secured "by contributions already paid." That, again, seems to me to strike the same note as the opening words. The company are saying that anything that has been earned up to date for the employee either by his contributions or ours—at all events anything that can be called pension benefit—is to remain secured to him notwithstanding the amendment. The insertion of those words to which I have last referred suggests that the scope of the proposed change is limited to the company's part of the contract, and that it was not intended by this clause to enable the company to change the

1960

Herbert (Alfred) Ltd. v. Hancocks.

Cross, J.

beneficial interests however much it thought reasonable that such changes would be in the interests of the beneficiaries. Mr. Oliver conceded, of course, that even on his construction, the company could not change the beneficial interests in any way. They could not, for example, say that half the death benefit shall be paid to the chairman of the company or anything like that. But he says that any change of beneficial interest which the company bona fide considered was in the interests of the employees could be made. He was prepared to say that, if the company had thought that the estate duty position required it, they could even have omitted the power of nomination; provided, however, that if a man left a widow inevitably the death benefit should go to her and only to the estate if he did not leave a widow. The company might assume that ninety-nine men out of a hundred, if they left widows, would want the widows to get the money, and so it would not be unreasonable to make that change. I cannot myself give so wide a construction to this clause.

Assuming that I was against Mr. Sparrow on this point, there would come the further question whether even so the amendment could be valid against the deceased because of the words "without "prejudice, however, to the pension benefits secured by contribu- "tions already paid." On that question Mr. Oliver submitted that here the amount of the benefits is not being changed but only their destination, and that those words do not assist Mr. Sparrow. Alternatively, he submitted that "pension benefits" mean simply the pension and do not cover any part of the death benefit—either the life assurance part, or the return contributions, or a sum equivalent to a five years' pension. Had I been in favour of Mr. Oliver on the main point, I think that there would have been a great deal to be said for his argument on this point, but it is not necessary for me to arrive at any definite conclusion, because I have decided on the main point that this amendment was not capable of binding the deceased without his consent, and no one has suggested that he became bound by it by consenting to it in any way. In my judgment the 1955 amendments were not binding on the deceased.

There remains another point which I do not think the evidence enables me to determine, namely, if the amendment had not been made, then under the scheme as it stood the deceased's estate would only have been entitled to the life assurance benefits of £1,100 provided by the company and a return of the contributions. It is agreed that the sum of £2,040, five years' pension, the changed figure introduced by the 1955 amendments, is substantially more than the return of the contributions. Mr. Oliver argues that, even if he is wrong on the main point, Mr. Sparrow cannot have it both ways. He cannot both reject the 1955 amendments, so far as they relate to nominations and widows, and claim the benefit of the difference between the contributions and the five years' pension benefit. At first blush I think there is considerable force in that argument, but I think it may depend to

some extent on what the practice of the company was before the 1955 amendments were made, whether these additional payments were covered by the insurance policy, when they became so covered, and whether the company paid any increased premiums in respect of them. This was not a point envisaged on the taking out of the summons, and I do not think that the evidence is sufficient to enable me to decide it.

Order accordingly.
Defendants' costs to be taxed on a common fund basis.

Solicitors: *Warren, Murton & Co. for Pinsent & Co., Birmingham; Joynson-Hicks & Co. for R. A. Rotherham & Co., Coventry; Julius White & Bywaters for Penman, Johnson & Ewins, Coventry.*

M. G. T.

[QUEEN'S BENCH DIVISION.]

*ISAACS AND OTHERS *v.* MARKET BOSWORTH RURAL DISTRICT COUNCIL.

1960
Jan. 18, 19.

Lord Parker C.J., Cassels and Ashworth JJ.

Rating—"Social welfare"—Organisation whose purpose is advanced—Trade union or trustees—Convalescent home and home for the aged—Trustees subject to strict control by executive council of union—Rating and Valuation (Miscellaneous Provisions) Act, 1955 (4 *&* 5 *Eliz.* 2, *c.* 9), *s.* 8 (1) (*a*).

A hereditament consisting of buildings and grounds used as a convalescent home and home for old people was vested in trustees. The benefits of the homes were confined to the members of a trade union and their wives. The main objects of the union were not concerned with charity or the advancement of social welfare, but subsidiary objects included the provision of benefits of the type provided by the homes. The affairs and business of the union were administered by its executive council. The trustees were appointed under a trust deed which showed that they were subject to strict control by the executive council, which was empowered to exercise supervision and control of the management of the homes and to make rules for their day-to-day running. The trustees consisted of two officers and the trustees of the union, a trustee chosen by a ballot of union members and a trustee appointed by the executive council. The funds for the purchase of the land in and the erection of the buildings on the hereditament were largely provided by the union, and the union made a substantial annual grant to the trustees for the purposes of the administration of the homes. Alterations of the trust deed could be made only with the approval of the executive council.

On appeal by the rating authority against a decision of quarter sessions that the hereditament was entitled to rating relief under

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[Reported by GROVE HULL, Esq., Barrister-at-Law.]

1960

Isaacs
v.
Market
Bosworth
R. D. C.

section 8 of the Rating and Valuation (Miscellaneous Provisions) Act, 1955 [1]:—

Held, that the organisation for the purposes of which the hereditament was occupied was the trade union and not the trustees, and that, in consequence, the hereditament was not entitled to rating relief.

Dicta of Lord Simonds and Lord Denning in *Skegness Urban District Council* v. *Derbyshire Miners' Welfare Committee* [1959] A.C. 807, 823, 827; [1959] 2 W.L.R. 717; [1959] 2 All E.R. 258, H.L.(E.). applied.

Case stated by Leicester county justices sitting in quarter sessions at Leicester.

By a notice dated May 29, 1957, the respondents, the trustees of "Natsopa Memorial Homes" (hereafter referred to as "the "trustees"), appealed to quarter sessions under section 4 of the Poor Relief Act, 1743, against a rate made by the appellant rating authority on or about April 1, 1956, in respect of the financial year 1956–57 and further against the demand for payment thereon and the refusal of the rating authority in connection therewith to afford the trustees the relief to which the trustees claimed to be entitled under section 8 of the Rating and Valuation (Miscellaneous Provisions) Act, 1955, in respect of a hereditament at Bosworth Road, Wellesborough.

The justices heard the appeal on July 22 and 26, 1957, and found (inter alia) the following facts. The trustees were the trustees of a trust deed dated September 27, 1920, the trusts of which were varied by (inter alia) a deed of variation dated December 6, 1948. The hereditament was vested in the trustees in fee simple upon the trusts contained in the trust deed (as varied), and consisted of buildings and the grounds thereof used as a convalescent home and home for old people. The history and present operation of the homes was set forth in a pamphlet annexed to the case stated. The buildings included an administrative block, a dining hall, bedrooms, a conference hall, a sick bay, a chapel, accommodation for old people, and the necessary buildings for a laundry and other services.

Save for two unimportant exceptions, the homes were conducted for the benefit of members of the National Society of Operative Printers and Assistants ("Natsopa"—hereafter referred to as "the society") and their wives. The society was a registered trade union whose members were generally employed in the printing trade. A copy of the rules of the society was annexed to the case stated. The society had approximately 43,000 members in England and Wales. The affairs and business of the society were administered by its executive council, subject to the control

[1] Rating and Valuation (Miscellaneous Provisions) Act, 1955, s. 8: "(1) This section applies to the following hereditaments, that is to say—(*a*) any hereditament occupied "for the purposes of an organisation "(whether corporate or unincorporate) "which is not established or conducted "for profit and whose main objects "are charitable or are otherwise concerned with the advancement of . . . "social welfare . . ."

and direction of the governing council of the society. The objects of the society were set forth in rule 2 of its rules. The main objects were concerned with conditions of employment and industrial disputes, but there were further objects referred to below.

The moneys for the erection and establishment of the homes were provided by the society, its members and friends. The trustees at the time of the hearing received an annual sum of £18,000 from the society, representing a contribution of 2d. per member per week. The trustees received some additional income from investments, the sale of garden produce and the Natsopa Co-operative Society, which ran a shop at the homes. The balance sheet showed an excess of income over expenditure for the year ending December 31, 1955, of £605.

There was convalescent accommodation at the home, for some 60 to 69 members of the society or members' wives, including members not recovering from illness but in need of a period of residence to prevent a breakdown of health. Applicants were normally admitted for a period of three weeks. Applications for admission in accordance with the society's rules were supported by a doctor's certificate. Only those qualifying under the rules were regarded as entitled to admission, but in practice there were sufficient vacancies for all such applicants, and applicants who were not qualified under the rules, e.g., members with less than 12 months' membership of the society, were sometimes admitted.

At all material times it had been the practice to hold at the homes the annual governing council meeting of the society lasting four days and attended by some 90 delegates, and two meetings of the executive council of the society of two days each, attended by some 30 members. Accommodation had been provided for persons attending these meetings at the homes at cost, but in future these meetings would be held elsewhere.

The trust deed dated September 27, 1920, set out the trusts on which the trustees held the hereditament. The primary purpose of the purchase was shown by the deed to be the provision of a memorial for the members of the society who fell in the First World War, but there were secondary purposes which included the provision of a convalescent home for members of the society recovering from illness of any kind and the provision of a home for aged members of the society who were no longer able to support themselves by working at their trade, and for their wives.

The rules referred to above included provisions as follows. Rule 2: "The objects of the society shall be . . . (h) to provide "superannuation for old members, and for members of the staff "or employees of the society. (i) To provide and maintain a "convalescent home for the benefit of members and wives." Rule 10: ". . . (3) The governing council shall have supreme "control and management of all the affairs and officers of the "society, and its decisions shall be final and binding upon all "members. (4) The powers of the governing council shall include

1960

Isaacs
v.
Market
Bosworth
R. D. C.

"the following . . . (i) do all things necessary in connection with "the management of the Memorial Home."

It was contended on behalf of the trustees that the hereditament was occupied by the trustees; that they were an unincorporated body established for the purposes of a war memorial and convalescent home for aged people; that in the "non-technical" sense the homes were a charitable or benevolent institution and there was an element of benevolence or bounty in the subscriptions which were contributed to the home; that the trustees were, by virtue of the deed of 1920, incapable of making a profit and were therefore a body not established or conducted for profit; that the benefits of the homes were provided for a section of the community consisting of the relevant branches of the printing trade; and that the main objects of the trustees were concerned with the advancement of social welfare.

It was contended on behalf of the rating authority that the hereditament was occupied for the purposes of the society; that under the provisions of the deed of 1920 and the rules of the society and in practice the homes were under the control of the society; that the objects of the society concerned with the provision of benefits were not its main objects; that the objects of the society in providing the benefits were not concerned with social welfare but were akin to those of an insurance company or friendly society; that the main objects of the society were not within section 8 of the Act; that if the hereditament were occupied for the purposes of the trustees, their main object was not concerned with the advancement of social welfare; and that the trustees could not be regarded as neither established nor conducted for profit.

The justices were of opinion that the hereditament was occupied by the trustees for the purposes of a memorial convalescent home and old people's homes; that the trust was not established nor were the homes and premises conducted for profit; that the main objects of the trust were the advancement of social welfare; and that accordingly section 8 of the Act applied to the hereditament. The justices, accordingly, allowed the trustees' appeal. The rating authority appealed.

F. A. Amies and *R. St. G. Calvocoressi* for the trustees.
S. W. Templeman for the rating authority.

The following cases, in addition to those referred to in the judgment, were cited in argument upon the point decided: *Smith, Stone & Knight Ltd.* v. *Birmingham Corporation*[2]; *In re Amos, Carrier* v. *Price*.[3]

Cur. adv. vult.

Jan. 19. Lord Parker C.J. I will ask Ashworth J. to give the first judgment.

[2] [1939] 4 All E.R. 116. [3] [1891] 3 Ch. 159; 7 T.L.R. 559.

ASHWORTH J. This is an appeal by way of case stated from a decision of the court of general quarter sessions for the county of Leicester, sitting at Leicester. The present appellants, who were the respondents in the court below, are the Market Bosworth Rural District Council, and the present respondents are conveniently referred to as the trustees of Natsopa Memorial Homes. Natsopa is the condensed title of the National Society of Operative Printers and Assistants, which is a well-known trade union; I shall refer to it as the society. In the court below the trustees appealed against a rate made by the rating authority, contending that the premises in question fell within the ambit of section 8 (1) (*a*) of the Rating and Valuation (Miscellaneous Provisions) Act, 1955. The trustees were successful, hence the present appeal.

[His Lordship stated the facts and continued:] Throughout the deed of 1920 there are frequent references to the executive council, and it is, in my view, plain that the trustees are subject to strict control by that body. As examples, I refer to clauses 6 and 8. Clause 6 provides: "The home shall be managed by the "trustees under and subject to the direction and control of the "executive council," and goes on: "The executive council may "appoint a management committee consisting of not more than "10 or less than three persons being members of the society "whether members of the executive council or not to supervise "and control the management of the home . . ." Clause 8 provides: "The executive council shall have full power to make "rules and regulations dealing with all or any of the following "matters," and without setting them out they are incidental matters relating to the general day-to-day management of the home, such as the engagement and dismissal of officers and servants, the rights, duties, remuneration and terms of employment of such officers and servants and the qualification and selection of inmates. Lastly, there is a composite clause in these words: "Any other matters relating to the management discipline and "good government of the home."

The link between the executive council and the trustees which appears from that first deed is, in my view, further emphasised by the provisions contained in the deed of 1948, which provided a new clause 13 as to the appointment of trustees. Clause 13 (i) now reads: "The present trustees are the two trustees of the "society the president of the society, the general secretary of the "society one trustee chosen by the members of the society by "ballot and one trustee being a member of the society appointed "by resolution of the executive council . . ." Moreover, by this same deed a further sub-clause was added to clause 13 in these words: "The trustees shall nominate for the decision of the "executive council one of their number to be designated 'con-"'troller' of the memorial home services and such controller "shall act for and on behalf of all the trustees in all matters

1960

Isaacs
v.
Market
Bosworth
R. D. C.

Ashworth J.

"relating to the day to day administration of the memorial "home."

There is one further provision in the old deed to which reference should be made, and that is contained in clause 14, namely: "It shall be lawful for the trustees from time to time by deed "with the approval of the executive council to make such altera-"tions variations and modifications of the trusts powers and "provisions of these presents as having regard to the experience "acquired in the administration of the trust and the circum-"stances of the time may seem to be necessary desirable or "expedient but so that no such alteration variation or modification "shall in any way prejudice or affect the main object of the trust "namely the establishment and maintenance of the Natsopa "Memorial Home for the purposes hereinbefore expressed."

The governing council is dealt with in rule 10 of the rules, and by sub-rule (3) it is provided: "The governing council shall have "supreme control and management of all the affairs and officers "of the society, and its decisions shall be final and binding upon "all members." By sub-rule (4) (i) the powers of the governing council are made to include the following: "Do all things "necessary in connection with the management of the memorial "home." It is not necessary to refer in detail to the rules dealing with the home.

One further document was exhibited to the case, namely, the pamphlet describing the history and present operation of the homes, and there are the following statements in it which, in my view, are of considerable importance: "The necessary funds "for the purchase of the land and erection and equipment of the "building were raised by a grant of £1,000 from the society's "general fund, by a levy on the membership spread over three "years and by voluntary donations from friends. In the first "three years the levy produced £24,876, and voluntary donations "to date amount to £29,596. Maintenance was provided by "allocating to the home fund a percentage of each member's "weekly contribution to the society. The purposes of the homes "were set out in a trust deed dated September 27, 1920, which "placed the property in the possession of a board of trustees. "To ensure that the property was always to be used for the "purpose for which it had been created the deed provides," and then are set out four summary statements of the provisions. There follows this paragraph: "It will therefore be noted that the "property though vested in several trustees, is at the same time "under the complete authority of the executive council and is "created as a permanent memorial." That seems to me to emphasise still further the very close link which connects the trustees with the society.

I now turn to section 8 (1) of the Act of 1955. That reads as follows: "This section applies to the following "hereditaments, that is to say—(*a*) any hereditament occupied

" for the purposes of an organisation (whether corporate or unin-
" corporate) which is not established or conducted for profit and
" whose main objects are charitable or are otherwise concerned
" with the advancement of religion, education or social wel-
" fare . . . " I should state that it was not suggested that either the trustees or the society are an organisation established or conducted for profit, and that issue does not enter into this case.

The rating authority contend, first, that the organisation for the purposes of which the hereditament is occupied is the society, and that its main objects do not fall within the types mentioned in paragraph (*a*) of the subsection. Secondly, the rating authority contend that, even if the trustees are to be regarded as the organisation occupying the hereditament, the main object of the trustees is the provision of the convalescent home for the society, and their main objects do not fall within the qualifying types.

Section 8 of the Act has already been before the courts in a number of cases, and has at least twice been considered in the House of Lords, namely, in *National Deposit Friendly Society Trustees* v. *Skegness Urban District Council* [1] and *Skegness Urban District Council* v. *Derbyshire Miners' Welfare Committee.*[2]

So far as the first of the rating authority's contentions is concerned, it is, in my view, clear that one of the crucial issues is the question: What is the organisation for the purposes of which the hereditament is occupied? In the *Derbyshire Miners'* case Lord Simonds said [3]: " My Lords, I turn again to the relevant
" section and note first the curious wording ' occupied for the
" ' purposes of an organisation . . . whose main objects,' etc.
" It is by no means clear to me what is the ' organisation ' whose
" main objects have to be considered. Is it the ' Social Welfare
" ' Organisation ' set up under the Act of 1952 to which I have
" already referred? Or is it the body of trustees who appear in
" fact to manage the holiday centre, or is it a committee, whether
" the Miners' Welfare Committee which has been mentioned or
" some other committee? It is not a satisfactory way of disposing
" of the case, but I see no alternative to saying that, whatever the
" ' organisation ' may be, its main object is nothing else than the
" provision of a holiday centre such as is described in the case.
" If so, the question is whether such a provision is concerned with
" the advancement of social welfare." Lord Denning said [4]:
" Such being the facts, if I were asked: ' For what purpose is
" ' the land used? Is it used " for the advancement of social
" ' " welfare " ? ' I should probably say ' Yes.' But I would
" hasten to point out that the question is not ' For *what* purpose
" ' is the land used? ' The question is: ' For *whose* purpose is it
" ' used? ' or more accurately: ' For the purposes of *what*
" ' *organisation* is it used, or rather occupied? ' Many a holiday

[1] [1959] A.C. 293; [1958] 3 W.L.R. 172; [1958] 2 All E.R. 601.
[2] [1959] A.C. 807; [1959] 2 W.L.R. 711; [1959] 2 All E.R. 258.
[3] [1959] A.C. 807, 823.
[4] Ibid. 827.

1960

Isaacs
v.
Market
Bosworth
R. D. C.

Ashworth J.

"camp is used for similar purposes to this one. The holiday camps of Messrs. Butlin provide holidays at low cost for people who could not otherwise afford them, but they do not obtain relief from rates on this score. The reason is because that organisation does not qualify under section 8 (1) (*a*). Again, many convalescent homes obtain relief, but only if the relevant organisation qualifies. The convalescent home in *National Deposit Friendly Society Trustees* v. *Skegness Urban District Council*[5] did not get relief, because the friendly society did not qualify. And I would add that it is not always right to take the occupier and treat him as the 'organisation.' In the case of a members' club, the committee of management occupy the club house, but it is occupied, not for the purposes of the committee-men, but for the purposes of the club itself. The relevant organisation is the club itself—the unincorporated association—and in order to get relief from rates, the club itself must qualify under section 8 (1) (*a*)." It is to be noted that section 8 (1) (*a*) contains no reference to the occupier himself nor, as Lord Denning pointed out, does the section refer to the purpose of the occupation. In order to qualify for relief an occupier must show that his occupation is for the purposes of an organisation falling within the qualifying conditions.

In the course of what, if I may so, was a careful and persuasive argument, Mr. Templeman contended for the trustees that it was unnecessary to look beyond them since they are in fact the occupiers. He contended that they were an unincorporated organisation, and that their occupation was for the purposes set out in the trust deed, and that their main objects were either charitable, or at least concerned with the advancement of social welfare. He conceded that if the trustees could properly be described as bare trustees the relevant organisation would be the society, and that, as indeed is found in the case stated, their main objects were not such as to fall within the subsection; but he urged that these trustees are not bare trustees, and that they would have no right to act outside the powers and duties set out in the deed even if the executive council directed them to do so. In my view, the fact that contravention of the provisions of the trust deed may and, no doubt, would be prevented, does not provide conclusive evidence that the trustees are themselves the organisation for whose purposes the hereditament is occupied. For myself, I think that the approach suggested on behalf of the trustees is somewhat narrow, and that it does not take sufficiently into account the relevant operative words of the section "for the purposes of an organisation." If one keeps in mind the following factors: first, the provisions of the deed; secondly, the constitution of the trustees; thirdly, the rules of the society and, fourthly, the statements in the pamphlet—there is, in my view, cogent evidence to show that the organisation for the purposes of

[5] [1959] A.C. 293.

which the hereditament is occupied is, indeed, the society. I would go further: In my judgment the evidence on this first issue does not admit of any other conclusion but that the organisation for the purposes of which the hereditament is occupied is the society, and on this ground, in my view, the appeal should suceed. In these circumstances, I do not think it necessary to embark upon a discussion of the other issue, namely, whether occupation for the purposes of the trustees would itself justify a claim for relief.

CASSELS J. I agree.

LORD PARKER C.J. I agree and have nothing to add.

Appeal allowed with costs.

Solicitors: *Robinson & Bradley for Thomas Flavell & Sons, Hinckley; Shaen, Roscoe & Co.*

[QUEEN'S BENCH DIVISION.]

* HESZ *v.* SOTHEBY & CO.

1960
Feb. 4, 5;
March 1, 2.

Master
Diamond.

PRACTICE NOTE.

Open Court — Proceedings in — Master — Reference under R.S.C., Ord. 36B, *rr.* 2, 6.

The plaintiff issued a writ for the return of a picture which had been lost by auctioneers to whom he had taken it to be sold. On proceedings for summary judgment under R.S.C., Ord. 14, Master Lawrence gave the plaintiff leave to sign judgment for the return of the picture or its value, and damages to be assessed.

On February 4, 1960, Master Diamond began the hearing of the reference to assess the value of the picture and the damages.

Stephen Terrell for the plaintiff.
Robin Dunn for the defendants.

Feb. 4. Counsel pointed out that there were members of the public present in the room.

MASTER DIAMOND. This is a public proceeding.

Solicitors: *Pritchard, Englefield & Co.; Farrer & Co.*

[Reported by Miss EIRA CARYL-THOMAS, Barrister-at-Law.]

[BRISTOL ASSIZES.]

1959
Nov. 10, 11, 26.

Devlin J.

* PARKER AND ANOTHER v. CLARK AND ANOTHER.

[1958 P. No. 2349.]

Contract—Formation—Intention to create legal relationship—Family arrangement—Sharing home—Agreement by plaintiffs to leave their own home and share home of defendants and by defendants to devise their house to female plaintiff.

Contract—Termination—Family agreement—Sharing home—Promise of bequest by owners—Whether agreement for their lives.

Vendor and Purchaser—Contract—Memorandum in writing—Offer in writing—Loss of letter of acceptance—Law of Property Act, 1925 (15 *Geo.* 5, *c.* 20), *s.* 40 (1).

The defendants, C. and Mrs. C., were an elderly retired married couple who, in 1955, were living in a large house which C. owned, called "Cramond." The female plaintiff, Mrs. P., was Mrs. C.'s niece, and lived with the male plaintiff, P., her husband, who had also retired, in their cottage, "The Thimble." The plaintiffs were 20 years younger than the defendants.

The defendants had very little domestic service and were not in good health, and the plaintiffs, with whom they were on very friendly terms, used often to visit them at "Cramond," sometimes with the object of assisting them when they were unwell. At the conclusion of one of these visits, C. suggested to P. that the plaintiffs should "come and live with us." P. later wrote to say that the plaintiffs approved of the idea, but that it would mean selling "The Thimble." On September 25, 1955, C. replied in a letter which was produced at the trial, saying that the major difficulty about what was to happen to "The Thimble" could be solved by his leaving "Cramond" and its contents to Mrs. P., her sister and her daughter, after the death of himself and Mrs. C. C. set out the maintenance expenses of "Cramond" (about £200) and continued: "If we go fifty-fifty on maintenance of house it would "cost you half of the £200 odd as set out and half the running "expense of food, drinks, etc., but I think it would be fair if your "share of the £200 was the same as you now pay at the "'Thimble' if it is less than £200. I would pay for a daily "woman four mornings a week, have a T.V. and a new car. You "could sell out and pay off your mortgage and invest proceeds to "increase your income. I hope your family vote for or against this "will be unanimous." P. replied in a letter which was not preserved, saying that he accepted C.'s offer and would sell "The "Thimble."

P. then sold "The Thimble" and on March 1, 1956, the plaintiffs moved to "Cramond." Later in 1957, however, C. told P. that the partnership was not working, and that the plaintiffs would have to find some other place to live.

On a claim for damages for breach of the agreement contained in the letter of September 25, 1955:—

Held, (1) that the language of the letter of September 25, 1955, and the reply thereto, taken with the surrounding circumstances, showed that the parties intended to enter into an agreement in

[Reported by Grove Hull, Esq., Barrister-at-Law.]

the terms of the letter which was binding in law, and not a mere unenforceable family arrangement (post, p. 294).

Balfour v. *Balfour* [1919] 2 K.B. 571; 35 T.L.R. 609 distinguished.

Synge v. *Synge* [1894] 1 Q.B. 466; 10 T.L.R. 194; and dictum of Lord Lyndhurst L.C. in *Hammersley* v. *De Biel* (1845) 12 Cl. & Fin. 45, 78 applied.

(2) That, having regard to the exceptional circumstances of the defendants' age and state of health, there was sufficient in the language of the letter to show it was a term of the agreement that the plaintiffs should reside at "Cramond" for the period of the defendants' lives (post, p. 295).

(3) That the letter of September 25, 1955, was a sufficient note or memorandum in writing of the agreement to satisfy the provisions of section 40 (1) of the Law of Property Act, 1925,[1] since, although the agreement was not in existence when it was signed, its language showed an intention to contract and amounted to a contractual offer (post, p. 296).

Smith v. *Neale* (1857) 2 C.B.N.S. 67; and *Reuss* v. *Picksley* (1866) L.R. 1 Ex. 342 applied.

Dictum of Fry J. in *Munday* v. *Asprey* (1880) 13 Ch.D. 855, 857 not followed.

(4) That the defendants were, accordingly, in breach of contract; that P. and Mrs. P. were jointly entitled to damages for the loss of the value of the benefits of living at "Cramond" during the joint lives of the defendants; and that Mrs. P. was entitled to damages for the loss of prospect of inheriting a share in "Cramond" under C.'s will.

ACTION.

The plaintiffs, Dudley Alfred Parker and his wife Madeline Kate Parker, claimed damages in this action against the defendants, Herbert Thomas Clark and his wife Jane Edith Constance Clark, for breach of a contract made between the parties, in or about September, 1955.

By their statement of claim the plaintiffs alleged: (1) that it was agreed between the parties: (a) that the plaintiffs should cease to occupy and should dispose of their interest in a dwelling-house known as "The Thimble"; (b) that the plaintiffs should occupy jointly with the defendants and reside at a dwelling-house owned by the defendants, known as "Cramond," for the period of the lifetime of the survivor of the defendants; (c) that the parties should share the running costs of "Cramond"; (d) that the defendants should purchase a television set and a new car for the joint use of the parties; (e) that the defendants should make a valid and binding testamentary disposition giving "Cramond" and its contents jointly to Mrs. Parker, her daughter and sister; (2) that in pursuance of this agreement the plaintiffs performed their obligations under sub-paragraphs (a), (b) and (c),

[1] Law of Property Act, 1925, s. 40: "(1) No action may be brought "upon any contract for the sale or "other disposition of land or any "interest in land, unless the agree-"ment upon which such action is "brought, or some memorandum or "note thereof, is in writing, and "signed by the party to be charged "or by some other person thereunto "by him lawfully authorised."

1959

Parker
v.
Clark.

above, and the defendants performed their obligations under sub-paragraph (d), above; (3) that, in or about October, 1957, the defendants repudiated the agreement by wrongfully giving the plaintiffs notice to quit "Cramond" and determining the agreement, and by refusing to comply with sub-paragraph (e), above. The plaintiffs claimed damages in respect of this repudiation.

The defendants, by their defence, denied that they had made the agreement. They admitted that the plaintiffs resided at "Cramond" between March, 1956, and December, 1957, but denied the plaintiffs' other allegations. Further, they pleaded that the alleged agreement was not in writing and that there was no sufficient note or memorandum in writing thereof to satisfy the provisions of section 40 (1) of the Law of Property Act, 1925. Finally, the defendants pleaded that if the alleged agreement had been made, it was determined by the plaintiffs, or alternatively pursuant to an agreement, express or to be implied from all the circumstances, made in or about October, 1957, between the first plaintiff and the first defendant.

The following statement of facts is taken in substance from the judgment: The male defendant was a retired civil servant who owned a large house called "Cramond" in Torquay, where, in 1955, he lived with his wife. He was then aged 77 and his wife was 78. They had no children. Mrs. Parker, the female plaintiff, was Mrs. Clark's niece. Commander Parker, her husband, had retired from the Royal Navy and in 1955 lived with Mrs. Parker in a cottage which he owned, called "The Thimble," at Mayfield in Sussex.

The Parkers were on very friendly terms with the Clarks and visited them from time to time. Sometimes the invitations were in the nature of an S O S, as the Clarks were not in very good health and had little or no domestic service. On September 18, 1955, the Parkers were leaving "Cramond" after a visit when Mr. Clark suddenly proposed to Commander Parker that the Parkers should join forces and live with them. The words used were: "Come and live with us," and Commander Parker assumed, although the word "permanently" was not used, that that was what was meant.

The Parkers liked the idea, but Commander Parker was satisfied that it meant selling "The Thimble"; he was not prepared to let it. Accordingly, a few days later, he wrote to Mr. Clark, saying that if they came to live in Torquay they would have to get rid of their cottage. Mr. Clark replied in a letter dated September 25 in the following terms:

"My dear Dudley, Many thanks for your letter. The major "difficulty re what is to happen to the 'Thimble' can be solved "by our leaving 'Cramond' and its major contents (insured for "£3,000 and £3,000) to Madeline [Mrs. Parker], Mavis [her "sister] and Pamela [the Parkers' daughter] when we both pass "away and if you cannot maintain it they can sell out. Its

"present value is £9,000 to £12,000 without contents. Maintenance at present costs Elect. £50, Tele. £10, Coal £21, Rates £113 13s. 4d., Water £8 11s. 4d. Total: £203 4s. 8d. My pension is £700 per annum and Connie [Mrs. Clark] has an annuity of £300 p.a. If I pass away Connie gets £300 widow's pension. This all disappears as we pass away. But I have some War Loan out of which I pay income tax and eventually death duties. The War Loan goes to my surviving brother and sisters. If we go fifty-fifty on maintenance of house it would cost you half of the £200 odd as set out and half the running expense of food, drinks, etc., but I think it would be fair if your share of the £200 was the same as you now pay at the 'Thimble' if it is less than £200. I would pay for a daily woman four mornings a week, have a T.V. and a new car. You could sell out and pay off your mortgage and invest proceeds to increase your income. I hope your family vote for or against this will be unanimous. B. & C."

On September 30 Commander Parker replied in a letter which was not preserved, saying that he accepted Mr. Clark's generous offer; that the family vote was unanimously in favour; and that he would dispose of "The Thimble." The Parkers then acted upon the arrangement and sold "The Thimble" for £3,900. Of this money £945 was used to pay off a secured advance and out of the balance £2,000 was lent to their daughter Pamela to enable her to buy a flat. Commander Parker told Mr. Clark what he had done and said that he could not call in the loan without dispossessing his daughter.

On March 1, 1956, the Parkers moved to "Cramond." They took with them enough furniture for the bedroom they were to occupy and also a few other pieces; the rest was stored. They found that Mr. Clark had engaged a daily woman and bought a television set, as he had promised. Shortly after their arrival Mrs. Clark told Mrs. Parker that the Clarks had decided not to charge the Parkers with their share of the rates. Apart from this, all the household expenses were shared. Housekeeping tasks and gardening were shared by the Parkers and the Clarks, and most of the work was done by the Parkers. Soon after the Parkers' arrival Mr. Clark, as promised in the letter of September 25, bought a new car. Neither of the Clarks drove, so that all the driving was done by Commander Parker. Mr. Clark paid all the running expenses, except that when the Parkers used the car for their own purposes they paid for the petrol.

About the time when he bought the car, Mr. Clark told Commander Parker that he would give the Parkers each £400 in order to save death duties on £800, but nothing came of this.

In August, 1956, Mr. Clark told Commander Parker that the car was a luxury and that he proposed to lay it up and then sell it. The Commander said that this was unreasonable, and reminded him of what he had said in the letter of September 25. Early in 1957 Mr. Clark made a will. He did not consult a

1959

Parker
v.
Clark.

solicitor, but made it out on a form. He stated in evidence that the will was in accordance with the terms of his letter of September 25, and left "Cramond" to the three beneficiaries there named, including Mrs. Parker. He later destroyed this will, but shortly after made another similar one. Commander Parker told Mr. Clark that he thought that it was unsatisfactory that the will was made on a purchased form and without legal guidance, and was not kept in a place of safety. Mr. Clark said nothing. In July, 1957, Mr. Clark told Commander Parker that he was considering selling "Cramond." The Commander said that this would mean that the Parkers would be without a home. Mr. Clark said nothing.

By the autumn of 1957 Mr. Clark had begun to regret the arrangement whereunder he had taken the Parkers into his home. Matters first came to a head on October 24 when, after another discussion about the car, Mr. Clark told Commander Parker that he thought the partnership was not working and that the Parkers would have to find some other place to live. Commander Parker protested strongly. He consulted a solicitor on November 1, and as the result of the advice which he received asked Mr. Clark to put on paper that he had told them to leave "Cramond." Mr. Clark replied that "Cramond" was not a common lodging-house. Commander Parker decided that he would make his contribution to the rates. He calculated that if he paid £41 5s. 4d., it would bring his total contribution up to what he had been paying at "The Thimble," which Mr. Clark had said in his letter of September 25 was to be its limit, and on November 4 he tendered a cheque for that amount to Mr. Clark, which Mr. Clark refused.

About the middle of November Mr. Clark asked Commander Parker when they intended to leave. The Commander replied that they had no intention of leaving and that he would have to have them evicted. Mr. Clark said: "There are other ways of "getting you out." About this time, Mr. Clark offered to pay the Parkers their expenses incurred in leaving "Cramond" and finding another place to live, and said that for this purpose he would set aside £150. Commander Parker told Mr. Clark that he did not trust him and would not accept his offer. A little later Mr. Clark offered, in addition to the £150, that he would pay for the expenses that the Parkers had incurred in moving their furniture to "Cramond," as well as the expenses for taking it away, and Commander Parker refused.

By the beginning of December the Parkers found the atmosphere unbearable and they decided that they would have to leave. Commander Parker told Mrs. Clark that they would accept Mr. Clark's last offer. She gave them a cheque for £150, and he handed to her the bill he had received for the furniture removal from Mayfield to Torquay and said that he would send the other bill when it arrived. On December 9 the Parkers left "Cramond." On January 7, 1958, Commander Parker wrote a friendly letter to Mrs. Clark in which he sent the further bill for the furniture.

There was no talk of any legal action, though Commander Parker described their situation as "anything but pleasant," and said that they felt very bitter over the loss of their cottage. The bills for the furniture removals were not discharged by the Clarks. No further action was taken by the plaintiffs until August 20, 1958, when a solicitor's letter was sent to the defendants putting forward a claim substantially in the terms of the statement of claim in the present action. No reply was received and on November 13, 1958, the writ was issued.

C. L. Hawser Q.C. and *P. E. Lewis* for the plaintiffs.
Hugh Park for the defendants.

November 26. DEVLIN J. read the following judgment: The plaintiffs in this case are suing on an unusual sort of contract. They are a married couple and they are suing another married couple upon an allegation that the defendants repudiated a contract whereunder the two couples were to share the running costs of the defendants' house, and whereunder the defendants' house was to be left by will in a manner that benefited the plaintiffs and their relatives. Such contracts are not easily proved in fact, and when proved are likely to run into legal difficulties such as those that are created by section 40 of the Law of Property Act, 1925. This is the case here. Fortunately the facts are clear. There is not much conflict of evidence and, where there is, I have no hesitation in preferring that of the plaintiffs and their witnesses. The defendant couple are very old and are not very reliable. The plaintiffs gave their evidence very satisfactorily. In all relevant matters they told the truth carefully, not only when they were narrating facts but also when they were giving evidence about their own states of mind.

[His Lordship stated the facts and continued:] The relief claimed by the plaintiffs falls into two categories. It is accepted by both sides that, if there has been a breach of contract, the measure of damage is the value of that which the plaintiffs have lost by reason of the breach. The particulars of special damage set out in the statement of claim do not assist much in the assessment, for they specify chiefly costs incurred by the plaintiffs as the result of entering into the contract and as the result of its breach. The two categories are, first, the value to the plaintiffs of such benefits as are attributable to living at "Cramond" and, secondly, the value to the female plaintiff of the prospect of inheriting "Cramond" when the two defendants are dead. In the first category, the plaintiffs do not allege and have not proved that their share of the joint living expenses at "Cramond" was any less than their living expenses independently would have been. They do not rely on Mr. Clark's statement that he would not charge them rates as being contractually binding; and, accordingly, as I have already said, the cost of their living at "The Thimble" was the ceiling over their

1959

Parker
v.
Clark.

Devlin J.

contribution to the "Cramond" expenses. What they have lost consists therefore of the benefit of living at "Cramond" rent-free, and the value to them of the use of a car and a television set specially provided by Mr. Clark. The appropriate sum to cover these items is claimed by them as joint contractors.

In the second category the claim is for the estimated value of "Cramond" and its contents, which is put in the statement of claim at £12,000. In fact, for the purposes of this action, the value has been agreed as £13,000. But the whole of this amount cannot properly be claimed in the present action. By the terms of the letter the house and contents were to be left jointly to Mrs. Parker, her sister and her daughter. It may be that if the plaintiffs were claiming as trustees, and if they could establish that Mr. Clark's promised bequest was intended for the benefit of the sister and the daughter as well as an inducement to the Parkers, they could obtain judgment for the full value. But Mr. Hawser eventually abandoned the argument that, on the pleadings as they stood, he could recover sums for the benefit of the sister and daughter. It follows, therefore, that the damages in this category cannot exceed one-third of the value of the house and contents. This is the figure which, less certain deductions which I shall consider later, is claimed by Mrs. Parker in her own right.

The contract relied upon by the plaintiffs is said to be contained in the defendants' letter of September 25 and Commander Parker's acceptance thereof. In this part of the case, since Commander Parker and Mr. Clark were the contractual protagonists, it is convenient to refer to them simply as plaintiff and defendant. The defendants' first submission in answer to the claim is that the letters, construed in the light of the surrounding circumstances, show no intention to enter into a legal relationship or to make a binding contract. No doubt a proposal between relatives to share a house, and a promise to make a bequest of it, may very well amount to no more than a family arrangement of the type considered in *Balfour* v. *Balfour*,[1] which the courts will not enforce. But there is equally no doubt that arrangements of this sort, and in particular a proposal to leave property in a will, can be the subject of a binding contract. The latter proposal has been considered chiefly in relation to marriage contracts. In *Synge* v. *Synge*[2] it was held that the defendant, who promised in writing, as part of the terms of the marriage, to leave a house and land to the plaintiff, had thereby entered into a binding contract. Kay L.J., delivering the judgment of the Court of Appeal, noted[3] the dicta of Lord Lyndhurst L.C. in *Hammersley* v. *De Biel*[4]: ". . . the principle of law, at least of equity, is this "—that if a party holds out inducements to another to celebrate

[1] [1919] 2 K.B. 571; 35 T.L.R. 609.

[2] [1894] 1 Q.B. 466; 10 T.L.R. 194.

[3] [1894] 1 Q.B. 466.

[4] (1845) 12 Cl. & Fin. 45, 78.

"a marriage, and holds them out deliberately and plainly, and "the other party consents, and celebrates the marriage in conse-"quence of them, if he had good reason to expect that it was "intended that he should have the benefit of the proposal which "was so held out, a court of equity will take care that he is not "disappointed, and will give effect to the proposal." That is the principle which I apply here; and, indeed, a contract of marriage is not dissimilar to an agreement by two families to live together for the rest of their joint lives.

The question must, of course, depend on the intention of the parties, to be inferred from the language they use and from the circumstances in which they use it. On the plaintiff's side, I accept his evidence that he considered that he was making a binding contract. An important factor in this was that he disposed of his own residence. It does not matter for this purpose whether it was or was not a term of the contract that he should sell "The Thimble"; the important thing is that the contract required him to give up his occupation of "The Thimble," and that he was always quite clear, and made it quite clear, that he would not give up occupation unless he also gave up the ownership and parted with the property. He would not have done that, he says—and I believe it—unless he thought that he was securing another permanent home. There is, undoubtedly, in the arrangement a lack of formality, upon which Mr. Park greatly relies. This, I think, is largely explained by the relationship between the parties; it is easier to demand formal documents from a stranger than it is from a relative and friend. It is clear that the plaintiff constantly relied upon the letter as a sort of title to his rights; he kept it and referred to it whenever his rights were called in question. When on October 24, 1957, they were seriously threatened, he went forthwith and consulted a solicitor. He is not, in my judgment, the sort of man who would "think up" a legal action as an afterthought, when he found he was not getting what he wanted.

The plaintiff is not a moneyed man. On the strength of Mr. Clark's promise he, so to speak, put down £672 10s. That is the figure that is agreed as the expense which he incurred in giving up "The Thimble," on the assumption that he could repurchase "The Thimble" or a cottage like it. In addition to that, he tied up £2,000, so that he has never since been in a position to buy another property like "The Thimble," and has never in fact bought one. The defendant knew this, and had plenty of time to reflect upon it between September 25, 1955, when he wrote his letter, and March 1, 1956, when the plaintiffs arrived. If he had thought that all that his letter involved was an amicable arrangement terminable at will, I cannot believe that he would not have enlightened the plaintiff and, as a cautious man himself, have warned him against the folly of what he was doing. I cannot believe either that the defendant really thought that the law would leave him at liberty, if he so chose, to tell the Parkers when

1959

Parker
v.
Clark.

Devlin J.

they arrived that he had changed his mind, that they could take their furniture away, and that he was indifferent whether they found anywhere else to live or not. Yet this is what the defence means. The defendant gave several answers which show that this was not really his state of mind. He said that the object of the letter was to induce the Parkers to come to "Cramond"; and he agreed also that he made the will in fulfilment of the promise. I am satisfied that an arrangement binding in law was intended by both sides.

The defendants' second submission is that the agreement is not sufficiently clear in its terms to be capable of constituting a legal contract. No doubt, if the letter had been drafted by a lawyer he would have gone into much more detail and would, for example, have specified how the running expenses were to be determined and matters of that sort. An agreement of this kind made in general terms requires good will and co-operation from both sides if it is to be successfully worked. But it was, in fact, made to work for more than a year and a half, and the defendants fulfilled all its terms, even to the point of making a will to the required effect. Mr. Park has not argued that the contract was too imprecise in detail to be enforceable. But he has contended that two of the terms pleaded in the statement of claim are not sufficiently clearly set out in the letter of September 25.

The former of these is the first pleaded term, which alleges that the plaintiffs were to cease to occupy and dispose of their interest in "The Thimble." Mr. Park argues that there is nothing express or to be implied in the letter which requires the plaintiffs to sell "The Thimble." Mr. Hawser accepts this and agrees that the only term to be implied from the letter about "The Thimble" is that the plaintiffs should cease to occupy it. But the elimination of part of the term pleaded does not affect the relief for which the plaintiffs are asking. The main consideration for the defendants' promise was that the plaintiffs should come and live at "Cramond." This they have done. It may be that the request was also dependent upon "The Thimble" being sold; but if it was, they have done that also.

Mr. Park's second point is on the second term pleaded, and he submits that there is nothing in the letter specifying the period for which "Cramond" was to be shared, and therefore nothing which justified the contention in the statement of claim that it was "the period of the lifetime of the survivor of the defendants." On this view, no time being mentioned, the duration of the agreement would be subject to reasonable notice on either side. It is clear, I think, that it was intended as a long-term arrangement. But an agreement to last for life must be exceptional, and would certainly be improbable in the case of two young couples. Here, however, the circumstances are unusual. The defendants are both over 80 and, describing their condition in September, 1955, Mr. Clark said: "Both of us were in very bad health and neither of "us thought we had much chance to live long." Because the

terms of the Clarks' offer were generous, one must not overlook the benefits which they were receiving from the arrangement. It is not easy nowadays to secure domestic assistance, especially in times of illness; and for the Clarks to have living with them permanently a couple 20 years younger, whom they believed to be congenial and who were obviously willing to help, was a great advantage and one which at market rates they might have had to pay a great deal for. I have already instanced the sort of things the Parkers did. While there was no bargain about it, I am sure that the Clarks expected this sort of help, and that the plaintiffs thought it natural and right to give it. The Clarks obviously wanted comfort and security for the rest of their lives, which they believed to be short. It would not have been much of a bargain to them if it had left the Parkers free to give notice before the end; it might be then that the need for their help would be most great. In these circumstances there is, I think, sufficient in the language of the letter to indicate that the agreement was to be for the duration of the defendants' lives. In offering the bequest of "Cramond" to the three women the letter says: "If you cannot maintain it they can sell out." This shows, I think, that the defendants expected that at the time of their deaths the plaintiffs would still be in residence.

Mr. Park's third submission is that section 40 of the Law of Property Act, 1925, has not been complied with, since the agreement was not in writing, nor was there any sufficient note or memorandum of it in writing. In fact, the whole agreement, which consists of the letter of September 25 and of Commander Parker's reply to it, was originally in writing. Mr. Hawser submitted that oral evidence of a written acceptance would be sufficient to satisfy the requirements of the statute. But he did not pursue this argument, preferring to rely upon a contention that a written offer which contained all the terms of the contract was a sufficient note or memorandum of it for the purposes of the statute, and that the acceptance of the offer could be proved orally. Mr. Park submitted that the memorandum was not a good one unless the agreement was in existence before it was signed. For this proposition he relied upon *Munday* v. *Asprey*.[5] In this case the purchaser's solicitors sent the engrossment of a conveyance to the vendor's solicitors together with a letter in which they sought an appointment for completion. These documents were held not to be a sufficient memorandum, since they were only a statement of an expectation of a future contract. Mr. Park particularly relied upon the following dictum of Fry J.[6]: "The statute requires that a concluded agreement existing at the "time when the memorandum is signed should be proved by "the plaintiff, whereas the document, as I have said, shews no "actual existing agreement."

I think with great respect that, whether the case was rightly

[5] (1880) 13 Ch.D. 855.

[6] (1880) 13 Ch.D. 855, 857.

1959

Parker v. Clark.

Devlin J.

or wrongly decided, this dictum cannot be supported. It is contrary to a number of authorities, two of which, *Smith* v. *Neale* [7] and *Reuss* v. *Picksley*,[8] were cited by Mr. Hawser, which show that a written offer is capable of being a good memorandum, although the agreement cannot come into existence until after the offer has been accepted. I agree that a document which contains no more than a statement of all the terms of a proposed agreement would not be enough; and it may be that that is the way in which an engrossment of a contract ought to be regarded. The memorandum must not only contain a statement of all the terms but its language must be such as to show an intention to contract. Mr. Park has submitted that the letter of September 25 was not an offer, but merely a statement of terms proposed for consideration. But I think that the letter was an offer and expressed as such; the concluding sentence of the letter satisfied me of that.

The amended defence raises the plea that the plaintiffs themselves determined the agreement. This was not pursued by Mr. Park in argument, and is contrary to the evidence which I have accepted. The plaintiffs did agree to leave the house—presumably in their view as an alternative to being evicted—in exchange for £150 and the promise of further payments for furniture removal. They maintain that by so doing they did not intend to prejudice their rights and it has not been alleged that they did. In any event the further payments were never made.

Accordingly, I am satisfied that there has been a breach of contract and that the plaintiffs are entitled to damages under the two heads I have already particularised. "Cramond" is obviously a desirable and well-appointed house, since with its contents it is valued at £13,000, and I assess the benefit of living in part of it rent-free, together with the use of a car and a television set, at £300 a year. I shall take a multiplier of four as representing the value as in December, 1957, of that sum. This multiplier is based upon what cannot be much more than a guess about the expectation of life of the two defendants. But it need not be more than approximate, since a discounting figure, also based upon the same expectation of life, must be applied in order to value Mrs. Parker's prospects under the will. The value of those prospects must also be discounted by the fact that Mrs. Parker might have had to find a sum to pay death duties, and I must also allow for contingencies, such as that the house might have been destroyed before the will took effect. Mr. Clark apparently contemplated finding the death duties from some other source and the house was in fact insured. But Mr. Hawser admits that there was no legal obligation on Mr. Clark to do either of these things, and that his doing them cannot be put higher than an expectation. Taking these matters into account, I value Mrs. Parker's prospects under the will as at today at £3,400.

[7] (1857) 2 C.B.N.S. 67. [8] (1866) L.R. 1 Ex. 342.

There will, therefore, be judgment for both plaintiffs jointly for £1,200 and costs, and for Mrs. Parker separately for £3,400.

1959

PARKER v. CLARK.

Judgment for the plaintiffs.
Costs.

Solicitors: *Shelton, Cobb & Co.; Pennington & Son for Hooper & Wollen, Torquay.*

[QUEEN'S BENCH DIVISION.]

* UNION OF INDIA *v.* COMPANIA NAVIERA AEOLUS S.A.

1960
Feb. 22.

McNair J.

[1960 I. No. 310.]

Shipping — Charterparty — Demurrage — Exceptions clause — Centrocon charter—"Time for loading or discharging . . . shall not count" during strike—Whether receivers liable for demurrage during strike period after expiry of laytime.
Ships' Names—Spalmatori.

A bill of lading covering a cargo of bulk wheat shipped on board a steamship for delivery at Bombay expressly incorporated the terms and conditions of the charterparty for the carriage of the wheat. The charterparty provided, inter alia: "At discharging port "receivers to pay demurrage, if incurred, . . . for all time used in "excess of allowed laytime. . . ." The bill of lading and the charterparty also incorporated the strike clause of the "Centro-"con" charterparty, which provided that if the cargo could not be loaded or discharged by reason of a number of causes, including a strike of any class of workmen essential to the loading or discharge "the time for loading or discharging, as the case may be, shall not "count during the continuance of such causes provided that a "strike . . . of the shippers and/or receivers' men shall not prevent "demurrage accruing if by the use of reasonable diligence they "could have obtained other suitable labour." It further provided that in case of any delay by reason of the excepted clauses no claim for damages or demurrage should be made by the charterers, receivers of the cargo, or owners of the steamer.

A strike broke out at the discharging port after the expiry of the laydays. It continued for eight days, and during that time the cargo could not be discharged as no other suitable labour was available. In a claim by the plaintiffs, the holders of the bill of lading and receivers of the cargo, for a declaration that they were not liable to pay the shipowners additional demurrage in respect of the strike period:—

Held, (1) that, on their true construction, the words "time for "loading and discharging" in the first part of the strike clause meant the time allowed for loading or discharging, and not the time used for loading or discharging, the clause being designed to cut out from the time for loading or discharging stipulated in other clauses of the charterparty time lost by reason of the excepted causes, and to provide that it should not count during the continuance of those causes.

1960

Union of India
v.
Compania Naviera Aeolus S.A.

(2) That the effect of the proviso was that where a strike of shippers and/or receivers' men broke out during the continuance of the laydays, such a strike should not prevent time counting.

(3) That the plaintiffs could not rely on the third part of the clause which was clearly in conflict with, and contrary to, the detailed provisions set out earlier, and was an inaccurate paraphrase of those earlier provisions. Accordingly, there was nothing in the charterparty to exclude the general rule as to the non-applicability of exceptions which come into play only during the demurrage period, and the plaintiffs' claim failed.

Rederiaktiebolaget Transatlantic v. *La Compagnie Française des Phosphates de l'Oceanie* (1926) 32 Com.Cas. 126, C.A. distinguished.

Moor Line Ltd. v. *Distillers Co. Ltd.*, 1912 S.C. 514 considered.

Action.

The plaintiffs, Union of India, were the holders of a bill of lading issued by Louis Dreyfus Corporation on May 5, 1957, covering a shipment of about 9,950 long tons of wheat in bulk shipped on board the *S.S. Spalmatori* at Tacoma, Washington, for delivery at Bombay, India. The bill of lading provided that all terms, conditions and exceptions of the charterparty relating to the carriage of the wheat, made between Louis Dreyfus Corporation and the shipowners, Compania Naviera Aeolus S.A., the defendants in this action, and dated London, February 20, 1957, were to be considered fully incorporated therein, and if there was any conflict between bill of lading and charterparty, provisions of the charterparty were to govern. By clause 10 of the bill of lading all terms, conditions and provisions of, inter alia, the strike clause of the "Centrocon" charterparty were to apply.

The charterparty, which was on the approved Baltimore Form C, provided for the loading of the vessel at Puget Sound of a full and complete cargo of wheat in bulk for delivery at Bombay. It provided for the steamer to be loaded according to berth terms, with customary berth dispatch, and if detained longer than six weather working days of 24 consecutive hours, Sundays and holidays excepted, charterers to pay demurrage at the rate of £200 British sterling per day, or pro rata, provided such detention shall occur by default of charterers or their agents.

A typed addition at the end of the print provided, inter alia, that certain attached typed clauses were deemed to be fully incorporated in the charterparty, also the strike clause (No. 30) of the "Centrocon" charterparty. Of the attached clauses, the following were relied upon as being material on one side or the other of the argument in this case: Clause 8: "Cargo to be received at "destination at the average rate of 1,000 tons of 2,240 lb. per "weather working day of 24 consecutive hours (Sundays and holi-"days excepted even if used) but 500 tons per weather working day "of 24 consecutive hours (Sundays and holidays excepted even if "used) for any portion loaded in deep tanks, it being understood "that deep tanks are clean and suitable and always provided vessel "can deliver at these rates." Clause 9: "At discharging port "receivers to pay demurrage, if incurred, at the rate of £200

"British sterling per day or pro rata for part of a day, for all time "used in discharging in excess of allowed laytime. Receivers "to collect despatch, if earned, at discharging port at the rate of "£100 British sterling per day for each and every day or pro rata "for part of a day for all laytime saved in discharging." Clause 10: "Notification of the vessel's readiness to discharge must be "delivered at the office of the receivers, or their agents, at or "before 4 p.m. (or at or before 12 noon if on Saturday) vessel "also having been entered at the Custom House, and the laydays "will then commence at 8 a.m. on the next business day, whether "in berth or not."

The "Centrocon" strike clause provided, as far as material: "If the cargo cannot be loaded by reason of riots, civil commo-"tions or of a strike or lock-out of any class of workmen, essential "to the loading of the cargo . . . or if the cargo cannot be "discharged by reason of riots, civil commotions, or of a strike "or lock-out of any class of workmen essential to the discharge, "the time for loading or discharging, as the case may be, shall "not count during the continuance of such causes, provided that "a strike or lock-out of the shippers' and/or receivers' men shall "not prevent demurrage accruing if by the use of reasonable "diligence they could have obtained other suitable labour at rates "current before the strike or lock-out. In case of any delay by "reason of the before-mentioned causes, no claim for damages or "demurrage, shall be made by the charterers, receivers of the "cargo, or owners of the steamer. For the purpose, however, of "settling despatch rebate accounts any time lost by the steamer "through any of the above causes shall be counted as time used "in loading."

The following facts stated on the writ in this action were agreed: the plaintiffs were at all material times the holders of the bill of lading; the laydays at the discharging port had expired at 1356 hours on July 2, 1957; discharge of the cargo at Bombay from 0700 hours on July 5 to 1700 hours on July 13, 1957, was prevented by a strike of workmen essential to the discharge; other suitable labour could not be obtained at all.

The plaintiffs claimed a declaration that upon the true construction of the charter dated February 20, 1957, and of the bill of lading dated May 5, having regard to the facts set out above, they were not liable to the defendants for £1,638 6s. 8d. additional demurrage in respect of the period of 8 days 10 hours during which the strike continued.

J. F. Donaldson for the plaintiffs.
Michael Kerr for the defendants.

The following cases, other than those referred to in the judgment, were cited in argument: *S.S. Breynton (Owners)* v.

1960

Union of India v. Compania Naviera Aeolus S.A.

*Theodoridi & Co.**; *Lilly & Co.* v. *Stevenson (D. M.) & Co.*†; *Szymonowski & Co.* v. *Beck & Co.*‡

McNair J. stated the facts, read the bill of lading and the relevant clauses of the charterparty, and continued: After the typed clauses one finds a clause headed "Centrocon Strike "Clause." That is a clause which is lifted without alteration from the well-known Centrocon charterparty, which is known as the River Plate charterparty 14 Homewards, designed to cover the homeward trade from the River Plate. The "Centrocon" strike clause, as set out in this charterparty, provides as follows: "If the cargo cannot be loaded by reason of riots, civil commo- "tions or of a strike or lock-out of any class of workmen, essential "to the loading of the cargo . . . or if the cargo cannot be dis- "charged by reason of riots, civil commotions, or of a strike or "lock-out of any class of workmen essential to the discharge, the "time for loading or discharging, as the case may be, shall not "count during the continuance of such causes." So far those words may be conveniently described as the first part of the clause.

The clause then continues, in its second part, as follows: "Provided that a strike or lock-out of the shippers' and/or "receivers' men shall not prevent demurrage accruing if by the "use of reasonable diligence they could have obtained other "suitable labour at rates current before the strike or lock-out."

Then follow two other sentences referred to as the third and fourth parts of this clause, as follows: "In case of any delay by "reason of the before-mentioned causes, no claim for damages "or demurrage, shall be made by the charterers, receivers of the "cargo, or owners of the steamer. For the purpose, however of "settling despatch rebate accounts any time lost by the steamer "through any of the above causes shall be counted as time used "in loading."

On the agreed facts it is to be noted that the laydays at the discharging port had expired before any strike intervened: the laydays had expired at 1356 hours on July 2, before this strike intervened; but that from 0700 hours on July 5, namely three days later, up to 1700 hours on July 13, discharge was prevented by the strike.

It is a well-settled rule of construction, as set out in Scrutton on Charter Parties, in the 11th ed., at p. 342, and in the current (16th) edition at p. 353, that "When once a vessel is on demurrage "no exceptions will operate to prevent demurrage continuing to "be payable unless exceptions clause is clearly worded so as to "have that effect"; and that rule was referred to by Bankes L.J. in *Rederiaktiebolaget Transatlantic* v. *La Compagnie Française des Phosphates de l'Oceanie*[1]: "the ordinary rule that when "once a vessel comes on demurrage the time she is detained is "to be calculated by running days or calendar days as opposed "to charterparty days."[2]

* (1924) 19 Ll.L.Rep. 409.
† (1895) 22 Rettie 278.
‡ [1923] 1 K.B. 457, C.A.

[1] (1926) 32 Com.Cas. 126, C.A.
[2] Ibid. 129.

Mr. Donaldson, for the receivers of cargo, urges first that this "Centrocon" strike clause, in its present context, as incorporated into the Baltimore "C" Form, does make special provision to the contrary of the general rule, so that although the strike occurred during the demurrage period yet, nevertheless, the charterers are entitled to rely on it. That is a result, he urges, which arises from the first and second parts of the clause. Further or alternatively, he submits that even if that be not right then the like result would follow from consideration of the third part of the clause.

The first question, as it seems to me, for consideration is the meaning of the words "the time for loading or discharging." It is clear that those words are, in a sense, proleptic, but the choice merely lies between reading them as Mr. Kerr, for the shipowners, would ask me to read them, as being "time "stipulated for loading or discharging," or "time allowed for "loading or discharging," and reading them as Mr. Donaldson submits they should be read, as meaning "time used for loading "or discharging."

In my judgment, taking those words alone for the moment, and not considering what other meaning it may be necessary to assign to them by reason of the proviso, it seems to me to be perfectly clear that what is meant by "the time for loading or "the time for discharging" is the time allowed for loading or discharging, especially when one reads on in the sentence and sees it says that this time, so defined, "shall not count during the "continuance of such causes." That seems to me to assume that this strike clause is designed to cut out time from the time for loading or discharging which has been stipulated or arranged for by other clauses of the charterparty, that shall not count during the continuance of certain causes. Although in clause 8 of the typed clauses the obligation as to discharging is not expressed in the words "time for discharging to be" so much, but by the phrase, "Cargo to be received . . . at the average rate "of 1,000 tons" and so on, it is quite clear to me at least that clause 8 is defining a time for discharging; and the strike clause, when one comes to it, says that that time for discharging, the number of days, will not count during the continuance of the exception causes.

It is said, however, that when one gets to the proviso, a different meaning must be given to it by reason of the used words "shall not prevent demurrage accruing." It is quite true that in certain contexts the words "and demurrage shall not accrue" have been held to be sufficient, in the judgment of the Court of Appeal, to exclude the general rule to which I referred earlier in my judgment as to the non-applicability of exceptions which come into play only during the demurrage period, i.e., after the vessel has once come on demurrage. Such a case was the case to which

1960

Union of India v. Compania Naviera Aeolus S.A.

McNair J.

I referred earlier, *Rederiaktiebolaget Transatlantic* v. *La Compagnie Française des Phosphates de l'Oceanie*,[3] where the charterparty provided, inter alia, "laydays not to count during the period "of such delay or hindrance and demurrage not to accrue"; and it was held there by Bankes and Scrutton L.JJ., that, in that very special charterparty, to quote the language of Scrutton L.J., the ordinary rule was excluded. But it is to be observed there that in that clause not only were the words "demurrage not to accrue" used, but there were also the words "laydays not to count," so it is easy to understand how the result was arrived at, and it was held that the intention of the draftsman, as shown by the words used, was that the exception should apply both during the laydays and during the demurrage period.

In my judgment there is no need, on the words of this proviso, to reach the same conclusion. Once it is accepted, as I think it must be, that, according to the proper canon of construction, the proviso must be read as a qualification on or exception from what has gone before, then it follows, it seems to me, that the proviso is dealing with some qualification against the non-counting of the laydays; and although it is true it does not use the phrase again in the proviso "laydays" it expresses the same thought by the use of the words "shall not prevent demurrage accruing."

The working of the proviso is well illustrated by the following example: Time for discharging, 10 days. On the ninth day a strike breaks out and continues until the twelfth day. Were it not for the proviso, the laydays would not start to run again until the end of the twelfth day; but the proviso says that in a particular class of strike, namely, a strike of receivers' men when other suitable labour is available, it is not to have that result. It says that such a strike, in such circumstances "shall not prevent "demurrage accruing." It might equally have said, "shall not "prevent time counting." It is merely expressing the same thought in different language.

In my judgment it expresses that thought in reasonably clear language. But if I am wrong in thinking that the language is quite clear I think that the same result in law would follow, namely, that at any rate it has not been stated in clear terms that the general rule shall not apply.

Accordingly, on my constructions of the first two parts of the clause, the construction contended for by the plaintiffs does not commend itself to me.

Before passing to the third and fourth parts I should mention that I am assisted in the construction of the words "time for "loading or discharging" which I have arrived at by the judgment of Lord Salvesen in *Moor Line Ltd.* v. *Distillers Co. Ltd.*[4] In that case the clause corresponding to the present clause I have construed reads as follows: "If the cargo cannot be discharged "by reason of a strike or lock-out of any class of workmen

[3] 32 Com.Cas. 126.

[4] 1912 S.C. 514, 519.

"essential to the discharge of the cargo, the days for discharging "shall not count during the continuance of such strike or lock-"out." It was argued on behalf of the shipowners that the words "days for discharging" covered both the laydays and demurrage time. The contrary was argued on behalf of the cargo interests. Lord Salvesen then said [5]: "The pursuers maintained that 'days "'for discharging' included the 10 days for which the charterers "were entitled to detain the ship on paying the stipulated rate of "demurrage. I cannot so read them. 'Days on demurrage' are "not 'laydays' or 'days for discharging.'"

The second way in which the case is put on behalf of the receivers is that whether or not they are right on the first and second sentences of this clause, yet the plain words of the third part are sufficient for them in this case. Those words are: "In "case of any delay by reason of the before-mentioned causes, no "claim for damages or demurrage, shall be made by the char-"terers, receivers of the cargo, or owners of the steamer." Neglecting for the moment the exclusion of claims by the charterers and receivers of cargo, and confining the clause only to claims by the owners of the steamer, it would then read: "In "case of any delay by reason of the before-mentioned causes, no "claim for damages or demurrage shall be made by the . . . "owners of the steamer." That is quite plainly in conflict with, and contrary to, the detailed provisions which have been set out earlier. Taken literally, that third sentence would mean that if there had been any delay at all, say only a couple of days, by reason of the strike, then the owners were to be disbarred from making any claim for damages or demurrage at all. Quite plainly it cannot mean that. It seems to me this third sentence, if any sense is to be given to it at all, is merely an inaccurate paraphrase of the detailed provisions which have gone before it.

It may be, that in so far as it excludes claims by the owners for demurrage, it is merely leading up to the fourth part of the clause dealing with dispatch money, which in effect says, at any rate so far as time used in loading is concerned, that even though the receivers get the benefit in their loading time allowance of any strikes they cannot claim as days saved so that they earn dispatch upon any day where no work has been possible because of strikes during the laydays.

It is clear that this method of lifting a clause from one charterparty into another may create difficulties. This Centrocon strike clause is, of course, designed for fitting into the language of the Centrocon charterparty. It would not be permissible for me, on this occasion, to read on, to found my judgment in the present case upon other parts of the Centrocon charterparty, so I refrain from referring to the terms of that charterparty in any detail, observing merely that certain of the linguistic difficulties arising in this Centrocon strike clause, when engrafted on to the Baltimore Form

[5] 1912 S.C. 514, 519.

1960

Union of India v. Compania Naviera Aeolus S.A.

McNair J.

"C," do not arise when the clause is read in its natural and native context.

Accordingly, in my judgment, the plaintiffs are not entitled to the declaration for which they ask, and as I understand it has been agreed that if they fail to get that declaration from the court they will regard themselves as liable for the amount of demurrage claimed, there is no need for me to make further order than that the court does not grant the declaration prayed for. The action is dismissed, with costs.

Judgment for the defendants with costs.

Solicitors: *William A. Crump & Son; Holman Fenwick & Willan.*

E. M. W.

[CHANCERY DIVISION.]

1960
Feb. 25.

Roxburgh J.

* *In re* C. S. C. (An Infant).

[1960 No. 121.]

Adoption—Adoption order—Child in possession of mother on three occasions—Whether "continuously in the care and possession" of applicants—Refusal of consent by mother—Duty of justices to consider possible legitimation of child—Whether power to order applicants to retain child pending appeal—Adoption Act, 1958 (7 *Eliz.* 2, *c.* 5), *ss.* 3 (1), 35 (3).

Adoption—"Care and possession" of applicant for three months—Whether "continuous"—Child spent three nights with mother—Adoption Act, 1958 (7 *Eliz.* 2, *c.* 5), *s.* 3 (1).

Adoption—Discretion of court—Possibility of legitimising child—Relevance—Putative father willing to marry mother after divorce.

Adoption—Appeal to High Court—Stay pending appeal—No power to stay refusal of order—Adoption Act, 1958, *s.* 35 (3).

By section 3 (1) of the Adoption Act, 1958: "An adoption order "shall not be made in respect of any infant unless he has been con- "tinuously in the care and possession of the applicant for at least "three consecutive months immediately preceding the date of the "order. . . ."

By section 35 (3) of the Act of 1958: "Where . . . an application "for an adoption order made by any person in respect of an infant "placed in his care and possession by . . . [an adoption] society "or [local] authority is refused by the court . . . that person shall, "within seven days after the date on which . . . the application "[was] refused . . . cause the infant to be returned to the society "or authority. . . ."

On December 22, 1959, a juvenile court heard an application for an adoption order under the Adoption Act, 1958. The adoption had been arranged by the local authority. The evidence given on the hearing of the application showed that, during the three months immediately preceding the hearing, the child had been in the care

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[Reported by Miss V. A. Moxon, Barrister-at-Law.]

and possession of the mother, on one occasion, for two consecutive nights and, on another occasion, for a night and a day. The putative father of the child gave evidence to the effect that, when the mother, who was married to a third party, was divorced, he would marry her. By the operation of section 1 (1) of the Legitimacy Act, 1959, which repealed section 1 (2) of the Legitimacy Act, 1926, any such marriage would legitimate the child. The mother refused to consent to the adoption but the juvenile court granted the application and dispensed with the consent of the mother. On appeal:—

Held, that the child had not been "continuously in the care and "possession" of the applicants within the meaning of section 3 of the Adoption Act, 1958, for three consecutive months immediately preceding the date of the order, and that, therefore, the adoption order must be discharged.

Per curiam. In deciding whether they ought to exercise their discretion to make an adoption order, the justices should consider, in connection with the welfare of the child, whether legitimation was not preferable to adoption.

Where the court does not make an adoption order, it has no power to stay the operation of section 35 (3) of the Adoption Act, 1958, and authorise the applicants to retain the child pending an appeal.

APPEAL from Berkshire justices sitting at Abingdon.

On December 22, 1959, a juvenile court heard an application for an adoption order. The adoption had been arranged by the local authority and the mother refused to consent to the granting of an adoption order. The putative father of the child, giving evidence, said that he was free to marry the mother, and that when she was divorced he would marry her immediately. He and the mother were living together as man and wife and had had possession of the child on three occasions.

The female applicant gave evidence, inter alia, that on November 29, 1959, the mother took the child so that the putative father could see it would be no good for them to have it and promised to bring him back that evening. She took him at 5.50 p.m. At 3.30 p.m. next day, she came to the female applicant and said: "[the putative father] will go the whole hog "to keep the baby." The child was returned to the female applicant on the following day. She also said that the mother had had the child for the night on three occasions.

The mother gave evidence, inter alia, that she had had the child on three occasions and that the date of the second occasion was November 2, 1959, when she had the child for one day and one night.

The justices granted the application and dispensed with the consent of the mother, who appealed to the High Court.

Michael Browne for the mother.

C. A. Settle for the applicants.

The argument was heard in camera and judgment was given in open court.

1960

C. S. C., *In re.*

Roxburgh J. I am giving judgment in open court, because matters of public importance seem to me to arise, namely, that justices are not alive, as far as I can discover, to all the pitfalls in the exercise of the important jurisdiction which they have in connection with adoptions. In my judgment I shall refer to the mother as Mrs. A., to the putative father as Mr. B., and to the adopters as Mr. and Mrs. C.

This is one of those cases in which the mother constantly changed her mind. It is not necessary for me to deal in detail with that aspect of the case, because that was not the ground of the justices' decision; and, in the view that I take of the law applicable, it is not a material matter for me to consider. The point has arisen before, in *In re Adoption Act, 1950,*[1] in the Court of Appeal, and, in dealing with the question of the mother who gives and withdraws her consent more than once, Jenkins L.J. said: "The question of what amounted to the unreasonable withholding of consent, particularly by a mother, had been the subject of some judicial discussion. All one could do was to decide each case according to its particular facts, with the guidance of such broad general principles as could be derived from the authorities. The mere fact that a child would be materially better off if adopted than he could hope to be if he remained the child of his true parents did not suffice in itself to make the withholding of consent unreasonable, but that did not mean that that possible element in a case should be wholly ignored. So, too, the mere circumstance that a child was handed over to proposed adopters for a probationary period of three months in itself could not render the parents' withholding of consent unreasonable. Further, the mere fact that a documentary consent under section 4 of the Act had been given and subsequently withdrawn did not amount to an unreasonable withholding of consent."

That is the first matter to which I want to draw attention, namely, that that is the present position of the law with regard to the withholding of consent by a mother.

The second is much more technical, but nonetheless important. Justices must remember that as long as there is a statutory appellate court in these matters, they must so conduct the proceedings as to comply with the Adoption (Juvenile Court) Rules, 1958, and make the proceedings intelligible to the appellate court. Rule 8 provides for the appointment of a guardian ad litem of an infant, and rule 9 provides that the guardian ad litem on completing his investigations shall make a confidential report in writing to the court. Commenting on that in the case of *In re J. S. (An Infant)*[2] I said[3]: "It seems to me quite plain that the parties have no right to see the reports except in so far as the justices or the judge think fit to disclose their contents at the

[1] The Times, July 29, 1958.

[2] [1959] 1 W.L.R. 1218; [1959] 3 All E.R. 856.

[3] [1959] 1 W.L.R. 1218, 1221.

"hearing. On the other hand, it must be the duty of the justices "in a case of an appeal to forward to the judge's clerk the confiden-"tial reports for the information of the statutory court of appeal "which exists for the hearing of these cases." No such report has been forwarded to me by the clerk to the justices; and although, were I going to decide the case on that ground, I should have had to adjourn it in order to interrogate the clerk as to whether there was any such report in the possession of the justices or their clerk, I do not propose to take that course for two reasons. One is because I have some reason to think that the answer would be in the negative; and secondly, I am proposing to decide the case on another ground. Nonetheless that point is an important point. It might even have been of itself enough to compel me to allow this appeal; and that would have meant putting the parties to great expense because the court did not comply with the rules.

But the matter does not stop there. Section 3 (1) of the Adoption Act, 1958, contains a clear and important provision: "An "adoption order shall not be made in respect of any infant unless "he has been continuously in the care and possession of the "applicant for at least three consecutive months immediately "preceding the date of the order, not counting any time before "the date which appears to the court to be the date on which the "infant attained the age of six weeks."

My complaint is not that the justices may have reached a wrong conclusion in law upon the true construction of that provision; but that they never considered whether that section had been complied with at all, and that, accordingly, they left me with a most confusing and unsatisfactory account of the evidence in relation to that matter, upon which they themselves have made no findings at all.

The fourth point is the effect of the Legitimacy Act, 1959, upon these problems. I would not blame the justices for overlooking that question altogether and therefore exercising their discretion on what appears to me to be a wrong principle, in the sense that they omitted to consider at all something that was very important, because, in fact, I am not sure that I should have thought of it unless counsel had drawn my attention to it; but that does not make it unimportant.

Very often the putative father does not want the child, and that was the position in *In re Adoption Act, 1950*,[4] to which I have briefly referred; but here he said: "My relationship with "[the mother] is that as soon as she is free to marry me I will "marry her. For the past two years I have been living with her "as man and wife. I am divorced. When [she] is divorced I "will marry her immediately. I am the father of [the child]. "I have seen him on numerous occasions. On three occasions "we have had possession of [the child] away from [Mrs. C.]." There was no cross-examination about that; and there is no reason

[4] The Times, July 29, 1958.

1960

C. S. C., *In re.*

Roxburgh J.

why the justices should have rejected that evidence. The importance of that is this: supposing that marriage takes place, by the operation of the Legitimacy Act, 1959, which repeals section 1 (2) of the Legitimacy Act, 1926, any such marriage would legitimate this child, and, of course, it is always important to consider, in connection with the welfare of the child, whether legitimation is not to be preferred to adoption.

The justices never considered that point, because nobody asked them to do so, but their failure to do so seems to me entirely to vitiate the exercise by them of the discretion, which they purported to exercise under the Adoption Act, 1958.

Section 5 (1), under which they purported to act, provides: "The court may"—and I draw attention to that; it is a pure discretion, and the matter that I have just been speaking of is clearly one of the matters which has to be considered—"dispense "with any consent required by paragraph (*a*) of subsection (1) of "section four of this Act"—which includes the consent of the mother—"if it is satisfied that the person whose consent is to be "dispensed with—(*a*) has abandoned, neglected or persistently "ill-treated the infant; or (*b*) cannot be found or is incapable of "giving his consent or is withholding his consent unreasonably." By subsection (2) under which the justices acted: "If the court "is satisfied that any person whose consent is required by the "said paragraph (*a*) has persistently failed without reasonable "cause to discharge the obligations of a parent or guardian of "the infant the court may dispense with his consent. . . ."

Justices therefore first have to consider whether the case comes within subsection (2) at all. The justices did consider that in this case, and they came to the conclusion that it did. Whether or not there was any evidence to justify their conclusions on that part of the case is a matter which I do not intend to explore; but what is quite certain is that, having reached that conclusion, they still had a further duty, namely, to consider the question whether they ought to exercise their discretion; and, in that connection, they undoubtedly would have had to take the question of possible legitimation into consideration, had they realised that there was such a possibility.

It is true that in this case there may be some question of domicile; and if a certain state of affairs in relation to domicile was disclosed, the legitimation might not be possible. That being so, I am not going to decide the case on that point, but I draw attention to the importance of it, nonetheless.

I now come back to the matter on which I do propose to decide the case; it is a short point, namely, the requirements of section 3 of the Adoption Act, 1958.

[His Lordship referred to the evidence of continuous care and possession, and continued:] I do not see how, in the light of the admission by Mrs. C. and the evidence of Mr. B. that the child had been away for three nights, I can reject the evidence of Mrs. A. on that point, even though the justices did not regard her as a

truthful witness; not only was there that amount of corroboration to which I have already referred, but there was no cross-examination directed to this point. In other words, this part of her evidence had never been challenged. I am not suggesting that the third case was within the three-month period, but Mrs. A. gives the date of the second occasion as November 2, 1959, so that there were three nights—two consecutive nights, plus one which had preceded it—within the period of three months.

It is true to say that the words "continuously in the care and "possession" of the applicant for at least three consecutive months in section 3 are difficult; they are most peremptory, and construed quite literally, do produce absurd consequences, as Mr. Settle pointed out. Supposing the child went to hospital for a night, on the literal construction of these words, the infant would not have been in the care or possession of the applicant during that night. Again, supposing the child went to school and stayed there, even during the daytime, it would not be in the possession of the applicant during the time that it was under the discipline of the school teacher. I am not the first person to appreciate the difficulty here, because in the Scottish case of *M., Petitioner*,[5] the Lord President said,[6] and I entirely concur in what he said: "I shall not attempt to define the words 'care "'and possession' nor to deal with the difficult border-line cases "which may arise," but where I cannot travel with Mr. Settle is to say that where a proposed adopter voluntarily parted with both the care and possession of the child for even one whole night within the three-month period, the requirement of the Act has not been broken. It seems to me that is the one thing that the policy of the Act intended to prevent and, if one finds, as I do, that the child was in the exclusive care and possession of the mother during the whole of the night and part of a day, that is not consistent with the words "continuously in the care and "possession" of the applicants.

It is upon that third ground that I decide this case, and I have done it in this way for this reason: there are a number of points in this case, and I am sure that if I had not taken this point, I should have had to order a new trial; had I ordered a new trial and then in the end taken this point of law and decided the case upon it, I should have merely put the parties to great expense for no purpose whatever. I realise that the course I have taken might make a difficulty in the Court of Appeal, because the point of construction is not altogether easy; but, on balance, I have thought that that is the right thing to do.

Accordingly, the appeal is allowed and the adoption order is discharged.

The question then arises as to what happens to the child. In *In re Adoption Act, 1950*,[7] I came to the conclusion that I had

[5] 1953 S.C. 227.
[6] Ibid. 229.
[7] The Times, July 10, 1958.

1960

C. S. C., *In re.*

Roxburgh J.

no power to grant a stay because there is a mandatory requirement in section 27 (4) of the Act of 1950 that the child is to be handed back; Mr. Wilmers, who argued that case before me, agreed; and that is how the child, in that case,[7] got back to the mother, to her ultimate ruin, because it was in view of what happened after the case was before me and before it came to the Court of Appeal, that the Court of Appeal reversed my order.[8]

Section 35 (3) of the Act of 1958 contains similar words, and so far as I know, I have no power to authorise Mr. Settle's client to retain the child pending an appeal.

I think it is very curious that the court is not given power to stay the operation of this section pending an appeal; but I do not think that I can, because it is a statutory requirement. I do not believe that the Court of Appeal have power to do so either, but there was no appeal on this point in the other case.[8]

I want to make it plain that if I thought I had jurisdiction, I should grant a stay. It seems to me ridiculous that a child should be sent back, then for there to be an appeal, and then that the child should be brought back again.

Appeal allowed.
No order as to costs.

Solicitors: *Barnes & Butler for Cecil Bartram & Rogers, Oxford; Preston, Lane-Claypon & O'Kelly for Cole & Cole, Oxford.*

[8] The Times, July 29, 1958, C.A.

[PROBATE, ETC., DIVISION.]

1959 *Nov.* 9, 10, 11.

Sachs J.

* HANIVER *v.* HANIVER.

Husband and Wife — Judicial separation — Discretion — Prayer for discretion not required in petition for judicial separation—Discretion statement not required—Matrimonial Causes Act, 1950 (14 *Geo.* 6, *c.* 25), *s.* 14 (1)—*Matrimonial Causes Rules,* 1957 (1957 *S.I. No.* 619 (*c.* 4), *rr.* 4 (4), 28 (1).

A wife, in answer to her husband's petition for divorce on the ground of her adultery, prayed for a decree of judicial separation on the ground of her husband's adultery, which he admitted, and alleged that although she had become pregnant by another man her conduct had not amounted to adultery as she had been unconscious through drink. She did not pray for the exercise of the court's discretion in her answer, nor file a discretion statement. Upon the court finding that, although influenced by drink, she had committed adultery which her husband, himself guilty of adultery, had condoned, the question arose whether a decree of judicial separation could be granted without a prayer for discretion or a discretion statement:—

Held, (1) that since under the relevant rules these matters were only required upon a prayer for a decree nisi, it was not necessary to include a prayer for the exercise of the court's discretion, nor file a discretion statement, where a party who had committed adultery prayed for a decree of judicial separation. The court must nonetheless consider, after being fully informed of all relevant circumstances, whether it would be proper to grant a decree of judicial separation notwithstanding that party's adultery.

(2) That it was proper to grant such a decree in the circumstances of the present case.

DEFENDED PETITION FOR DIVORCE.

The husband and wife were married in July, 1945; both of them at that time were under 21, both practising Roman Catholics and both had lived in a country district in Ireland.

The husband by his petition prayed for a divorce on the ground of a single act of adultery on the part of his wife, which resulted in the birth of a child in November, 1951. He alleged that that adultery had never been condoned; and he asked for the discretion of the court to be exercised in his favour notwithstanding several acts of adultery from 1946 onwards.

The wife by her answer admitted that the 1951 child was not the child of the husband; but contended that on the occasion when it was conceived she was, in effect, unconscious as a result of taking alcohol to which she was unaccustomed and that, accordingly, she could not be deemed responsible for the act in question. She prayed for a decree of judicial separation on the ground of the husband's adultery, and neither asked in the prayer of her petition for the discretion of the court to be exercised in her favour, nor filed a discretion statement.

The case is reported solely upon the question, which was considered after judgment on the main issues had been given, whether or not a discretion statement should be filed, and a prayer for discretion included in the petition before a decree of judicial separation could be granted, the wife having been found guilty of adultery when the child was conceived.

R. J. A. Temple Q.C., *H. S. Law* and *J. A. P. Hazel* for the husband.

James Stirling Q.C. and *D. A. McIntyre Kemp* for the wife.

Kemp. Although a petitioner for a judicial separation must make a full disclosure of his adultery to the court, and ask the court to exercise its discretion in his favour, there is no statute or rule which imposes a mandatory duty on the court to require a prayer for the exercise of the court's discretion, and the filing of a discretion statement, before a decree of judicial separation, which is a final decree, can be granted, although the court may in its inherent jurisdiction require these steps to be taken. If the court is satisfied that all relevant matters have been disclosed, and that it is a proper case in which to grant a decree notwithstanding the adultery, it may do so without ordering the petitioner

1959

Haniver
v.
Haniver.

to go through what would only be a procedural formality. On the facts of the present case it is not necessary for the wife to take these steps: see Rayden on Divorce, 7th ed., note (c), p. 244, where it is suggested that, since the rules relating to discretion statements, namely rules 4 (4) and 28 (1) of the Matrimonial Causes Rules, 1957,[1] referred only to "decrees nisi," it did not appear that a discretion statement was necessary in a petition for judicial separation, though in Latey on Divorce, 14th ed., p. 669, the contrary is suggested in view of the provision in section 14 (1) of the Matrimonial Causes Act, 1950,[2] relating to the duties of the court, etc., upon the presentation of such a petition.

Temple. There can be no decree of judicial separation in the absence of a prayer for discretion and a discretion statement, for it is proper to infer, from the wording of section 14 (1) of the Act of 1950, that the same rules should be applied to cases of judicial separation as to petitions for divorce.

[Sachs J. referred to *Apted* v. *Apted and Bliss*,[3] in which the practice relating to discretion statements had first been laid down.]

Sachs J., who had held on the evidence that, although when the child had been conceived the wife, who had not drunk alcohol before, was undoubtedly affected by the alcohol she had drunk earlier in the evening, he was not satisfied that she had not only lost control of herself, but had lost consciousness, and that he must accordingly find her guilty of adultery, which the husband had condoned, said after hearing the argument upon the question of discretion:

On this question of whether a prayer for discretion in the pleadings and a discretion statement are here needed, there is a

[1] Matrimonial Causes Rules, 1957, r. 4 (4): "The petition shall conclude "with a prayer setting out particu- "lars of the relief claimed, including "the amount of any claim for "damages, any claim for costs, and "in appropriate cases, a prayer that "the court will exercise its discretion "to grant a decree nisi notwithstand- "ing the adultery of the petitioner "during the marriage."

R. 28 (1): "Every party to a "matrimonial cause praying that the "court shall exercise its discretion to "grant a decree nisi notwithstanding "his adultery shall lodge in the "divorce registry a statement (in this "rule called 'a discretion statement') "signed by him or his solicitor, "stating that the court will be asked "to exercise its discretion in his "favour notwithstanding his adultery, "and setting forth particulars of the "acts of adultery committed and of "the facts which it is material for the "court to know for the purpose of the "exercise of its discretion."

[2] Matrimonial Causes Act, 1950, s. 14 (1): "A petition for judicial "separation may be presented to the "court either by the husband or the "wife on any grounds on which a "petition for divorce might have been "presented, or on the ground of "failure to comply with a decree for "restitution of conjugal rights, or on "any ground on which a decree for "divorce a mensa et thoro might have "been pronounced immediately before "the commencement of the Matri- "monial Causes Act, 1857, and the "foregoing provisions of this Act "relating to the duty of the court on "the presentation of a petition for "divorce, and the circumstances in "which such a petition shall or may "be granted or dismissed, shall apply "in like manner to a petition for "judicial separation."

[3] [1930] P. 246; 46 T.L.R. 456.

conflict between the two standard textbooks, Rayden on Divorce, 7th ed., p. 244, and Latey on Divorce, 14th ed., p. 669. The rules relating to the asking of discretion in a petition and the filing of a discretion statement now alone govern the position and must, it appears to me, be construed as they stand. When one looks at the wording of the Matrimonial Causes Rules, 1957, rr. 4 (4) and 28, and their predecessors, and notes that in each case the wording relates to a prayer "that the court shall exercise its discretion to "grant a decree nisi," it seems to me that the relevant rules cannot apply to prayers for a judicial separation. It accordingly follows that Mr. Kemp is right in his submission that "his tackle "is in order."

In those circumstances it is for me to come to a conclusion whether I will exercise my discretion without asking for the petition to be amended and without asking for a discretion statement to be filed, I have come to the conclusion that this is eminently a case where that discretion should be exercised and I grant a decree of judicial separation accordingly.

Decree of judicial separation.

Solicitors: *Young, Jones & Co.; Dollman & Pritchard.*

J. B. G

REPORTER'S NOTE: The practice whereby a petitioner must ask for the discretion of the court to be exercised in his favour notwithstanding his adultery, and file a discretion statement, was laid down in a direction of Lord Merrivale P. dated May 29, 1930, following on the practice enunciated by him in his judgment in *Apted* v. *Apted and Bliss* [1930] P. 246. Lord Merrivale P. directed that: "when it is intended to ask, "at the hearing of a matrimonial cause, that the discretion of the court "be exercised on behalf of either party, the petition (or answer) shall "contain a prayer to this effect." It was further directed that a statement signed by such party or his solicitor, setting forth the relevant facts, should be lodged with the application for the registrar's certificate. By a further direction, dated May 30, 1930, a plea for discretion was to be confined to the prayer. (See Browne and Latey on Divorce, 11th ed., p. 296.) This direction was incorporated in the rules by an amendment, as from January 1, 1935, to rule 30 (which related to the registrar's certificate, etc.) of the Rules of 1924 (S.R. & O. 1934, No. 1348/L. 32; [1934] W.N. (Pt. 11) 354). In this rule reference is made only to a prayer for a decree nisi. The rule became rule 28 in the Rules of 1937. Rule 30 (*c*) of the Rules of 1924 (as amended) included, in addition to the directions of 1930, a provision that the words "notwithstanding his "or her adultery" should be included in the prayer of the petition (see now rule 4 (4) and direction in [1957] 1 W.L.R. 558), that notice of allegations in the discretion statement not referable to any specific allegations in the pleadings should be given to the other spouse (now rule 28 (4)); and that the statement should remain privileged until the contents were given in evidence (now rule 28 (5)). These three provisions originated from a direction of November 15, 1932 (see footnote to *Kirk* v. *Kirk and Gundy* (1934) 50 T.L.R. 237), from a ruling of Lord Merriman P. on February 1, 1934 (see *Kirk* v. *Kirk and Gundy*

1959

Haniver v. Haniver.

[1934] W.N. 31, 32), in which Langton J. held that discretion statements were only required for adultery, and not for other offences which were discretionary bars), followed by a direction dated March 28, 1934 [1934] W.N. 86, and from a ruling in *Cullen* v. *Cullen* [1933] P. 218; 49 T.L.R. 469 respectively.

Prior to the ruling in *Apted* v. *Apted and Bliss* there was some uncertainty as to the course to be adopted by a petitioner who had committed adultery. In *King* v. *King* [1915] P. 88, Bargrave Deane J. laid down a rule that he would in future grant no relief or assistance to any petitioner guilty of adultery "unless in the petition the misconduct "sought to be excused is admitted, and, in the prayer, the discretion of "the court is specifically asked for." In *Tickner* v. *Tickner* [1924] P. 118; 40 T.L.R. 367, in which the history relating to petitioners guilty of adultery is considered, the petitioner had admitted her adultery in her oral evidence, and the King's Proctor suggested that a petitioner who asked for the exercise of discretion should be required to say so in petition, and that if the facts were kept back until the case came to court, relief should be refused until a fresh petition had been filed "setting out definitely every single occasion on which he or she had "committed adultery." Sir Henry Duke P. stated that the matter of procedure was under his consideration. Discretion cases were put into the defended list by directions of May 14, 1926, and July 13, 1928.

[CHANCERY DIVISION.]

1960 *Jan.* 12; *Feb.* 3.

Cross J.

* CARR and Another *v.* BOXALL; BRIMMER (Third Party).

[1957 C. No. 1556.]

Legal Aid—Costs—Order for costs against aided person—Damages awarded to aided person—Payment into court—Payment out on satisfaction of costs to be paid by aided person.

Interest — Unliquidated damages — Time from which interest to be awarded—Discretion of court—Law Reform (Miscellaneous Provisions) Act, 1934 (24 *&* 25 *Geo.* 5, *c.* 41), *s.* 3 (1).

By section 2 (2) (*e*) of the Legal Aid and Advice Act, 1949, the liability of an assisted person by virtue of an order for costs made against him is not to exceed the amount (if any) which is reasonable for him to pay having regard to all the circumstances, and by section 3 and regulation 16 of the Legal Aid (General) Regulations, 1950 (S.I. 1950, No. 1359) all moneys payable or costs awarded to an assisted person become, in effect, subject to a charge in favour of the legal aid fund.

By section 3 of the Law Reform (Miscellaneous Provisions) Act, 1934: "In any proceedings . . . for the recovery of any debt or "damages, the court may, if it thinks fit, order that there shall be "included in the sum for which judgment is given interest at such "rate as it thinks fit on the whole or any part of the debt or "damages for the whole or any part of the period between the date "when the cause of action arose and the date of judgment."

[Reported by Miss V. A. Moxon, Barrister-at-Law.]

Two plaintiffs brought an action for a declaration that the defendant was not a tenant of premises of theirs and an injunction, and the first plaintiff claimed damages for assault. The defendant counterclaimed that he was a tenant of the premises and for damages for having been prevented from carrying on business in them; he also claimed damages for assault against the first plaintiff. Before the trial the plaintiffs conceded that the defendant was the tenant of the premises, and the first plaintiff paid £25 into court on the issue of assault. The hearing took place on July 23 and 24, 1958, when, on the issue of assault, judgment was given for both the first plaintiff and the defendant for 40s.; it was declared that the defendant was a tenant of the plaintiffs and an inquiry as to his damages was ordered: all questions of costs were adjourned for further consideration. On August 1, 1958, the defendant reoccupied the premises. On March 3, 1959, the order in the action was drawn up. Subsequently the plaintiffs paid £600 into court against the defendant's damages. The official referee, by his report dated November 6, 1959, assessed those damages at £1,301 14s. 3d. The defendant was a legally assisted person.

On further consideration, when it was agreed that the order would have to provide for taxation and payment (a) of certain costs by both plaintiffs to the defendant; (b) of certain other costs by the defendant to both plaintiffs; (c) of certain costs by the first plaintiff to the defendant, and (d) of certain other costs by the defendant to the first plaintiff:—

Held, (1) that plaintiffs suing a legally aided defendant were entitled to every reasonable protection and that, as there might be a balance of costs payable by the defendant to the first plaintiff or the plaintiffs, the court would direct that one half of the sum paid into court should not be paid out except on the production of an affidavit by the defendant's solicitors to the effect that the costs payable by the defendant to the first plaintiff and the plaintiffs had been satisfied by set-off or payment.

(2) That, although the defendant's claim was for unliquidated damages, the court in the exercise of its discretion under section 3 of the Law Reform (Miscellaneous Provisions) Act, 1934, would award interest from August 1, 1958, the date when the defendant reoccupied the premises, and not merely from the date of the official referee's report assessing the amount of the damages to which the defendant was entitled.

ACTION.

In March, 1957, the plaintiffs, Cecil Charles Wilfred Carr and Victor Farrell, bought a property at Hayling Island from the third party, Arthur Thomas Orlando Brimmer. The defendant, Frederick Boxall, carried on business in a kiosk on the property which he occupied under an oral tenancy granted to him by the third party. The plaintiffs refused to recognise that the defendant had any rights as against them to occupy the kiosk, and on April 10, 1957, they removed from it certain chattels belonging to the defendant. In the course of that operation the defendant and the first plaintiff came to blows. On May 20, 1957, the plaintiffs issued a writ claiming a declaration that the defendant was not a tenant of the plaintiffs, an injunction restraining him from continuing to have recourse, or returning to, or entering into possession of the kiosk, and from doing further violence to them, and the first plaintiff claimed damages for assault. By his

1960

Carr
v.
Boxall.

defence the defendant set up his tenancy of the kiosk and denied the assault and, he counterclaimed, inter alia, for a declaration that he was the tenant of the kiosk, an injunction to restrain the plaintiffs from interfering with his occupation of the kiosk and from denying him access thereto, damages for trespass to goods and, against the first plaintiff, damages for assault. The plaintiffs issued a third party notice against the third party, claiming that they were entitled to be indemnified by him. In June, 1958, the first plaintiff paid £25 into court on the issue of assault. Shortly before the trial of the action, the plaintiffs conceded that the defendant was entitled to a tenancy of the kiosk, and on August 1, 1958, the defendant reoccupied it. The action was heard by Danckwerts J. on July 23 and 24, 1958, and the hearing was confined to the issues of assault, and exemplary damages for trespass. The order in the action, dated March 3, 1959, provided, inter alia, that the first plaintiff should recover 40s. by way of damages for assault against the defendant, and that the defendant should recover 40s. by way of damages for assault against the first plaintiff. The order also declared that the defendant was a tenant of the kiosk and that an inquiry should be made before an official referee as to what damages (if any) he had sustained by having been prevented from carrying on his business in the kiosk. All questions of costs between the plaintiffs and the defendant were adjourned for further consideration; but, as the defendant was legally aided, the order provided for the taxation of his costs as required by regulation 18 (3) of the Legal Aid (General) Regulations, 1950. Subsequently, the plaintiffs paid £600 into court against the defendant's claim for damages. By his report dated November 6, 1959, the official referee assessed the damages which the defendant had sustained by having been prevented from carrying on his business at the kiosk at £1,301 14s. 3d.

Ian McCulloch for the plaintiffs.
A. J. Balcombe for the defendant.
M. J. Anwyl-Davies for the third party.

No cases were referred to in argument.

February 3. Cross J. read the following judgment which, after stating the facts, continued as follows: The parties are agreed that the order on further consideration must provide for the payment by the plaintiffs to the defendant of the sum of £1,301 14s. 3d., and also a further sum of £50, being agreed damages in tort for the conversion of certain property of the defendant with which the official referee did not deal. The parties are further agreed that in the circumstances, and having regard to the payment into court by the first plaintiff and the fact that the plaintiffs conceded before the trial that the defendant was entitled to a tenancy, the order will have to provide for the taxation and payment (a) of certain costs by both plaintiffs to the defendant;

(b) of certain other costs by the defendant to both plaintiffs; (c) of certain costs by the first plaintiff to the defendant; (d) of certain other costs by the defendant to the first plaintiff. All this would give rise to no difficulty whatever if the defendant was not in receipt of legal aid. As it is, however, this matter is slightly complicated by two provisions contained in the Legal Aid and Advice Act, 1949, and the Legal Aid (General) Regulations, 1950 (as amended) made thereunder. First, there are the provisions contained in section 2 (2) (*e*) of the Act and regulation 17 to the effect that the liability of an assisted person by virtue of an order for costs made against him is not to exceed the amount (if any) which it is reasonable for him to pay having regard to all the circumstances, including the means of all parties and their conduct in connection with the dispute, and, secondly, there is the provision contained in section 3 of the Act and regulation 16, under which any damages payable to and costs awarded to the defendant will have to be paid to the Law Society, and will become subject to a charge in favour of the Law Society to recoup so much of the solicitor and client costs of the defendant as is not covered by his contribution. I can, of course, direct a set-off of the costs payable by the first plaintiff to the defendant against the costs payable by the defendant to the first plaintiff, and of the costs payable by both plaintiffs to the defendant against the costs payable by the defendant to both plaintiffs (see section 3 (*b*) of the Act), and this I propose to do. But there may, of course, still be a balance of costs payable by the defendant. The sum of £1,301 odd payable to the defendant by way of damages must, I think, be regarded as part of his "means" within the meaning of section 2 (2) (*e*), and, as this sum must obviously far exceed any balance of costs which may become payable by him to the plaintiffs or the first plaintiff, I have no difficulty in saying that it is reasonable that he should pay such balances (if any). Indeed, the defendant's counsel did not contend to the contrary. But counsel for the plaintiffs has argued that they ought not to have to pay the damages until after the various sets of costs have been taxed, since the solicitor and client costs of the defendant may amount to a substantial sum, and the balance of the damages ultimately received by the defendant if they are paid over now might be insufficient to cover the balances of costs payable by him. I should not think that this would be at all likely to happen. But plaintiffs suing a legally aided defendant are entitled to every reasonable protection, and, in the circumstances, I propose to direct that one-half of the sum of £600 which was paid into court by the plaintiffs against the defendant's claim for damages, the whole of which would normally be paid out to the defendant in part satisfaction of the damages awarded, shall not be paid to the defendant except on production of an affidavit by the defendant's solicitor to the effect that the costs to be taxed under the order and paid by the defendant to the plaintiffs or to the first plaintiff, have been satisfied either by set-off or payment.

1960

Carr
v.
Boxall.

Cross J.

The order will also give liberty to both plaintiffs and defendant to apply, so that, if any difficulty arises hereafter in connection with any balance of costs payable by the defendant, the matter can be mentioned to the court again.

Another point which was argued before me relates to interest on the sum of £1,301 14s. 3d. payable by the plaintiffs to the defendant. Under section 3 of the Law Reform (Miscellaneous Provisions) Act, 1934, the court is given power in any proceedings for the recovery of any debt or damages to award interest on the debt or damages for the whole or any part of the period between the date when the cause of action arose and the date of judgment. Counsel for the defendant asked me to exercise my discretion by giving his client interest at the rate of 4 per cent. from August 1, 1958, to judgment. Counsel for the plaintiffs and the third party, on the other hand, while not denying that I have power to award such interest, submit that such interest should not normally be awarded on unliquidated damages, and that, in any event, it should not begin to run until the date of the report of the official referee which assessed the damages. I cannot accept these submissions. If at the trial on July 24, Danckwerts J. had been able to assess the damages suffered by the defendant up to date, and to make an order for their payment, the defendant would have received interest on the judgment so long as the plaintiffs did not satisfy it, while as soon as it was satisfied he would have had the use of the £1,301 odd and the plaintiffs would have ceased to have had the use of it. The fact that the order was not drawn up until March, 1959, and the award of the official referee was not made until November, 1959, will result, if I do not award interest, in the defendant losing the interest which he would, in one form or another, have received if the damages could have been assessed at the trial. I have no reason to think that the plaintiffs were in any way to blame for the delay which took place in drawing up the order or in prosecuting the inquiry as to damages. But I see no reason why they should reap any benefit from this delay. I therefore propose to direct payment of interest at 4 per cent. on the sum of £1,301 14s. 3d. from August 1, 1958, when the defendant, in fact, reoccupied the kiosk, down to judgment.

Order accordingly.

Solicitors: *Taylor, Willcocks & Co.; Arthur S. Joseph & Cates for MacDonald, Jacobs & Oates, Portsmouth; Bernard W. Main for Bliss, Sons & Covell, High Wycombe.*

[QUEEN'S BENCH DIVISION.]

* WILSON v. WREXHAM CORPORATION.

1959
Oct. 12, 22.

Lord Parker C.J., Ashworth and Hinchcliffe JJ.

Highway—Private street works—Objection to proposals—Jurisdiction of justices—Resolution to make up street and apportion expenditure on one basis—Service of notices—Further resolution on different basis—Whether valid—Private Street Works Act, 1892 (55 *&* 56 *Vict. c.* 57), *ss.* 6, 7, 10, 11.

On November 29, 1956, a local authority resolved, pursuant to the Private Street Works Act, 1892,[1] to carry out certain private street works, and that the expenditure thereof should be apportioned among the premises fronting, adjoining or abutting the street on a frontage basis. No further steps were taken to implement that resolution and there was no publication and no notices were served upon the frontagers. In September, 1957, the authority passed a second resolution in respect of the same street, amending the first resolution so as to change the basis of apportionment of expenditure from frontage to degree of benefit, and approving the necessary plans, documents and provisional apportionment prepared by the surveyor on that basis. That resolution was duly published and notices thereof served upon the frontagers in accordance with section 6 (3) of the Act. No formal objections were made in respect of

[1] Private Street Works Act, 1892, s. 6: "(1) . . . the . . . authority "may from time to time resolve with "respect to [a] street . . . to do . . . "works (in this Act called private "street works) . . . and the expenses ". . . shall be apportioned . . . on "the premises fronting, adjoining, or "abutting on such street . . . (2) The "surveyor shall prepare . . . —(*a*) A "specification of the private street "works . . . (*b*) An estimate of "the probable expenses . . . (*c*) A "provisional apportionment of the "estimated expenses . . . Such specification . . . estimate and provisional "apportionment . . . shall be submitted to the . . . authority, who "may by resolution approve the same ". . . (3) The resolution approving the "specifications, . . . estimates, and "provisional apportionments, shall be "published . . . and copies thereof "shall be served on the owners of the "premises shown as liable to be "charged . . ."

S. 7: ". . . any owner of any "premises shown in a provisional "apportionment as liable to be "charged with any part of the "expenses of executing the works "may, by written notice . . . object "to the proposals . . . on any of the "following grounds . . ."

S. 8 (1): "The . . . authority . . . "may apply to a court of summary "jurisdiction to appoint a time for "determining . . . objections . . . "and . . . any such court may proceed "to hear and determine . . . objections in the same manner . . . and "with the same powers . . . as if "the . . . authority were proceeding "summarily against the objectors to "enforce payment of a sum of money "summarily recoverable. The court "may quash in whole or in part or "may amend the resolution, . . . "estimates, and provisional apportionments . . ."

S. 10: "In a provisional apportionment . . . the apportionment of "expenses . . . shall, unless the . . . "authority otherwise resolve, be "apportioned according to the frontage ". . . but the . . . authority may, "if they think just, resolve that in "settling the apportionment regard "shall be had to the following considerations . . . (*a*) The greater or "less degree of benefit to be derived "by any premises . . ."

S. 11: "The . . . authority "may from time to time amend the "specifications . . . estimates, and "provisional apportionments for any "private street works, but if the total "amount of the estimate . . . is "increased, such estimate and the "provisional apportionment shall be "published . . . and objections may "be made to the increase and apportionment, . . ."

1959

Wilson
v.
Wrexham
Corporation.

the proposals. However, informal representations were made to the authority by certain of the frontagers, and as a result, on November 28, 1957, a third resolution was passed rescinding the second resolution and restoring the first, thereby changing the basis of apportionment back to frontage. The necessary plans and provisional apportionment on that basis prepared by the surveyor were approved by resolution of the authority and duly published and notices thereof served pursuant to section 6 (3).

One of the frontagers, whose liability under the provisional apportionment had risen from £191 18s. 8d. on the degree of benefit basis under the second resolution to £318 2s. 7d. on the basis of frontage under the third resolution, served notice of objection under section 7 to the latter resolution. At the hearing of the objection it was contended, inter alia, that in the circumstances the authority could not rescind the second resolution and substitute a further resolution, and that once a provisional apportionment had been made on one basis and published, and notices served, there was no power under section 11 to change the basis of apportionment. The notice of objection contained no reference to that contention as a ground of objection, and the justices, having decided against the frontager on the grounds stated in his notice, were of the opinion that he ought to have included in his notice the ground that there had been some material informality defect or error in respect of the third resolution and that his notice was invalid; they accordingly confirmed the provisional apportionment. On appeal:—

Held, that the frontager could not challenge the validity of the third resolution by a notice of objection under section 7 because, if the resolution was a nullity, so also were the publication, the notices, the objection and the hearing before the justices: section 8 (1) did not give justices power to determine a matter which was otherwise completely outside their jurisdiction, and if the frontager wished to pursue his contention that the resolution was ultra vires he should have done so by way of application to the Queen's Bench Division for one of the prerogative writs. The justices, accordingly, were right in confirming the provisional apportionment.

Per curiam: The first resolution was and remained purely a "domestic resolution," for no plans had been prepared, or publication made or notices served in respect of it, while the second, "published resolution," was fully rescinded and abandoned when the third resolution was passed, and the authority were in fact entitled to pass the third resolution.

Semble: Section 11 does not empower a local authority to change by amendment the basis of apportionment in a published resolution.

Case stated by Denbigh justices.

The Wrexham Corporation applied to the justices to hear and determine objections made by the appellant frontager, Robert Donald Wilson, to their proposals to carry out private street works under the provisions of the Private Street Works Act, 1892, in a length of a private street, Windermere Road, Wrexham, and in particular to a provisional apportionment of the estimated expenses of such works of £1,631 15s. in all, and £318 2s. 7d. in so far as it related to the appellant's property.

The following were among the facts found by the justices. The appellant frontager had built, and at all material times was the owner of, a bungalow having a frontage of 104 feet 6 inches to the unmade length of Windermere Road. On November 29, 1956,

the highways committee of the corporation resolved in pursuance of the powers conferred on them by the Private Street Works Act, 1892, to do certain street works in part of Windermere Road, and that the expenditure thereof should be apportioned upon the premises fronting, adjoining or abutting on the street according to the respective frontages of such premises. That resolution was confirmed by the corporation on December 18, 1956, but no notices under section 6 (3) of the Act were served upon the appellant.

On September 5, 1957, the committee resolved (A) that in the resolution of November, 1956, "the words 'according to the "'respective frontages of such premises' be deleted 'and the "'following addendum made thereto' that in settling the appor- "tionment regard shall be had to the 'greater or lesser degree of "'benefit derived by any premises from such works.' (B) that "the plans, specifications, sections, estimates and provisional "apportionment now submitted by the borough surveyor relating "to the works . . . be approved and the necessary notices be "published and served in the manner prescribed by the Private "Street Works Act, 1892." That resolution was confirmed by the corporation on September 24, 1957, and was duly published in the manner prescribed by Part II of the Schedule to the Act and notices thereof dated October 17, 1957, were served under the provisions of section 6 (3) on the owners, including the appellant, of the premises shown as liable to be charged. By the notice served on him the appellant was informed that the estimate of the probable expenses of the works amounted to £1,631 15s. and a provisional apportionment had been made under which his liability amounted to £191 18s. 8d.

On November 28, 1957, after representations by certain frontagers had been received by the corporation relating to the provisional apportionment, the committee resolved: (i) that the resolutions (A) and (B) of September 5, 1957, be rescinded, and that the resolution of November 29, 1956, be restored and approved; (ii) that accordingly the borough surveyor should submit a specification, plans, sections, estimate and provisional apportionment for approval to the next meeting of the committee; and (iii) that all notices served on the frontagers liable to be charged and published pursuant to resolution (B) of September, 1947, be withdrawn. The corporation confirmed that resolution on December 17, and on January 9, 1958, the highways committee, and on January 28, 1958, the corporation resolved, that the plans, speci- "fications, sections and provisional apportionment now submitted "by the borough surveyor relating to . . . Windermere Road be "approved and the necessary notices be published and served . . ."

That resolution was published, and notices dated February 13, 1958, served pursuant to section 6 (3) of the Act; by the notice served upon him the appellant was informed that the estimate of the probable expenses amounted to £1,631 15s. and that a provisional apportionment had been made under which his liability amounted to £318 2s. 7d.

1959

Wilson
v.
Wrexham
Corporation.

The appellant served notice of objection under section 7 of the Act objecting to the proposals on the grounds: (a) that the proposed works were insufficient and unreasonable, and that the estimated expenses were excessive; (b) that the provisional apportionment was incorrect in respect of the degree of benefit to be derived by him. At the hearing he did not prosecute his objection on the ground that the proposed works were insufficient.

On behalf of the appellant it was contended that the corporation could not rescind their previous resolution of September 5, 1957, once the procedure under the Private Street Works Act, 1892, had been invoked by the service of notices under the Act, and that the corporation should have left those making representations to lodge formal objections to the provisional apportionment made pursuant to that resolution, and pursue such objections under the provisions of section 7 of the Act; that section 11 did not permit the corporation to rescind a resolution and withdraw notices served under the Act and substitute a further resolution and serve further notices which had the effect of conferring upon the other frontagers an advantage as against him whose liability was thereby increased; that once a provisional apportionment had been made on one basis and notices served thereunder, the corporation could not by virtue of section 11 change the basis of their apportionment; and that the failure to include in the notice of objection an objection that there had been some material informality, defect or error in respect of the resolution under which the final provisional apportionment had been made did not prevent the appellant from making the above points on the ground that section 7 did not preclude a party to any proceedings from making any objection in point of law. It was also argued that the power afforded to an urban authority under section 11 would not enable it to alter a provisional apportionment of expenses so as to favour one frontager against the others.

On behalf of the council it was contended that the provisions of section 11 in so far as they enabled an urban authority from time to time to amend a provisional apportionment, also enabled the authority to amend the resolution laying down the basis of apportionment pursuant to which the provisional apportionment was made; that if the corporation were not empowered to amend the resolution of September 5, 1957, they were also unable to amend the previous resolution of November 29, 1956; that the appellant was not entitled to challenge the right of the corporation to amend the resolution or to contend that the provisional apportionment was consequently incorrect as he had not included in his notice of objection either of the grounds of objection contained in section 7 (*c*) and (*f*) of the Act.

The justices were of the opinion that the estimated expenses were not excessive; that the proposed works were reasonable, and that the provisional apportionment on the basis of frontage was correctly made. They were further of the opinion that the appellant ought to have included in his notice of objection the ground

that there had been some material informality, defect or error in or in respect of the resolution of November 28, 1957, and that his notice was therefore defective. They accordingly confirmed the provisional apportionment under which his liability amounted to £318 2s. 7d.

Additional facts are stated in the judgment of Lord Parker C.J.

On October 12, 1959, the court adjourned the hearing for the notices given by the local authority to the appellant to be produced, and the case was further argued on October 22, 1959.

R. G. Woolley for the appellant frontager.
H. Parrish for the council.

The following case was cited in argument: *R. & T. Glynn Evans* v. *Liverpool Corporation.*[2]

LORD PARKER C.J. This is an appeal by way of case stated by justices for the County of Denbigh to whom an application was made by the Wrexham Corporation to hear and determine certain objections made by the appellant to a proposal to carry out private street works under the provisions of the Private Street Works Act, 1892. The estimated expenses of such works amounted to £1,631 15s. in all, and £318 2s. 7d. was the provisional apportionment in respect of the appellant's property. It was a difficult matter. The justices went into it in considerable detail, and in the end they came to the conclusion that not only were the proposed works reasonable and the provisional apportionment correct, but they were of opinion that the objections which the appellant sought to make before them were ones which were not included in his grounds of objection, and for that reason also the objections failed.

Until February, 1958, the appellant was the owner of a bungalow having a frontage of 104 feet 6 inches to Windermere Road, which was not then a highway repairable by the inhabitants at large, but although he ceased to be the owner he remained under the contract of sale liable to pay all road charges which might become payable in the future, hence his interest in the matter.

The matter arises under the Private Street Works Act, 1892, and before continuing to state what in fact the corporation did, I should refer shortly to a few sections of the Act. By section 6—and I am taking it quite shortly—it is provided that the urban authority may from time to time resolve in respect of a street which is not sewered, levelled, paved, metalled, flagged or channelled, etc., that work of that nature shall be done, and that the expenses incurred in executing the works shall be apportioned on the premises fronting, adjoining, or abutting on such street. That is what I may call a "domestic resolution" of the urban

[2] [1959] 2 Q.B. 249; [1959] 2 W.L.R. 749; [1959] 2 All E.R. 419.

1959

Wilson
v.
Wrexham
Corporation.

Lord Parker
C.J.

authority which is not published. Pausing there, it is provided by section 10 that in that resolution the method of apportionment shall be on a frontage basis unless the urban authority otherwise resolve, but that the urban authority may, if they think just, resolve that the apportionment shall be made having regard to the greater or less degree of benefit to be derived by any premises from such works. Having passed such a resolution, the surveyor in the ordinary way is then instructed to prepare a specification, estimate and provisional apportionment in accordance with the basis already resolved. When those have been prepared the urban authority may pass a resolution approving the specification, estimate and apportionment of the surveyor, and if that is done that resolution, which I will call the "published resolution," has to be published together with his specification, plans, sections, estimates and the like, and copies are to be served on the owners. Each owner of property abutting the street in question has one month in which to make certain objections, and by section 7 it is provided that the objections can be made on one of five different grounds. After the month has expired the urban authority, if there are objections, may apply to a court of summary jurisdiction to hear those objections. The court of summary jurisdiction has then authority to "quash in whole or in part or may amend the "resolution, plans, sections, estimates, and provisional appor-"tionments, or any of them, on the application either of any "objector or of the urban authority." Finally, by section 11, there is power in the urban authority to amend the specifications, plans and sections, estimates and provisional apportionments.

The appellant's frontage was more than the frontages of any of the other owners of dwellings along the street, and a frontage basis would clearly require him to pay considerably more when the total cost was apportioned than if the basis was on the degree of benefit. What happened was this: On November 29, 1958, the corporation resolved under section 6 (1) of the Act to do certain work to this road. In that resolution, which is what I have called a "domestic resolution," they resolved that the provisional cost should be borne on the basis of frontage and not of degree of benefit. However, no steps whatever were taken as the result of that domestic resolution. The surveyor was not asked to prepare any plans; there was no approval, therefore, of his plans, and there were no notices. It remained, and was, purely a domestic resolution.

On September 5, 1957, however, the corporation passed a second resolution, again a "domestic resolution," under which they resolved to change the basis of apportionment from frontage to degree of benefit, and they instructed their surveyor to prepare the necessary documents on that basis. He did so, and they confirmed and approved by resolution what he had done. In other words, on this occasion, unlike the first, they went through the statutory procedure and, having confirmed what the surveyor had done, made the necessary publication and served the necessary

notices pursuant to section 6 (3). In fact no formal objections under section 7 were ever made as the result of that resolution, either within a month or at all and, so far as the appellant was concerned, there was, of course, no inducement to him to make any objection because under this resolution his apportionment was on a degree of benefit basis which was more favourable to him than a frontage basis.

On November 28, 1957, however, the highways committee passed yet another "domestic resolution," under which they changed back from the degree of benefit basis to the frontage basis. The surveyor was again asked to prepare plans on that basis. His documents were approved by resolution, and that resolution was published and again the necessary notices were given. Having regard to the change of basis the appellant's apportionment rose from a sum of £191 18s. 8d. to some £318. He did object, and his notice of objection stated the following grounds: "(a) that the proposed works were insufficient and "unreasonable and that the estimated expenses were excessive; "(*b*) that the provisional apportionment was incorrect in respect "of the degree of benefit to be derived by the appellant." Pausing there, it is quite clear that he had in fact no case under his first objection. It is also clear, I think, that the second objection was completely misconceived, because in fact the new apportionment was not on the degree of benefit basis at all but on a frontage basis. It now becomes clear that the corporation had, in sending him notice of the resolution, specifically drawn his attention to the fact that a change had been made from degree of benefit basis to frontage basis; he therefore knew of it, and how he came to make that second objection I do not quite know. It is only fair, however, to say that at that stage nobody fully appreciated the position.

The justices decided this matter on the ground that nowhere among those objections I have read was any objection made to this change from degree of benefit basis to frontage basis. The court has been rather concerned with that because, as I have said, the position then was by no means clear. But for the letter from the corporation to which I have referred there was nothing to indicate to him what the basis was on which the apportionment was made. Also it appears that he was ignorant at that time of something which he learned later, namely, that the reason for the change from degree of benefit basis to frontage basis was representations made by other frontagers informally and not by way of objection to the resolution of September 5, 1957.

In those circumstances, Mr. Woolley, who has argued this case very well, has submitted a number of arguments to the effect that there was no power in the corporation to pass the resolution as to which the objection was made and the objection determined by the justices. He has a number of arguments. As I understand it, his main argument is really this: that there was here no abandonment of the original scheme but that the original scheme

1959

Wilson
v.
Wrexham
Corporation.

Lord Parker
C.J.

was perpetuated but with a minor amendment, namely, this change from degree of benefit basis to frontage basis, and that there is no power under the Act to amend in that respect. He referred us to section 11 and, although it is not strictly necessary for the decision, I am inclined to agree with his argument that under section 11 it is not possible to change the basis of apportionment. Indeed, it would be odd if there were power, because there is no ground on which a frontager could object unless, as I understand it, the total cost of all the work in the street had gone up. In other words, as between himself and his neighbours, he would have no right of objection whatsoever. Accordingly, Mr. Woolley maintains that there was no power to pass this resolution.

His other argument really leads to the same result, namely, that the corporation had no jurisdiction to pass the resolution. If, however, there was no power to pass that resolution, it was a complete nullity. The publication of it was a nullity. The objections made were a complete nullity. The hearing before the justices was a complete nullity. Accordingly, it would be quite impossible for him to raise that point before the justices. Indeed, if one visualised a third objection having been made to the effect that the resolution in question was ultra vires, there being no jurisdiction to make it, it would have been the duty of the justices to say: "We cannot deal with that." If it is a good point, the only way in which the appellant could get it dealt with would be, as soon as he knew the full facts, to come to this court and apply, if the justices would not adjourn the matter, for prohibition. If, as most likely, they would have adjourned the matter, he could have applied to this court for an order of certiorari to quash the resolution in question as being a complete nullity.

It is right to say that section 8 (1) does say: "The court"—that is, the court of summary jurisdiction—"may quash in whole "or in part or may amend the resolution, plans, sections, "estimates, and provisional apportionments," but I do not think myself that any reliance can be put on those words to give a court of summary jurisdiction power to determine a matter which is otherwise completely outside their jurisdiction. Full effect can be given to those words by enabling them to quash on the merits for good ground shown when there is full jurisdiction in the matter. Accordingly, for my part, I am content to decide this case on the basis that even if the appellant had made this objection before the justices, it was not a matter with which they could deal, and the only way in which he could have the matter dealt with would be coming to this court.

It is only right, however, to go on to say that having heard the argument on both sides I am clear in my own mind that any application to this court would have failed. I am now satisfied that there was no attempt to invoke the powers of section 11, the amending powers, at all. If there had been, there would have been no jurisdiction. I am satisfied without going into the facts

in detail to say that the first published resolution was fully rescinded and abandoned. I think that when the resolution in question was made there was a total abandonment of the original resolution with fresh instructions to the surveyor to prepare plans and estimates on the new basis and, accordingly, that that was something which was clearly within the power of the corporation. They were not invoking the powers of section 11, which would not have covered them on the facts of this case. However, the first ground is sufficient for the decision, and on that ground I would dismiss this appeal.

ASHWORTH J. I agree, and it is only out of deference to Mr. Woolley's argument that I add one word or two. In my judgment, the appeal can be disposed of, and should be disposed of, on the first of the grounds mentioned by the Lord Chief Justice. It seems to me that directly the argument is analysed, the appellant is contending that the resolution which was the before the justices was a nullity, yet he was seeking before those justices to raise a contention to that effect and thus invite them to determine their own jurisdiction in this matter. They could only have jurisdiction if the resolution was effective and intra vires, and his contention that it was ultra vires was a matter which should have been pursued in this court by means of one of the prerogative remedies.

Mr. Woolley did raise one further point which I should like to mention. Section 8 (2) of the Act provides: "No objection which "could be made under this Act shall be otherwise made or "allowed in any court proceeding or manner whatsoever." As I understood him, he was saying that that, so to speak, limited the appellant's rights here and indirectly enabled him to raise the contention as to jurisdiction which I have already indicated was not maintainable. As it seems to me, that is an unsound argument because it presupposes an objection which could be made under this Act, and the objections which can be made under the Act are catalogued under section 7 and do not include an objection which goes to the vires or otherwise of the second resolution.

On the second branch of this argument, namely, whether this resolution was in fact intra vires owing to the abandonment of the second one, I have nothing to add. I agree that the appeal fails.

HINCHCLIFFE J. I agree, and there is nothing I can usefully add.

Appeal dismissed.

Solicitors: *T. D. Jones & Co. for James, James & Hatch, Wrexham; Sharpe, Pritchard & Co. for Town Clerk, Wrexham.*

J. F. L.

[QUEEN'S BENCH DIVISION.]

1960
Feb. 2, 3.

Finnemore J.

*JUDD *v.* HAMMERSMITH, WEST LONDON AND ST. MARK'S HOSPITALS BOARD OF GOVERNORS AND ANOTHER.

[1958 J. No. 5662.]

Damages—Personal injuries—Disability pension—Compulsory contributor to statutory superannuation fund—Injuries resulting in inability to work—Superannuation before normal retirement age—Whether pension to be set off against loss of wages.

The plaintiff had been employed as a local government officer by a metropolitan borough council for 32 years, during which period he had made compulsory contributions to a superannuation fund maintained by the council under the Local Government Superannuation Acts, 1937 to 1955. At the age of 58 he was knocked down, owing to the negligence of the defendants' servant, by an electric truck and received injuries which rendered him incapable of ever working again; as a result he was superannuated and became entitled to receive a pension. On the question whether, in assessing damages, the pension received by the plaintiff until his normal retirement age of 65 ought to be taken into account and set off against his loss of wages:—

Held, that the plaintiff had become entitled to receive the pension, not by reason of the accident, but by reason of the contributions he had made during his service with the council, the benefit of which a wrongdoer should not be allowed to appropriate, and it mattered not that those contributions were compulsory; accordingly, the pension should be disregarded in assessing damages.

Payne v. *Railway Executive* [1952] 1 K.B. 26; [1951] 2 T.L.R. 929; [1951] 2 All E.R. 910, C.A. applied.

ACTION.

On November 18, 1957, the plaintiff, Frederick Judd, was walking along a road in the grounds of the Hammersmith Hospital, the premises of the first defendants, the Board of Governors of the Hammersmith, West London and St. Mark's Hospitals, towards the physiotherapy department where he was to receive treatment, when he was knocked down and injured by a small electric truck driven by the second defendant, Ernest Albert Treby, the servant of the first defendants. Finnemore J. found that that accident was the fault of the second defendant.

The plaintiff, who was then aged 58, had been employed by the Hammersmith Borough Council as a local government officer since July 6, 1926, some 32 years. At the time of the accident he was suffering from rheumatoid arthritis, for which he was receiving treatment but was able to carry on with his work and to walk about, although he normally used a stick, and used public transport to do his work. He was in very little pain and able to enjoy his life reasonably well. His condition was quiescent and, but for the injuries he received in the accident, inter alia, a fracture of the right femur, he would have been able to continue

indefinitely with only a partial disability, and would have remained at work up to the normal retiring age of 65. As a result of the accident he became for all practical purposes a permanent cripple; he was largely confined to a wheel chair, was in continual pain and would never get any better. He had been unable to work since the accident and would never be able to work again, and, on January 5, 1959, owing to his condition, he was superannuated.

During his period of employment with the council the plaintiff had been a contributor to a superannuation fund maintained by the council under the Local Government Superannuation Acts, 1937 to 1955. Under the Hammersmith Superannuation Scheme, 1955, made under the Act of 1953, he had elected to retain his previous superannuation rights under the Shoreditch and Other Metropolitan Councils Superannuation Acts, 1922 to 1951, and in consequence, on retirement he received a superannuation allowance comprising a pension based on 1/80th of his average remuneration over three years in respect of each year of service, and a lump sum payment of 3/80ths of his average remuneration in respect of each year of service. The annual pension amounted to £300 11s. 11d. and the lump sum payment to £901 15s. 7d., the service taken into account in the calculation of those retirement benefits being from July 6, 1926, to January 5, 1959. Had he continued in the service of the council until his 65th birthday, March 9, 1964, he would have received an annual pension of £413 13s. 9d. and a lump sum payment of £1,250 1s. 3d.

This report is solely concerned with the question whether the retirement benefits paid to the plaintiff ought to be taken into account in assessing damages.

Michael Lee for the plaintiff.
John May for the defendants.

The cases cited in argument are referred to in the judgment.

FINNEMORE J. stated the facts and continued: The point of law which has arisen concerns the pension which was granted to the plaintiff under the statutory scheme which applied to him as a local government officer. Ought that to be taken into account, and, between now and his retirement age of 65, be set off against his loss of wages? I was referred to *British Transport Commission* v. *Gourley*,[1] which was cited because, while concerned with taxation and, therefore, somewhat removed from the present case, it did deal with the general question whether, when a person is injured through somebody else's fault and is entitled to claim damages by way of compensation, tax must be taken into account and the amount of damages reduced by the amount which would have been paid by the successful plaintiff by way of tax

[1] [1956] A.C. 185; [1956] 2 W.L.R. 41; [1955] 3 All E.R. 796, H.L.

1960

Judd
v.
Hammersmith, etc., Hospitals Board.

Finnemore J.

to the Inland Revenue, on the principle that a person must not make a profit out of his accident but must be compensated only for the actual loss which relates to him. Mr. May referred to the speech of Lord Goddard[2] and said that the principle of remoteness had to be applied, and we shall see in a moment how that may affect the present case. It was held there that tax deduction was not too remote to be considered and to be applied in the reduction of damages.

Mr. Lee cited, as supporting his contention, *Payne* v. *Railway Executive*.[3] In that case the plaintiff, a petty officer in the Royal Navy, was seriously injured in a railway accident. He was invalided out of the service very much as the plaintiff here was retired from his service. He, as here, was given a pension on his disability and consequent inability to carry on his work; the pension in the present case amounting to some £300 a year.

The scheme under which the plaintiff paid his contributions was a contractual scheme; the council also made its contributions, and I think that one point made by Mr. May as a sort of second limb of defence, that one ought to divide the pension into two, is based on a fallacy. As everybody knows, in a contributory pension scheme, whilst the employee makes a contribution and the employer—in this case the council—makes one, the amount which the employer contributes has to come from somewhere, and, when there is a scheme of this sort in operation, it would seem, as a matter of common sense, that the wages or the salary paid would have to take into account and reflect the contributions made by the employer, at all events in some degree: it is not just a case of the employee paying so much and the employer paying so much, because it is almost bound to be that the actual wages, or salary, paid would be very likely less than the notional sum which the employee might get if there were no such scheme in operation. But, in any event, that is not the point on which the legal decision depends. The submission in law of Mr. Lee is that the pension has to be disregarded: whether because it is res inter alios acta, or because it is too remote, or because it is wrong to allow a tortfeasor or wrongdoer to benefit by what somebody else has done by way of provision for his future, matters not; nor does it matter if it be the result that the plaintiff benefits to this extent by having his pension and having also his compensation for his loss of earnings.

Payne v. *Railway Executive*,[4] subject to one matter to which I will refer later, seems to me to be very much in line with the present case, because there it was argued that the pension ought to be taken into account. Sellers J., who tried the case, applied the principle which had been adumbrated in *Bradburn v. Great Western Railway Co.*[5] decided in 1874, long before modern social

[2] [1956] A.C. 185, 207.

[3] [1952] 1 K.B. 26; [1951] 2 T.L.R. 929; [1951] 2 All E.R. 910, C.A.

[4] [1952] 1 K.B. 26, C.A.

[5] (1874) L.R. 10 Ex. 1.

legislation had to be considered. In that case the tortfeasor claimed that insurance money which the plaintiff received as a result of his injury, for which, of course, he had paid his premiums, ought to be taken into account, but it was held that that was money received because of res inter alios acta. Sellers J. considered that principle and applied it, saying [6]: "The plaintiff has become entitled to the pension by reason "of his naval service, it being one of the benefits such "service affords. The pension would have been paid if the "accident had been without any negligence on the part of the "railway's servants. It was argued for the plaintiff that a "pension must be disregarded in making the assessment just as "insurance is to be disregarded, and that as a matter of principle "a wrongdoer should not get the benefit of the fortuitous "circumstance that the plaintiff was serving in the Royal Navy "at the time and had consequently received a pension. I agree "with that contention. Just as the wrongdoer cannot appropriate "to himself the benefit of the premiums paid by the injured "party to cover accident risks so he cannot, I think, appropriate "the benefits accruing from the injured party's service which "similarly entitles him to those benefits."

Cohen L.J., after quoting the passage I have just read, continued [7]: "I respectfully agree with his conclusion and his "reasoning. It seems to me that the accident in this case was "not the causa causans of the receipt by the first plaintiff of the "disability pension, but the causa sine qua non. The causa "causans was his service in the Royal Navy."

In this case the contributions paid by the plaintiff were compulsory, but that does not matter: it is the contributions made by him during his 32 years' service with the council which entitle him to the money he is now enjoying. The causa causans of the pension was the service of the plaintiff with the borough council and, incidentally, his payment of contributions towards the scheme. Cohen L.J. went on to say that he was all the more ready to arrive at that conclusion because of the difficulty of the Minister of Pensions—and the borough council here does not have the right—in assessing pensions, to take into account damages which might be awarded.

It is also true that Singleton L.J. made the same point, but it seems to me that the ratio decidendi is in the conclusion I have just quoted from the judgment of Cohen L.J., and that Singleton L.J. equally accepted that. First of all, he quoted [8] from the judgment of Pigott B.[9] and said [10]: "And, from another point of "view, I draw attention to the words of Pigott B.[11]: '. . . there "'is no reason or justice in setting off what the plaintiff has "'entitled himself to under a contract with third persons, by "'which he has bargained for the payment of a sum of money

[6] [1952] 1 K.B. 26, 35.
[7] [1952] 1 K.B. 26, 36.
[8] Ibid. 39.
[9] L.R. 10 Ex. 1, 3.
[10] [1952] 1 K.B. 26, 39, 40.
[11] L.R. 10 Ex. 1, 3.

1960

Judd
v.
Hammersmith, etc., Hospitals Board.

Finnemore J.

" 'in the event of an accident happening to him.' Equally, it " can be said that the pension awarded to the plaintiff in the " present case is due to his contract or to his terms of service, " with the Admiralty. In certain circumstances a man serving in " the Navy may become entitled to a pension; that is a factor " which enters into the question of his pay; if there were no " pension rights it is reasonable to assume that the pay would be " higher. Why then should the pension enure for the benefit of a " wrongdoer? I myself should be prepared to adopt the reasoning " of Pigott B. and to hold that the plaintiff does not receive the " pension because of the accident 'but because he has made a " 'contract providing for the contingency.' "

That seems to me to be exactly this case. Possibly, though I do not think it affects the principle, it is a little stronger in this case because the man has obviously contributed to the fund for his future pension.

Singleton L.J. went on to say [12]: " None the less, I prefer to " base my judgment in this case on another ground "—and he dealt with the point of the Minister of Pensions taking into account the question of damages awarded in a successful action brought for negligence.

I think, therefore, on the authority of the Court of Appeal in that case, that I am bound to hold that the pension in this case should not be taken into account in favour of the defendants as against the plaintiff.

The question of assessing damages is an extremely difficult matter. I have to consider, first, what the plaintiff has already lost, which, I think, for practical purposes and taking into account deduction of tax and so on, is the sum of £800. I then have to consider what he has lost in having a lower lump sum gratuity at the end of his service than he would have had, which I put at £350. I have to take away five years half the National Insurance benefits and that is agreed at the figure of £511. I have then to add on the reduction of pension for such term of years as I think is right after the age of 65. As I said, the plaintiff will have a pension of £300 instead of one of over £400. Then, forgetting the pension now, I have to consider what I think is a fair sum to allow him for loss of salary between now and the time when he is 65, again making allowance for the fact that he gets it now without waiting for it; and, secondly, that he still has to face all the mishaps and risks of ordinary life which might cause him to be disabled or, indeed, which might bring his life to an end before he reaches the age of 65. I have to take all those matters into account before arriving at what seems to be, not on any arithmetical basis but, as far as one can do it, on a reasonable and sensible and humane basis, a sum which ought to be given to him in compensation for what he has lost, and what he is likely to go on losing because he can no longer do any work of any kind. Then

[12] [1952] 1 K.B. 26, 40.

there has to be added to that what Mr. Lee says is really a much larger sum than that as compensation for pain and suffering, which was very considerable, and for his loss of amenities of life in the sense in which those amenities include any kind of activity.

[His Lordship considered that aspect of the matter and continued:] Doing the best I can with all these matters, in regard to the first matter, that is, the loss already incurred and the loss I have to consider for the future, taking away the 50 per cent. in respect of National Insurance benefits over five years, I think the proper sum of compensation is £3,500, and to that I would add, as general damages for the lamentable condition in which the plaintiff is now, the sum of £5,500.

If I am wrong on the pension point, I would say that the damages are to be reduced by £1,200.

Judgment for the plaintiff with costs.

Solicitors: *J. G. Haley; Richard Newton.*

J. F. L.

[COURT OF APPEAL.]

* LENTON *v.* TREGONING AND ANOTHER.

C. A.
1960
March 1.
Pearce and Harman L.JJ.

[1956 L. No. 428]

Injunction — Form — Joint or several — Injunction not expressed to restrain severally—Breach of injunction by one defendant—Jurisdiction to commit for contempt.

Contempt of Court — Appeal — Civil contempt — Refusal of committal order—Jurisdiction of Court of Appeal—Discretion or substantive law—Committal order—Appeal from—Jurisdiction.

The plaintiff sought an injunction to restrain the two defendants, husband and wife, from obstructing the roadway to her house. Danckwerts J., by an order dated July 21, 1959, ordered that "the "defendants be restrained from doing by themselves or by their "servants workmen or agents or any of them or otherwise howsoever "the following acts that is to say: (1) obstructing the roadway" in question. The injunction was not expressed to restrain the defendants "and each of them." After the making of the order, the second defendant, the wife, repeatedly obstructed the roadway and on one occasion assaulted the plaintiff and her husband when they were removing obstructions she had placed on it. The plaintiff applied by motion to commit the second defendant for her contempt in obstructing the roadway. Vaisey J. dismissed the motion on the ground that, since the order restrained the defendants jointly and not severally, he was precluded from making an order:—

Held, (1) that an appeal lies from a refusal to commit, but that on a question of discretion the Court of Appeal would be loth to interfere.

(2) But that, on the true construction of Danckwerts J.'s order, the defendants were liable if either of them did an act in contravention of the order, and, accordingly, as there had been a breach of

C. A.
1960
Lenton
v.
Tregoning.

that order by the second defendant, an order committing her to prison should be made.

Dictum of Brett L.J. in *Jarmain* v. *Chatterton* (1882) 20 Ch.D. 493, 500, C.A. applied.

Per Harman L.J. It would have been much better to have added in the order "and each of them" or "either of them" as is more usually done.

Appeal from Vaisey J.

The plaintiff, Mrs. Phyllis Mary Vinson Lenton brought an action against Richard Nicholas Tregoning and his wife Mildred Maud Tregoning to restrain them from obstructing the roadway in front of the defendants' premises so as to interfere with its use for vehicular traffic or otherwise interfering with the plaintiff's right of way over it. Danckwerts J. by an order in that action dated July 21, 1959, ordered that "the defendants be restrained "from doing whether by themselves or by their servants workmen "or agents or any of them or otherwise howsoever the following "acts or either of them that is to say (1) obstructing the roadway "which passes in front of the premises of the defendants known "as Vale View, Besore, Truro in the County of Cornwall and "which continues westward along the southern boundary of the "premises of the plaintiff known as Clifton Cottage, Besore, "aforesaid in such a way as to interfere with its use for vehicular "traffic and (2) otherwise interfering with the plaintiff's right of "way over the said roadway."

Mrs. Tregoning, the second defendant, subsequently on numerous occasions placed heavy objects in the roadway. Particulars of the obstructions are given in Pearce L.J.'s judgment. The first defendant had no part in obstructing the roadway being at all material times in hospital.

By motion the plaintiff asked for an order that the second defendant be committed to prison for her contempt in obstructing the roadway mentioned in the order of July 21, 1959. Vaisey J. dismissed the motion holding that, since the order was not expressed to restrain the defendants "and each of them," there was no jurisdiction to commit one of them for breaking the injunction.

The plaintiff appealed.

J. A. R. Finlay for the plaintiff.

The second defendant did not appear and was not represented.

The following cases were mentioned in argument which are not referred to in the judgments: *Beckett* v. *Attwood* [1]; *Hope* v. *Carnegie* [2]; *Hackett* v. *Baiss* [3]; *Crowther* v. *Elgood*.[4]

Pearce L.J. This is an appeal from an order of Vaisey J.

[1] (1850) 50 L.J.Ch. 687.
[2] (1869) L.R. 7 Eq. 263.
[3] (1875) L.R. 20 Eq. 494.
[4] (1887) 3 T.L.R. 355; 34 Ch.D. 691, C.A.

dismissing a motion to commit the second defendant for breach of an order made by Danckwerts J. on July 21, 1959.

The order related to a lane which passed in front of the plaintiff's and the defendants' houses and read as follows: "And "it is ordered that the defendants be restrained from doing "whether by themselves or by their servants workmen or agents "or any of them or otherwise howsoever the following acts or "either of them that is to say (1) obstructing the roadway which "passes in front of the premises of the defendants known as "Vale View, Besore, Truro in the County of Cornwall and which "continues westward along the southern boundary of the "premises of the plaintiff known as Clifton Cottage, Besore, "aforesaid in such a way as to interfere with its use for vehicular "traffic and (2) otherwise interfering with the plaintiff's right of "way over the said roadway."

The short point arises before us whether, on the construction of that order, the second defendant can be held in contempt in respect of matters which she did alone, although the order does not specify "the defendants and each of them" or "the "defendants or either of them."

Notice of the judge's order was served on the second defendant and at a later stage, when she was clearly in breach of it, the notice of motion to commit was served on her. On August 2 and 9 there was broken glass strewn on the road. That would be a defiance of that injunction if it was put there by the second defendant. The solicitors for the plaintiff, who had already written to the second defendant on July 24 telling her that she must obey the order, wrote a further letter to her on August 13. On September 13 there was an obstruction of the lane by broken glass and old iron. On that day the second defendant assaulted the plaintiff and her husband when the plaintiff and her husband tried to clear away the obstruction. There was a further assault in similar circumstances on September 14, and on that occasion a rude note was left by the second defendant for the plaintiff. On September 22 the order was served but the obstructions of the lane continued almost daily from then. The various obstructions that were put there were an old wooden door, a tin bath, chests, buckets, sheets of galvanised iron and stones. On October 23 the plaintiff saw the second defendant actually putting obstructions in the lane and on that occasion they consisted of sheets of galvanised iron, biscuit tins, a wooden door, buckets, stones and broken glass. There were other occasions on which she was seen to be doing similar acts.

On December 8 the motion to commit the second defendant was heard. The judge came to the conclusion that he could not make an order of committal on the sole ground of the construction of the order. He came to the conclusion that as it restrained both defendants jointly and not the defendants severally and, as there was no evidence of obstruction by both defendants jointly but

C. A.
1960
Lenton v. Tregoning.
Pearce L.J.

only by the second defendant acting alone, he was precluded from making any order. However, he gave leave to appeal.

An appeal does lie from a refusal to commit although, if it is a question of discretion, this court is very loth to interfere with the judge's decision. In *Jarmain* v. *Chatterton*,[1] however, an appeal against a refusal to commit was allowed. The Lords Justices observed that in a matter of discretion they would be slow to allow such an appeal. Brett L.J. said[2]: "Here the "meaning of the order is in dispute, and a considerable question "is raised whether the vice-chancellor did not interpret the order "in a different way from that in which this court has construed "it." His brethren took the same view and they allowed the appeal and made the order to commit.

In this case if it were a question of discretion on the part of the judge I for my part would hesitate long before I interfered with it; but I think that the judge was prevented from exercising his discretion by taking a wrong view of the construction of the order which it is alleged has been broken. The words ". . . "the defendants be restrained from doing whether by themselves "or by their servants workmen or agents or any of them or "otherwise howsoever the following acts . . ." are very wide. Even if, which I doubt, the use of the words ". . . the defendants "be restrained from doing whether by themselves or by their "servants workmen or agents . . ." did not make it a contempt for one defendant alone to do an act in contravention of the order, the addition of the words ". . . or any of them . . ." makes it clear that the defendants are liable if either of them does an act in contravention of the order. Moreover, the words ". . . or "otherwise howsoever . . ." further emphasise that it is intended that any act in breach of the order shall be prevented.

Counsel for the plaintiff has pointed out that this order in its exact form, namely specifying the defendants without adding the words "or either of them," is in the form suggested by Lord Uthwatt in *Marengo* v. *Daily Sketch and Sunday Graphic Ltd.*[3] I am satisfied that there has been a breach of that order by the acts of the second defendant.

This is an unhappy case, for the affidavit which we gave leave to read shows that these acts have continued since the hearing of the motion before Vaisey J. It appears to be clear that the second defendant is a person of not very high intelligence and of considerable obstinacy, who is deliberately acting in the way complained of in defiance of the order of the court. The letters which she has written make this plain. It is essential that she should understand that she cannot defy the order of the court and we must commit her to prison. It is to be hoped that either she will herself appreciate that she has been acting foolishly and wrongly or that some other person will manage to persuade her

[1] (1882) 20 Ch.D. 493, C.A.
[2] Ibid. 500.
[3] 64 T.L.R. 160; [1948] 1 All E.R. 406, C.A.

of that. I have no doubt that if she makes suitable apology the court will probably take into account the fact that she is not a person of great intelligence and that she has failed to appreciate the seriousness of what she is doing. However, this is serious and the order must be enforced.

I would order that she be committed to prison but the order must not be issued until two exhibits are produced to the court. I would therefore allow the appeal.

HARMAN J. I agree and will only add two or three words. For myself I do not applaud the form in which the order was drawn. It would have been much better to have said "and each "of them" or "or either of them" as is more usually done. Nevertheless, I cannot assent to the judge's view that without those words the order cannot be enforced against the defendants severally. That point, however, it is not necessary to decide because of the additional words "or otherwise howsoever" which seem to me to make the matter tolerably clear. We are not interfering with the judge's discretion but only disagreeing with him on a point of construction. As my Lord has pointed out there is no bar to entertaining the appeal which should be allowed with the limitation which my Lord has proposed.

Appeal allowed with costs.

Solicitors: *E. P. Rugg & Co. for R. L. Frank & Caffin, Truro.*

B. A. B.

[CHANCERY DIVISION.]

* HENRY ANSBACHER & CO. *v.* INLAND REVENUE COMMISSIONERS.

1960
Feb. 18.
Danckwerts J.

Revenue — Stamp duty — Security — Contract for sale — Supplemental guarantee by bank—Contract not a primary document—Whether guarantee "primary security"—Stamp Act, 1891 (54 *&* 55 *Vict. c.* 39), *Sch.* 1.

By a contract of sale the appellants agreed to buy all the ordinary stock units of a company, under which, by a date called the first completion date, 61s. was to be paid for every 1s. ordinary stock unit. There was to be also a second payment, the amount of which was not immediately ascertainable because the Federation of Malaya and Singapore had acquired the company's assets and the amount of the compensation was not ascertainable at once, and clause 10 of the agreement provided for payment to trustees, the other parties to the agreement, of the amount as soon as ascertained. Clause 11 provided that the appellants should procure that the payment to the trustees of any sum payable to them under clause 10 be guaranteed by a named bank executing in a specified form a deed of guarantee duly stamped. The bank duly executed a deed

1960

Ansbacher (Henry) & Co. v. Inland Revenue Comrs.

expressed to be supplemental to the sale agreement, whereby it guaranteed to the trustees to the extent of £750,000 the due and punctual payment of whatever sum should in the event be payable to them under clause 10 of the agreement on the second completion date. The Inland Revenue Commissioners considered that the sale agreement was a secondary instrument within paragraph (2) to the heading "Mortgage, Bond, Debenture, Covenant" in Schedule 1 to the Stamp Act, 1891,[1] and that the guarantee was "the only or "principal or primary security for the payment of" the £750,000 within paragraph (1) of that heading, and they accordingly assessed the guarantee to stamp duty at the rate of 5s. for every £100, namely, £1,875. On appeal:—

Held, that the sale agreement, not being under seal, was not a document within the heading "Mortgage, Bond, Debenture, Cove-"nant," but that that did not make the guarantee, which was a secondary security, a primary security within the meaning of the schedule; the guarantee, therefore, remained a secondary document, and was a collateral, auxiliary, additional, or substituted security to a security of another kind to that mentioned in the heading, and, accordingly, the claim for duty was misplaced.

Case stated by the Inland Revenue Commissioners.

The appellants, Ansbacher (Henry) & Co., a private company, presented an instrument, dated December 9, 1957, of guarantee, made between the National Bank Ltd. and Evelyn James Bunbury, Sir Edward Wilshaw and Arnold Wilfred Sarsen, trustees, and expressed to be supplemental to a sale agreement dated October 29, 1957, to the Commissioners of Inland Revenue under section 12 of the Stamp Act, 1891, for their opinion as to the stamp duty chargeable upon it.

The commissioners stated, inter alia, that by the instrument the bank guaranteed to the trustees to the extent of £750,000 the due and punctual payment to the trustees of whatever sum should in the event be payable to the trustees on the second completion date under the terms of clause 10 of the sale agreement.

At the date of the sale agreement the Governments of the Federation of Malaya and of Singapore had acquired certain assets of the Oriental Telephone and Electric Co. Ltd., and there were vested in that company certain claims against the Governments for compensation. The sale agreement was made between Evelyn James Bunbury, Charles Penrhyn Ackers, the Right Honourable Malcolm Baron Hailey of Shahpur and Newport Pagnell, Sir Charles Alexander Innes and Sir Edward Wilshaw ("the direc-"tors"), who were expressed to be acting for and on behalf of themselves and all others the holders of ordinary stock of the

[1] Stamp Act, 1891, Sch. 1: "Mort-"gage, Bond, Debenture, Covenant "(except a marketable security other-"wise specially charged with duty) . . . "(1) Being the only or principal or "primary security (other than an "equitable mortgage) for the payment "or repayment of money . . . (2) Be-"ing a collateral, or auxiliary, or "additional, or substituted security "(other than an equitable mortgage) "or by way of further assurance for "the above-mentioned purpose where "the principal or primary security is "duly stamped."

Oriental Telephone and Electric Co. Ltd. who should assent to the terms thereof, and the appellants (called "the purchaser") of the other part.

Clauses 1 and 2 of the sale agreement provided that the directors and the holders of ordinary stock of the Oriental Telephone and Electric Co. Ltd., who should assent to the terms of the sale agreement, should sell and the appellants should purchase all the ordinary stock of the company held by the assenting stockholders, and that the price was to be (A) the sum of 61s. per 1s. ordinary stock unit, to be paid or satisfied as thereinafter provided on the date thereinafter referred to as "the first completion "date," and (B) such a further sum (thereinafter called "the "second instalment") as should be payable under the provisions thereinafter contained, which further sum was to be paid on the date referred to as the "second completion date." Clause 7 (c) provided that the company would execute a deed of appointment (in a form set out in the third schedule) appointing the trustees to be its attorneys, inter alia, to determine or cause to be determined the amount of its claim against the Governments, and clause 8, that after their appointment the trustees should, on the company's behalf, prosecute the claims against the Governments for compensation, and should out of a sum of £200,000 of the company's moneys to be transferred to a separate account of the company at a bank, and out of any compensation received by the trustees pay and discharge certain liabilities therein mentioned.

Clause 9 of the agreement contained provision whereunder on the claims having been finally settled, and on all compensation payable by either of the Governments in respect thereof having been paid to the company (or on its being decided by the trustees that it was not reasonably practicable to recover any further compensation) then, and in either such case, subject to all matters required to enable the second instalment to be calculated having been completed, the amount (if any) payable on the second completion date in respect of each ordinary stock unit of the company (which was to be ascertained in accordance with the provisions of the fourth schedule thereto, and the amount of which was under that schedule dependent, inter alia, on the amount of the compensation) was to be certified as therein provided.

By clause 10 it was provided that on the second completion date as therein defined the appellants should pay or cause to be paid to the trustees as trustees for the asssenting stockholders a sum (being the second instalment) equal to the sum certified under clause 9 thereof multiplied by the number of ordinary stock units sold thereunder by the assenting stockholders.

Clause 11 provided that the appellants should procure that the payment to the trustees of the sum (if any) payable to them under clause 10 should be guaranteed to the extent of £750,000 by the National Bank Ltd., executing and delivering to the trustees on the first completion date a deed of guarantee duly stamped in

1960

Ansbacher (Henry) & Co. v. Inland Revenue Comrs.

the form of the draft deed set out in the fifth schedule thereto (being the draft of the guarantee).

The sale agreement was expressed to be conditional on the passing by the company in general meeting on or before November 29, 1957, of the special resolution set out in the first schedule thereto, and on the holders of not less than the percentage specified of the ordinary stock of the company accepting its terms in manner therein mentioned on or before November 29, 1957, or such later date as therein provided for. Both conditions had been satisfied and the sale agreement had become unconditional before the date of the guarantee. The sale agreement was signed by each of the directors and by Louis Albert Hart on behalf of the appellants, in each case over a sixpenny adhesive stamp.[2]

On December 10, 1957, the company, in accordance with the provisions in clause 7 (c) of the sale agreement duly executed a deed of appointment in the form of the draft set out in the third schedule thereto appointing the trustees to be its attorneys. On December 9, 1957, the guarantee was executed under the seal of the bank.

The commissioners were of opinion that the sale agreement was not a security within the heading "Bond, covenant, or instrument of any kind whatsoever," etc., or within the heading "Mortgage, Bond, Debenture, Covenant," etc., in the First Schedule to the Stamp Act, 1891, or at all, being an agreement for two payments, one of which was wholly unascertainable at the date of the agreement: no instrument (other than the guarantee) securing payment of the purchase-money for the stock or any part thereof and stamped with ad valorem duty, or exempt from such ad valorem duty by statute, had been produced to the commissioners. They were of the opinion that the guarantee fell within the heading "Mortgage, Bond, Debenture, Covenant (1)" in the First Schedule to the Stamp Act, 1891, and was "the only or principal or primary security for the payment of" the sum of £750,000, and they accordingly assessed it to duty at the rate of 5s. for every £100, namely, £1,875.

The appellants objected to the assessment and contended that the sale agreement was a "security" and the "principal or primary security" for the moneys mentioned therein and in the guarantee and, accordingly, that the guarantee was not the only or principal or primary security within the heading "Mortgage, Bond, Debenture, Covenant (1)" in the First Schedule to the Stamp Act, 1891, for the moneys mentioned in the guarantee. They further contended that the guarantee was a "collateral, or auxiliary, or additional, or substituted security (other than an equitable mortgage) or by way of further assurance for the above-mentioned purpose where the principal or primary

[2] Finance Act, 1949, s. 35 (1) (a) and Sch. 8, provide that no instrument shall be chargeable with duty under the heading agreement or any memorandum of an agreement as being an agreement or memorandum of agreement for the sale of stock.

"security is duly stamped" within the heading "Mortgage, "Bond, Debenture, Covenant (2)" in the First Schedule to the Stamp Act, 1891, and as such should be liable to duty at the rate of 1s. for every £100 limited to a maximum of 10s. under the provisions of section 7 of the Revenue Act, 1903.

The appellants, having paid the duty in accordance with the assessment in pursuance of section 13 of the Finance Act, 1891, required the commissioners to state a case. The questions for the opinion of the court were: (1) Whether the guarantee was liable to the amount of duty assessed by the commissioners: (2) If not, with what amount of duty the guarantee was chargeable.

John Foster Q.C. and *G. B. H. Dillon* for the appellants.
J. Pennycuick Q.C. and *E. Blanshard Stamp* for the Crown.

The following cases referred to in argument were not cited in the judgment: *Jones* v. *Inland Revenue Commissioners*[3]; *National Telephone Co.* v. *Inland Revenue Commissioners*[4]; *Durham (County) Electrical Power Distribution Co.* v. *Inland Revenue Commissioners*[5]; *British Italian Corporation Ltd.* v. *Inland Revenue Commissioners*[6]; *Independent Television Authority and Associated-Rediffusion Ltd.* v. *Inland Revenue Commissioners.*[7]

DANCKWERTS J. This is a case of stamp duty and, like most stamp duty cases, it is a troublesome matter. The question arises in this way. There was a contract of sale by which the appellants, a company but not a limited company, agreed to purchase for practical purposes all the ordinary stock units of a company called the Oriental Telephone and Electric Co. Ltd. It was subject to a condition that the shareholders should agree to this transaction; that condition was fulfilled, and therefore I may treat it for practical purposes as a definite contract between the contractors and the appellants for the sale and purchase of all the stock units in that company. The price was to be ascertained in this way. There was to be a payment by a certain date of the sum of 61s. for every 1s. ordinary stock unit, and the date on which that sum was to be paid was the first completion date. The particular date does not matter. The date of the agreement was October 29, 1957, and in the result the first completion date was December 13, 1957. The second payment could not be ascertained at once, because the assets of the company had been acquired by the Federation of Malaya and Singapore, and the amount of the compensation could not be ascertained, but the agreement provided, in effect, that when it had been ascertained the amount should

[3] [1895] 1 Q.B. 484; 11 T.L.R. 78, D.C.
[4] [1899] 1 Q.B. 250; 15 T.L.R. 98, C.A.
[5] [1909] 2 K.B. 604; 25 T.L.R. 672, C.A.
[6] (1957) reported in Sargeant on Stamp Duties, 3rd ed., p. 334; [1921] W.N. 220, C.A.
[7] [1959] 1 W.L.R. 259; [1959] 1 All E.R. 464.

1960

Ansbacher (Henry) & Co. v. Inland Revenue Comrs.

Danckwerts J.

be paid off accordingly; there was to be payment of the second sum, the one which was still to be ascertained and which would plainly be ascertained in due course, and then a final payment on the second completion date would take place.

Clause 11 of the agreement provided that the appellants should procure that the payment to the trustees of the sum, if any, payable to them under clause 10 should be guaranteed to the extent of £750,000 by the National Bank Ltd. executing and delivering to the trustees on the first completion date a deed of guarantee duly stamped in the form of the draft deed set out in the fifth schedule thereto, being the draft of the guarantee. Such a guarantee was duly executed by the bank. It was expressed to be supplemental to the sale agreement, and by it the bank guaranteed to the trustees to the extent of £750,000 "the due and "punctual payment to the trustees of whatever sum shall in the "event be payable to the trustees on the second completion date "under the terms of clause 10 of the said agreement." The Commissioners of Inland Revenue having been applied to on the question of what was the proper amount of the stamp duty on the guarantee, duty was paid at the rate of 5s. per cent., which amounts to the sum of £1,875. It is claimed, on the other hand, that the amount of stamp duty on the guarantee should be only 10s. I should add that by virtue of section 35 (1) (*a*) of the Finance Act, 1949, the agreement for sale has not borne any stamp duty, as being exempted by that section as an agreement or memorandum of agreement for the sale of stock.

I now turn to the provisions under which the claim is made. The claim is made under a heading in the First Schedule to the Stamp Act, 1891: "Mortgage, Bond, Debenture, Covenant "(except a marketable security otherwise specially charged with "duty) and Warrant of Attorney to confess and enter up judg-"ment. (1) Being the only or principal or primary security "(other than an equitable mortgage) for the payment or repay-"ment of money," and then there are certain rates—not exceeding £10 and going up to over £100, and for any fractional part of £100 over £300 of the amount secured, 5s. per cent. There is a second paragraph which is material: "Being a collateral, or "auxiliary, or additional, or substituted security (other than an "equitable mortgage) or by way of further assurance for the "above-mentioned purpose where the principal or primary "security is duly stamped." That is the heading under which the payment of stamp duty in the present case is claimed by the commissioners, and it is the only one under which the claim is made, and the other provisions I am about to refer to are only material because of certain decisions which have been given on the provisions of a slightly different character.

Turning back to the First Schedule, there is a heading which starts off with bonds: "Bond, Covenant, or Instrument of any "kind whatsoever. (1) Being the only or principal or primary "security for any annuity (except upon the original creation

"thereof by way of sale or security, and except a superannuation "annuity), or for any sum or sums of money at stated periods, "not being interest for any principal sum secured by a duly "stamped instrument, nor rent reserved by a lease or tack." There is also a second paragraph similar to the one relating to the other group: "Being a collateral, or auxiliary, or additional, or "substituted security for any of the above-mentioned purposes "where the principal or primary security is duly stamped." I am not concerned with the question whether a claim might be made under either of the instruments in this case under that head or any other head. I am simply concerned with the claim made by the Inland Revenue in this case under the particular heading I read first of all. The materiality of that other paragraph is, that a number of cases which have been referred to in argument, and it is not necessary for me to go through them, have established, to the surprise of most people who come fresh to this Act, that "security" is not, as one would have supposed, an instrument securing payment of money by land or personal property being charged, so as to make sure that the sum payable shall be discharged, but includes a mere promise to pay, although it is not an instrument which creates security for a debt at all, and although there is no security in the conveyancing sense of the word, and though the debt may be a purely unsecured debt. There is complete authority for that proposition in the cases to which I have been referred. Those cases also establish that if a primary security which is a mere instrument under hand for the purpose of the other heading (not the one which is the material one), has either been stamped with the proper duty or is exempt from duty, any other document which is secondary to it cannot be stamped as a primary document and, at most, may bear the lower rate of duty for which these headings provide.

The claim in this case is really based on this proposition: it is said, it would appear, correctly, that the instrument under hand, the sale agreement, cannot be a mortgage, bond, debenture or covenant within the material heading because it is not under seal; but it is also claimed on the part of the Inland Revenue that it cannot be "the only or principal or primary security" for the purpose of the provisions under these various headings, including in particular any mortgage, bond, debenture or covenant because, for the same reason, it is not under seal; and therefore it is said that it does not come within paragraph 1 of the heading "Mort-"gage, Bond, Debenture, Covenant." That may be perfectly correct, but it does not seem to me that that makes what is, in effect, a secondary security become the primary security within the meaning of the Act. It remains a secondary document even though it is secondary to some document which is not a security under seal within the term "Mortgage, Bond, Debenture, "Covenant," and the argument which was put up on behalf of the Commissioners of Inland Revenue supports this result, because, as was pointed out to me, the words in paragraph 2 of

1960

Ansbacher (Henry) & Co. v. Inland Revenue Comrs.

Danckwerts J.

the heading "Mortgage, Bond, Debenture, Covenant" must mean some document which is secondary to the document mentioned in paragraph 1. The guarantee may well be a document which is not a secondary document to any document within paragraph 1 under the heading "Mortgage, Bond, Debenture, "Covenant." The result is that it does not come within that heading at all, and it does not become a primary document when it is not a primary document.

That, shortly, is the argument, and if it is analysed in that manner the answer is plain: neither the sale agreement under hand nor the guarantee by the bank under seal is a document within "Mortgage, Bond, Debenture, Covenant," and that the guarantee remains a secondary document. It is a collateral, auxiliary, additional or substituted security to a security of another kind than that mentioned in "Mortgage, Bond, Debenture, "Covenant," but it is not by virtue of that, for purposes of that heading, a primary document or the only document, or the only or principal or primary security. The claim for duty is misplaced in the way it was made, and, therefore, the appeal should be allowed with costs and there will be an order for repayment. I have not considered the fixing of the duty because all I have held so far is that it does not come within this heading. I will say 10s., but not under this heading.

Appeal allowed with costs.

Solicitors: *Herbert Smith & Co.; Solicitor, Inland Revenue.*

K. R. A. H.

[CHANCERY DIVISION.]

1960
Feb. 4;
March 17.

Cross J.

* *In re* JEWISH ORPHANAGE CHARITY ENDOWMENTS TRUSTS.
SEBAG-MONTEFIORE and Others *v.* ROTHSCHILD EXECUTOR AND TRUSTEE CO. and Another.

[1959 J. No. 5898.]

Charity—Rules—Alteration—Charity established by scheme—Power to alter scheme provided that no "deviation from the main prin-"ciples"—Purported alteration of investment clause—Whether power to alter investment clause—Whether permitted range of investments one of "main principles" of scheme.

Charity—Investments—Variation of powers—Whether power to alter scheme includes power to enlarge investment clause.

A scheme made by the Charity Commissioners in 1876 governing the affairs of an orphanage contained provisions for the alteration or modification of the scheme by resolution confirmed by the Board of Governors. It provided that "no alterations, modifications, or "variations shall be made involving a deviation from the main "principles of this scheme." The scheme contained an investment

clause in which the permitted range was wider than that permitted by the Trustee Act, 1859, and at some time before 1910 that power was extended to give a wider power of investment. On September 16, 1959, the Board of Governors duly confirmed a resolution, altering the investment clause so that the power of investment as to one-third of the funds was limited to investments authorised by law and as to two-thirds was extended to include investment in first-class equities. On a summons to determine the validity of the resolution: —

Held, (1) that the provision for modification of the scheme was effective to cover an alteration of the investment clause, for the Charity Commissioners were entitled in a scheme establishing a charity to confer power on someone else to enlarge the original investment clause.

Dictum of Harman J. in *In re Tobacco Trade Benevolent Association Charitable Trusts* [1958] 1 W.L.R. 1113, 1116; [1958] 3 All E.R. 353 considered.

(2) That a clause prescribing the manner in which funds could be invested could not be regarded as one of the "main principles" of a charitable trust; and that, therefore, the resolution was effective to extend the range of permissible investments.

In re Holloway's Trusts (1909) 26 T.L.R. 62 distinguished.

ADJOURNED SUMMONS.

The following statement of the facts is taken from the judgment: On July 7, 1876, the Charity Commissioners made a scheme amalgamating the Jews' Hospital, Lower Norwood, Surrey, and the Jews' Orphan Asylum, Tenter Ground, Middlesex, into one institution to be called "The Jews' Hospital and Orphan "Asylum." By clause 3 of the scheme the objects of the new institution were stated to be the provision of a home in the institution for, and the maintaining, educating, clothing and apprenticing to industrial employments of, poor children of the Jewish religion, including those deprived of both parents and of one parent only. and the relief of poor aged persons of the Jewish religion. Clauses 4 to 45 of the scheme contained provisions for the government of the institution: there was to be a board of governors consisting of subscribers to the institution, which was to meet at least once a year, and a committee of management. Clauses 46 to 54 provided for the taking over by the new institution of the property and debts of the two existing institutions and for the acceptance of gifts and bequests. Clauses 55 and 57 dealt with the appointment of trustees to hold the property of the new institution. Clause 56 was an investment clause which permitted the investment of the funds of the institution in a specified range of investments somewhat wider than that then authorised by the Trustee Act, 1859. Clauses 58 to 71 dealt with the conditions of admission of beneficiaries and the appointment of salaried officers. Clauses 72 and 73 conferred power to make by-laws and clause 74 gave power to make other provision for the poor aged beneficiaries. Clause 75 was in the following terms: "If, in the opinion of the "committee, any alteration or modification of this scheme shall "be required for any purpose, the committee shall submit the "same to a meeting of the governors. If the said meeting, by a

1960

Jewish Orphanage Charity Endowments Trusts, *In re.*

"majority not being less than two-thirds of the persons present "thereat, adopt such alteration or modification, the committee "shall submit the same to another meeting of the governors, and "if the said second meeting shall by a majority of the persons "present thereat confirm the same, such alteration or modifica-"tion shall thereupon be made and take effect. If the said first "meeting shall, by a majority, not being less than two-thirds of "the persons present thereat, make any variation in the said "alteration or modification, the said variation shall be considered "by the committee, and if the same shall be adopted by them, "the committee shall submit the said alteration or modification, "with such variation, to a second special meeting, and if the said "second meeting shall, by a majority of the persons present "thereat, adopt the said alteration or modification, with the said "variation, the same shall be made and take effect. Provided "that no alterations, modifications, or variations shall be made "involving a deviation from the main principles of this scheme."

The scheme established in 1876 was altered from time to time under clause 75. At some date before 1910 a resolution was passed purporting to extend the powers of investment contained in clause 56 of the original scheme to cover a considerably wider range, although not so as to include a general power to invest in equities.

On June 22, 1928, the Charity Commissioners made a further scheme by which a separate charity to be known as the "Jews' "Hospital Pension Charity" was set up to carry on the part of the work of the original charity which was concerned with the relief of poor aged persons and the name of the original charity was changed to the Jewish Orphanage. Certain investments forming part of the endowment of the original charity were transferred to the new pensions charity. Some of these were investments which were not authorised under the original investment clause but only under the purported alteration made some time before 1910.

On July 15, 1959, the committee of the Jewish Orphanage, being desirous of further widening the investment powers of the charity, submitted a resolution to the board of governors for the alteration of the investment clause in the scheme so as to limit the power of investment with regard to one-third of the funds to investments authorised by law for the investment of trust funds, but to permit the remaining two-thirds to be invested in first-class equities. The resolution was duly passed and confirmed by the board of governors as required by clause 75 at a further meeting held on September 16, 1959. The Charity Commissioners questioned the validity of that resolution, and the plaintiffs, the managing trustees of the orphanage, took out this summons against the custodian trustee of the charity's funds, the Rothschild Executor and Trustee Co., and the Attorney-General asking whether the resolution was valid and effective to extend the range of permissible investments, or whether it was invalid because the proposed

alteration involved a deviation from the main principles of the scheme, and if it were invalid, that the proposed extended range be authorised by the court.

L. H. L. Cohen for the managing trustees.

Martin Roth for the custodian trustee.

Bryan Clauson for the Attorney-General.

The following cases, in addition to those referred to in the judgment, were cited in argument: *Howe* v. *Dartmouth (Earl)* *; *Holland* v. *Hughes* †; *Baud* v. *Fardell.*‡

Cur. adv. vult.

March 17. CROSS J., reading his judgment, stated the facts and continued: Counsel for the Attorney-General puts the case against the validity of the resolution in two ways. First, he says that so far as paragraph 75 of the scheme does on its true construction purport to cover an alteration of the range of investments permitted by the scheme as originally framed, it can have no legal effect. Alternatively, he says that paragraph 75 of the scheme on its true construction does not cover such an alteration since it would constitute a deviation from the main principles of the scheme.

In support of his argument on the first point, counsel referred to a dictum of Harman J. in *In re Tobacco Trade Benevolent Association Charitable Trusts,*[1] where the Tobacco Trade Benevolent Association, which was an unincorporated body, by a resolution passed at a general meeting in 1956 introduced a new rule purporting to widen the range of its permitted investments. The association's original rules made in 1860 contained no power of alteration, but in 1871 a rule had been passed at an annual general meeting purporting to confer a power of altering the rules. That rule had been acted upon and the association had made various alterations in its rules in particular in those relating to investments. The decision in the case was that as the original rules conferred on the association no power to alter them, the alteration made in 1871 and any subsequent alterations made in pursuance of it were invalid, but in the course of his judgment Harman J. said[2] that he doubted "Whether, if in the "beginning the rules had provided a power to alter them, the "body could then make use of that power to widen its investment "capacity."

Counsel argued that the doubt expressed by Harman J. was justified. He pointed out that before the Trustee Act, 1859, was passed the 3 per cent.'s investments were the only form of investment which the court recognised as proper for the investment of

* (1802) 7 Ves. 137.
† (1809) 16 Ves. 111.
‡ (1855) 7 De G.M. & G. 628.

[1] [1958] 1 W.L.R. 1113; [1958] 3 All E.R. 353.
[2] [1958] 1 W.L.R. 1113, 1116.

1960

Jewish Orphanage Charity Endowments Trusts, *In re.*

Cross J.

trust funds. By the various Trustee Acts the range of authorised investments has been greatly widened, but at any given time there are always some investments upon which trustees cannot lawfully invest unless the terms of their trust expressly permit them to do so. Although a settlor or testator has always been able to empower his trustees to invest in non-trustee securities, he cannot, so the argument ran, confer on other people, whether they be the trustees themselves or some of the beneficiaries or some outside person or body, a power to extend the investment clause contained in the settlement; nor can the Charity Commissioners insert such a power in a scheme establishing a charity.

In view of the dictum of Harman J. I thought it right to take time to consider the matter, but on consideration I do not think that his doubt was justified. If a testator or settlor can himself empower his trustees to invest in forms of investment not authorised by law for the investment of trust funds, I do not see on principle why he should not be entitled to confer on someone else a power to enlarge the original investment clause. I do not remember ever having seen such a power in a will or settlement, but that is not surprising, for anyone who was prepared to allow the range of permissible investments to be extended in this way during the life of the trust would normally give his trustees the wider power in the first instance. One can, of course, easily conceive of some exercise of such power which would be invalid; trustees, for example, could not exercise it so as to authorise the investment of trust moneys on loans to themselves. (Compare *In re The French Protestant Hospital.*[3]) But no question of that sort arises here. I think, therefore, that the first submission of counsel for the Attorney-General fails.

It remains to consider whether the range of investments originally prescribed by clause 56 of the scheme was one of its "main principles." On this point I was referred to the case of *In re Holloway's Trusts*,[4] where Swinfen Eady J. had to consider a somewhat similar restriction on a power of alteration contained in a trust deed establishing Holloway College; but there the trust deed was divided into a number of parts with separate headings, one of which was "Nature and principles of the "college." It was therefore easy to say that anything outside that part could be altered under the power. Here, however, I have nothing of that sort to guide me. It is clear that it would be a deviation from the main principles of this scheme to alter the objects of the charity to something quite different from the objects laid down in clause 3. But what sort of alteration, short of an alteration of the objects, would constitute a deviation from the main principles of the scheme? Was it, for example, a main principle of the scheme that all the committee should be appointed by the board of governors? If so, the alteration of clause 6 in 1933, under which some members of the committee

[3] [1951] Ch. 567; [1951] 1 T.L.R. 785; [1951] 1 All E.R. 938.

[4] (1909) 26 T.L.R. 62.

are to be appointed by orphan aid societies, was invalid. Again, was it a main principle of the scheme that the age of admission of orphans should be from two to eleven? If so, the deletion of clause 63 in 1950 was invalid. Where is one to draw the line? Counsel for the Attorney-General says that however difficult it may be to say on which side of the line some cases fall, a restricted range of investment was in 1876 common form in trusts both private and charitable, and should therefore be regarded as one of the main principles of this scheme. The fact that nowadays it has become common, in private trusts at any rate, to insert a very wide, if not unlimited, investment clause is, he submits, irrelevant. But I cannot think that a clause prescribing the manner in which funds can be invested could, even in 1876, have been regarded or described as a main principle of a charitable trust. I propose, therefore, to declare that the resolution in question effectively extended the range of permissible investments.

Declaration accordingly.
Applicants' and first defendants' costs to be taxed on a trustee basis, and second defendant's costs on a common fund basis, such costs to be paid out of trust fund.

Solicitors: *Hyman Isaacs, Lewis & Mills; Treasury Solicitor.*

M. G. T.

[QUEEN'S BENCH DIVISION.]

* WESTCOTT *v.* STRUCTURAL AND MARINE ENGINEERS LTD.

1960
March 10.
Lord Parker C.J.

[1958 W. No. 2164.]

Building—Safety regulations—"Temporary platform"—Fixed structure temporarily used as working place—Whether breach of statutory duty—Building (Safety, Health and Welfare) Regulations, 1948 (*S.I.* 1948, *No.* 1145), *reg.* 24 (1) (5) (*d*).

By regulation 24 of the Building (Safety, Health and Welfare) Regulations, 1948: "(1) . . . every side of a working platform or "working place, being a side thereof from which a person is liable "to fall a distance of more than 6 ft. 6 ins., shall be provided with "a suitable guard-rail or guard-rails. . . . (5) (*d*) The require-"ments of paragraph (1) . . . shall not apply to a temporary plat-"form which is used only by erectors of structural steelwork or iron-"work for the purposes of bolting-up, riveting or welding work of "such short duration as to make the provision of a platform with "guard-rails and toe-boards unreasonable if (i) the platform is at "least 34 inches wide and (ii) there is adequate handhold and "(iii) the platform is not used for the deposit of tools or materials

[Reported by Miss E. CARYL-THOMAS, Barrister-at-Law.]

1960

Westcott
v.
Structural
and Marine
Engineers
Ltd.

"otherwise than in boxes or receptacles suitable to prevent the fall "of the tools or materials from the platform."

The plaintiff, a chargehand steel erector employed by the defendants, was engaged in the erection of a new steel tower on a conical base in place of one which had been demolished, and during the process of bolting the new conical base onto a fixed concrete structure he was standing on the concrete structure some 11 ft. from the ground. While he was putting a nut on a bolt he fell and suffered injuries. He sued his employers for damages, alleging, inter alia, a breach by them of regulation 24:—

Held, that "temporary platform" in regulation 24 (5) (*d*) applied to a platform erected temporarily for a particular purpose, but did not apply to a fixed structure which was being used only temporarily as a working place; paragraph (5) (*d*), therefore, had no application to the fixed structure on which the plaintiff was working, and the employers' prima facie obligation under regulation 24 (1) to provide a guard-rail or guard-rails was an absolute obligation; accordingly, the defendants were in breach of the statutory duty imposed on them by regulation 24 (1).

Action.

The following facts are taken substantially from the judgment: The plaintiff, Ernest Leonard Westcott, was employed by the defendants, Structural and Marine Engineers Ltd., as a chargehand steel erector. On September 17, 1957, he was sent to the Royal Air Force Station, West Ruislip, to be in charge of the demolition of two steel towers and the erection of similar towers in their places. The towers were standing on conical bases which in turn were bolted onto square brick structures. By October 1 one tower had been demolished and a new one erected in its place; the demolition of the second tower had been completed and the plaintiff was engaged in erecting the new tower. The first part of the construction was to bolt the new conical base onto the brick structure, and for that purpose the old bolts (which were still embedded in the concrete) and the old nuts were used. The plaintiff was tightening the nut on a bolt while standing on the structure some 11 ft. from the ground when he overbalanced, fell and suffered injuries. He sued the defendants for damages, alleging that they were guilty of breach of duty owed by master to servant at common law in that they failed to provide proper plant and equipment and exposed him to unnecessary risk, and also that they were in breach of their statutory duty under (inter alia) regulation 24 of the Building (Safety, Health and Welfare) Regulations, 1948, in that they failed to provide guard-rails at the plaintiff's working place.

Dudley Collard for the plaintiff.
Peter Ripman for the defendants.

Lord Parker C.J. stated the facts, considered the evidence, found that the plaintiff had been supplied with proper tools for the job, and continued: When one comes to the regulations, the position is more difficult. In the first place, I think that the Building (Safety, Health and Welfare) Regulations, 1948, clearly

apply. These chimneys, as it seems to me, were part of a building, and the work concerned the demolition and re-erection of part of a building.

The first regulation relied upon is regulation 5, which is dealing with the provision of scaffolds, and provides, so far as it is material: "Suitable and sufficient scaffolds shall be provided for "all work that cannot safely be done on or from the ground." For my part, I think that this was work which would come within the words of work which can be safely done without the provision of a scaffold.

But when one comes to regulation 24, there is no similar qualification. Regulation 24 (1) provides that subject to paragraphs (3), (4) and (5) of that regulation "every side of a working "platform or working place, being a side thereof from which a "person is liable to fall a distance of more than 6 feet 6 inches, "shall be provided with a suitable guard-rail or guard-rails." This concrete on which the two men were working was over 6 ft. 6 ins. from the ground, and it must be, and is conceded, that where they were standing was a working place. Accordingly, prima facie, the obligation arose to provide a guard-rail or guard-rails.

That, as I have said, is subject to certain other paragraphs. The only paragraph which could apply is paragraph (5) (*d*). [His Lordship read regulation 24 (5) (*d*) and continued:] Observe that whereas paragraph (1) is referring to "a working platform or "working place," paragraph (5) (*d*) is referring to "a temporary "platform." In my judgment, "a temporary platform" cannot apply to a working place such as this fixed tower with its concrete platform at the top on which the men were working. That, as I have said, is undoubtedly "a working place," but I am quite unable to see how it could be said to be a "temporary platform." It seems to me that the expression there "a temporary platform" points to and covers the case of a platform erected temporarily for a particular purpose, and does not apply to a fixed structure, part of the building, which is being used as a working place for the time being. "Temporary" there is not, I think, referring to the fact that it is used only temporarily, but that the platform is there only temporarily. Accordingly, if that be right, then sub-paragraph (*d*), which is really a proviso to paragraph (1), has no application, and the prima facie obligation under paragraph (1) is an absolute obligation to provide a guard-rail or guard-rails. I should add that, even if I am wrong, I think it would be difficult to say that there was here "adequate handhold" within the meaning of sub-paragraph (*d*).

I confess that I come to that conclusion with some reluctance, because it seems to put a very severe burden on employers in a case such as this, but those who sit in these courts are constantly coming across cases under the regulations where such a harsh burden is put upon employers. Often the obligation is qualified by words such as whether it is "reasonable or reasonably

1960

Westcott v. Structural and Marine Engineers Ltd.

Lord Parker C.J.

"practicable." There is no qualification here; it is an absolute obligation.

Accordingly, in my judgment, these employers were in breach of the statutory duty imposed by regulation 24 (1) of these regulations.

[His Lordship then considered the question of contributory negligence and found that the defendants had not discharged the burden of proof upon them. After considering the evidence in relation to damages, his Lordship awarded the plaintiff £1,643 13s. 7d., which included £893 13s. 7d. agreed special damages.]

Judgment for the plaintiff with costs.

Solicitors: *W. H. Thompson; Barlow, Lyde & Gilbert.*

[CHANCERY DIVISION.]

1960 *March* 22.

Roxburgh J.

* MORRIS MOTORS LTD. *v.* PHELAN.

[1960 M. No. 661.]

PRACTICE NOTE.

Passing off—Goodwill, damage to—Sale of article as new—Motor-car—Injunction to restrain—Terms of injunction.
Injunction—Form—Trap—Injunction to restrain sales of cars as new—Disputed meaning of "new"—Need for definition in injunction.

MOTION.

The plaintiffs, Morris Motors Ltd., moved for an injunction restraining the defendant, John Phelan, "from advertising, offering for sale, or selling any motor-vehicle not being a new motor-vehicle of the plaintiffs' manufacture as and for a new motor-vehicle of the plaintiffs' manufacture and from falsely representing that any motor-car of the plaintiffs' is new when it is to the defendant's knowledge not new." The defendant was willing to treat the motion as the trial of the action, and to give a perpetual undertaking in the terms of the notice of motion set out above.

C. Mayson for the plaintiffs.
F. E. Skone James for the defendant.

It was understood at one time in the trade that "new" meant unused and not second-hand, and it was thought that a car could be advertised as new if it had not been on the road, but it was now

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[Reported by Miss PHILIPPA PRICE, Barrister-at-Law.]

realised as a result of the judgment of Wynn-Parry J. in *Morris Motors Ltd.* v. *Lilley* [1] that that was not so.

1960

MORRIS MOTORS LTD. *v.* PHELAN.

ROXBURGH J. If a special meaning is given to the word "new," as indeed was done in *Morris Motors Ltd.* v. *Lilley*,[1] I am not willing to put a defendant under an injunction which is in fact a trap, and on that ground I do not consent to the terms of the notice of motion. The notice of motion must be amended. The decision of Wynn-Parry J. was that a new motor-car did not merely mean unused but that it meant something else. If that is so counsel must redraft the notice of motion so as to embody that decision, even though the notice of motion as it stands is in the same form as the order granted by Wynn-Parry J. The notice of motion should be amended to read: "from advertising, offering "for sale or selling any motor-vehicle of the plaintiffs' manufac- "ture and for a new motor-vehicle of the plaintiffs' manufacture "and from falsely representing that any motor-vehicle of the "plaintiffs' manufacture is new after it has been the subject of a "retail sale by a distributor or dealer, has been registered with "the local county council, has had number plates affixed thereto, "and has been driven away by the purchaser." That form is exactly following the language of Wynn-Parry J.[2]

Solicitors: *Osmond Bard & Westbrook; Peacock & Goddard for Rothera, Sons & Langham, Nottingham.*

[1] [1959] 1 W.L.R. 1184; [1959] 3 All E.R. 737.

[2] [1959] 1 W.L.R. 1185, 1186.

[PROBATE, ETC., DIVISION.]

* *In the Estate of* COOK, DECD.

1960 *Feb.* 19.

Collingwood J.

Will—Signature—Sufficiency—Description of deceased in own hand in place of signature—"Your loving Mother"—Wills Act, 1837 (7 *Will.* 4 & 1 *Vict. c.* 26), *s.* 9.

The words "Your loving Mother" subscribed by the deceased at the foot of her will, and intended by her to represent her name, constitute a sufficient signature according to the requirements of section 9 of the Wills Act, 1837.[1]

PROBATE ACTION.

The deceased made a holograph will which commenced with the words "I, Emma Cook of 38, Maida Vale declare this to be "my last will . . . " and then set out her testamentary dispositions. In the presence of two witnesses the deceased wrote the words "Your loving Mother" at the foot of the document and the witnesses duly attested the same. The deceased then put the

[1] Wills Act, 1837, s. 9: "No will "shall be valid unless it shall be in "writing, and . . . it shall be signed "at the foot or end thereof by the "testator, or by some other person in "his presence and by his direc- "tion. . . ."

1960

Cook, decd., *In the Estate of.*

document into an envelope on which she wrote "Last will." The plaintiff and the defendants to the action, which prayed that the will be admitted to probate, were the children of the deceased, who were the sole beneficiaries under the will and the persons entitled on an intestacy. Terms of settlement had been signed.

John B. Latey Q.C. and *Bryan Anns* for the plaintiff.
A. Richard Ellis for the first defendant.
R. Gavin Freeman for the second defendant.

The following case was cited in argument in addition to those referred to in the judgment: *Morton* v. *Copeland*.[2]

Collingwood J. In this case there is no doubt that the requirements of the Wills Act, 1837, have been complied with so far as attestation is concerned; the only question is whether the will has been signed within the meaning of section 9 of that Act. [His Lordship referred to the facts and continued:]

Mr. Latey has referred me to several authorities, the most important of which, I think, is *In the Goods of Sperling*.[1] That was a case where, the deceased having signed his will in the presence of a servant, the servant described himself as "Servant "to Mr. Sperling," not writing his name or giving any further identification. That was held to be a sufficient attestation and subscription, and Sir J. P. Wilde, giving the short judgment, said[2]: "I think that there is a sufficient attestation and subscrip-"tion. I am satisfied that Saunders," that is the servant, "wrote the words which appear on the will, intending thereby an "identification of himself as the person attesting," and I think the same test would be applicable to the case of a testator.

In *Baker* v. *Dening*,[3] it was held that under the Statute of Frauds the making of a mark by the devisor, to a will of real estate, was a sufficient signing; and it was not necessary to prove that he could not write his name at the time. In the course of his judgment Coleridge J. said[4]: "I should be sorry if our decision "were to lead to the practice of substituting a mark for a name, "for this might give much opportunity for fraud. But here we "are on the question of law, whether, if a party make his mark, "that be a signature, although he could have written his name. "How can we say that it is not, when we look at the statute and "find what is admitted in argument? The statute has only the "word 'signed'; and it is admitted that, in some cases, this is "satisfied by a mark. When I consider the inconvenience which "would result from inquiring, in all cases, whether the party who "has made a mark could write at all, or could write at the par-"ticular time, I think it would be wrong to raise a doubt by "granting a rule. Rule refused."

[2] (1855) 16 C.B. 517.
[1] (1863) 3 Sw. & Tr. 272.
[2] Ibid. 273.
[3] (1838) 8 Ad. & El. 94.
[4] Ibid. 98.

In *In the Goods of Redding*[5] a testatrix, having duly executed her will under an assumed name, subsequently altered the will by erasing that name, and signing her true name; but the witnesses did not subscribe the will as altered. Probate was granted of the will as it originally stood, as the court considered the assumed name might be regarded as the mark of the testatrix. Finally, there is the decision in *Hindmarsh* v. *Charlton*,[6] in which Lord Campbell L.C., in the course of his speech, said[7]: "I will lay "down this as my notion of the law: that to make a valid sub-"scription of a witness, there must either be the name or some "mark which is intended to represent the name."

Applying those principles to the present case, I am quite satisfied here that the words "Your loving Mother" were meant to represent the name of Emma Edith Cook, the testatrix, and, accordingly, I pronounce for the will in solemn form and the terms of compromise will be made a rule of court.

Solicitors: *James B. Holt; Tamplin, Joseph & Flux; Millard & Potts.*

E. J.

[5] (1850) 2 Rob.Ecc. 339.
[6] (1861) 8 H.L.Cas. 160.
[7] Ibid. 167.

[QUEEN'S BENCH DIVISION.]

* PRACTICE DIRECTION (TRUSTEE'S ABSENCE).

1960
Mar. 2.

Trusts—Abroad, trustee going—Power of attorney—Statutory declaration—To be filed with each power of attorney—Trustee Act, 1925 (15 *&* 16 *Geo.* 5, *c.* 19), *s.* 25 (4).

The masters of the Queen's Bench Division have agreed that the practice under section 25 of the Trustee Act, 1925,[1] is to require a statutory declaration by the donor to be filed with each power of attorney that is filed, and that no exception to this practice can be made.

William H. Redman,
Secretary to the Masters of the
Queen's Bench Division.

March 2, 1960.

[1] Trustee Act, 1925, s. 25: "(1) A "trustee intending to remain out of "the United Kingdom for a period "exceeding one month may, . . . by "power of attorney, delegate to any "person (including a trust corpora-"tion) the execution or exercise during "his absence from the United King-"dom of all or any trusts . . . vested "in him as such trustee. . . . (4) The "power of attorney shall be attested "by at least one witness, and shall "be filed at the Central Office within "ten days after the execution thereof "with a statutory declaration by the "donor that he intends to remain out "of the United Kingdom for a period "exceeding one month from the date "of such declaration, or from a date "therein mentioned."

[RESTRICTIVE PRACTICES COURT.]

R. P. Ct.† (E. & W.)

1959 *Nov.* 16, 17, 18, 19, 20, 23, 24, 25, 26, 27, 30; *Dec.* 1, 2, 3, 4, 17, 21.

* *In re* FEDERATION OF BRITISH CARPET MANUFACTURERS' AGREEMENT.

[1957 No. 12 (E. & W.).]

[1957 No. 13 (E. & W.).]

Restrictive Practices—Restriction—Whether contrary to public interest—Price restriction—Carpet industry—Minimum prices for standard quality carpets—No formula or costings system—Restrictions on discounts and direct sales to consumers—Whether removal of restrictions would result in reduction in export business—Whether benefit or advantages conferred on public—Restrictive Trade Practices Act, 1956 (4 *&* 5 *Eliz.* 2, *c.* 68), *s.* 21 (1) (*b*) (*f*).

By two agreements, one made between all the members of the Federation of British Carpet Manufacturers and the other between the federation and all the wholesalers on the federation's wholesale list, the federation controlled the prices of certain qualities of Axminster and Wilton carpets, fixed a wholesale discount of 11–12½ per cent. payable only to all wholesalers on the list, and prevented generally quantity discounts and direct sales by manufacturers to consumer buyers.

The carpets subject to price control were known by the symbols A1 and W1, which denoted carpets containing a prescribed weight of surface yarn. Manufacturers, by putting good quality materials into A1 and W1 carpets, had given them a very good reputation in the trade but the symbols did not signify anything to the general public in the United Kingdom. In Australia and New Zealand the symbols were known to the public, in whose minds a "British "A1" quality stood high. However, there had been a sharp decline in the export trade of the whole carpet industry from 1954 onwards, and an even greater decline in exports of A1 carpets. In 1958, exports accounted for £8,000,000 out of total sales of £71,000,000. The decline in exports was steadily continuing.

The prices for A1 and W1 carpets were fixed by reference to broad market trends and general costs, but no costings system or price formulae were employed. Theoretically, every application for admission to the federation's wholesale list were considered on the basis of certain criteria designed to exclude persons who could not provide a proper wholesale service, but in fact the list was operated arbitrarily.

On a reference by the registrar of both agreements, the restrictions were justified on the ground that their removal would deny the public specific and substantial benefits within paragraph (*b*) and substantially reduce exports of carpets within paragraph (*f*) of section 21 (1) of the Restrictive Trade Practices Act, 1956.[1] The

† Upjohn J., Sir Stanford Cooper and Mr. W. L. Heywood.

[1] Restrictive Trade Practices Act, 1956, s. 21: "(1) For the purposes of "any proceedings before the court . . . "a restriction accepted in pursuance "of any agreement shall be deemed "to be contrary to the public interest "unless the court is satisfied of any "one or more of the following cir-"cumstances, that is to say . . . "(*b*) that the removal of the restric-"tion would deny to the public as "purchasers, consumers or users of "any goods other specific and sub-"stantial benefits or advantages

main benefits alleged were the maintenance of standards of quality in Axminster and Wilton carpets at fair and reasonable prices, stability of carpet prices and a cheap and efficient distributive system:—

Held, (1) that since the standards denoted by the symbols A1 and W1 meant nothing to the public, they were of no benefit to it, and that, although they gave to retailers a convenient standard of comparison with other qualities, that was not a matter of substantial benefit (post, pp. 372, 384).

(2) That prices fixed, as these were, arbitrarily and without a recognised costings system could not be guaranteed to be reasonable for the public (post, p. 379).

(3) That price stability in itself was not a benefit but, in any event, on the evidence, abrogation of the restrictions would not lead to undue instability in price (post, p. 385).

(4) That arbitrary selection to the wholesalers' list and the exclusion of genuine wholesalers therefrom had harmed the public and could not be justified, nor could the restriction on direct sales to consumers (post, pp. 382, 387).

(5) That, in view of their rapid decline, no further reduction in exports caused by removal of the restrictions would be likely to be substantial; but that, in any event, the court was not satisfied that the removal of the restrictions would cause any reduction (post, pp. 388, 388–389). Accordingly, the federation had failed to establish their case under either paragraphs (*b*) or (*f*) of section 21 (1) and the restrictions must be declared contrary to the public interest.

TWO REFERENCES.

On July 18, 1957, the Registrar of Restrictive Trading Agreements, pursuant to section 20 (2) (*a*) of the Restrictive Trade Practices Act, 1956, by two notices of reference referred to the court an agreement made between the members of the Federation of British Carpet Manufacturers, and an agreement made between the federation and numerous carpet wholesalers whose names appeared on the list of houses to whom the current rate of wholesale discount might be allowed, numbered 1320 and 1316 respectively on the register of agreements. By representation orders made under rule 11 of the Restrictive Practices Court Rules, 1957, the federation was made sole respondent to the proceedings on the first reference on behalf of all its members, and the Wholesale Floor Covering Distributors' Association respondent to the proceedings on the second reference on behalf of all the wholesalers on the list.

By an order made on November 13, 1958, by consent of all the parties to the proceedings, it was ordered that the two references be consolidated and heard together.

"enjoyed or likely to be enjoyed by "them as such, whether by virtue "of the restriction itself or of any "arrangements or operations resulting "therefrom: (*f*) that, having regard "to the conditions actually obtaining "or reasonably foreseen at the time "of the application, the removal of "the restriction would be likely to "cause a reduction in the volume or "earnings of the export business "which is substantial either in rela- "tion to the whole export business of "the United Kingdom or in relation "to the whole business (including ex- "port business) of the said trade or "industry. . . . (2) In this section "'purchasers,' 'consumers' and "'users' include persons purchasing, "consuming or using for the purpose "or in course of trade or business "or for public purposes. . . ."

R. P. Ct.
(E. & W.)

1959

Federation of British Carpet Manufacturers' Agreement, *In re.*

The following statement of facts is taken from the judgment of the court.

This consolidated reference is concerned with certain trading restrictions which members of the Federation of British Carpet Manufacturers (which we shall call "the federation"), have by a series of agreements bound themselves to observe and also with certain common form agreements which members require wholesalers with whom they deal to enter into. The restrictions fall broadly into two classes: first, a price-cum-quality control of certain qualities of carpet, and secondly, restrictions on trading by placing some limitation on wholesalers with whom manufacturers may deal, by fixing rates of discount and defining the terms on which sales may be made to retailers.

Woven carpets are made of yarns of many differing materials, they may be made of all wool or worsted, man-made fibres, cotton or mixtures of these yarns. The backing may be of cotton, jute, linen, hemp, paper or terylene. Furthermore, carpets may be woven in a variety of different weaves and on a number of different types of loom.

The price-cum-quality restrictions of the federation affect only all-wool or worsted carpets and then only certain qualities known as W1, a Wilton weave, and A1, an Axminster weave.

Carpets, we have been informed, were first woven in Axminster in 1755 and in Wilton from Huguenot times. Carpet manufacture is still carried on in those towns but the main centres of the carpet making industry are, and for many years have been, in Kidderminster, in Scotland and in the North of England. The particular weaves Wilton and Axminster, with which we are concerned, however, originated in the United States of America where the weaving of carpets by power loom was first invented many years ago, but carpets made on these looms were described as Wilton or Axminster no doubt for good commercial reasons. Power looms were introduced in this country under patent licences and one well-known firm—it is best that we should preserve a complete anonymity of names from start to finish of this judgment—introduced a particular quality named "Imperial Axminster" which achieved great success. Other firms began to copy this until Imperial Axminster became the description of a particular quality rather than the production of a particular firm. It acquired world-wide renown as a medium to good quality carpet suitable for domestic use anywhere in a house.

Before the war there were a number of associations of carpet manufacturers who were concerned to protect their mutual interests but none of them attained the position of power and influence now held by the federation. The most important seems to have been the Carpet Manufacturers Association (C.M.A.), formed many years ago, although it was small in numbers compared to the whole industry, but it had a powerful rival in the Allied British Carpetmakers, formed in 1937. The C.M.A.

was a staunch supporter of the Imperial Axminster standard and its members agreed to a specification for the standard comprising total yarn weight and surface yarn weight. During the pre-war years, this specification was upgraded for the reason that individual members of the C.M.A. had been seeking to obtain some advantage over one another by giving a better quality than their competitors within the C.M.A. The members of the C.M.A. agreed among themselves the price at which they would sell Imperial Axminster and this price tended to set the general price for Imperial Axminster throughout the trade.

During this time, too, the C.M.A. devised similar standards and prices for "Super Wilton." This is a more expensive quality than Imperial Axminster and, though used to some extent domestically, is more normally found where harder wear is to be expected, e.g., in hotels. Apart from this price leadership by C.M.A. in these two qualities, there was no price control in the trade so far as is known.

During the 1930s, the carpet industry experienced trouble from the type of trader known as a "brassplater." As the possibility of re-entry of this type of trader into the carpet trade plays an important part in the federation's case, we shall at once explain this phrase.

In the carpet industry the wholesaler plays an important part in the distribution and sale of its products. Some manufacturers will deal only direct with retailers; they have to maintain an elaborate sales organisation of their own. Other manufacturers refuse to deal with retailers at all but deal exclusively with wholesalers; they need only maintain a minimum sales organisation. Most manufacturers, however, deal both with wholesalers and retailers and they regard the wholesaler as part of their selling organisation. Speaking in very general terms the pattern of sales of this last class of manufacturers seems to be that they deal direct with the big retailers in the populous areas, leaving the less populous or more remote areas to be covered by the wholesalers' systems of travellers. The wholesaler may be a specialist in floor coverings or he may be a general wholesaler with a carpet department.

The wholesaler is expected to provide a service for the retailer, i.e., he is expected to have adequate show-rooms where the retailer can see and compare wide varieties of carpets; he is expected to carry reasonable holdings of stock so that the retailer can obtain quick delivery. Finally, the larger wholesaler is expected to provide what is called a "customers' customer" service. This means that a small retailer holding only a small stock can send a member of the general public requiring a carpet to the wholesaler to inspect his range of carpets. The customer chooses a carpet, notes its number and then orders it through the retailer. For these services the wholesaler of course obtains a wholesale discount on the manufacturer's list price to the retailer.

R. P. Ct.
(E. & W.)
1959

Federation of British Carpet Manufacturers' Agreement, *In re.*

The "brassplater" is a trader who held himself out as a wholesaler but he had no more than a small office from which he conducted business—hence the name. He held no stock, had no showroom and was no more than a commission agent. If he obtained an order from a retailer he merely passed it on to the manufacturer but, representing himself to be a wholesaler, claimed the wholesale discount though performing no service to the retailer or general public.

Frequently, the brassplater would deal direct with the general public and, having low overheads, would be prepared to split the wholesale discount either with the retailer or the public. This enabled him to quote lower prices to the retailer than the manufacturer was prepared to do. Very often he was only in the trade for a comparatively short time. No doubt, he was a thorn in the flesh of the manufacturer, though we are satisfied that some of the evidence as to the gravity of this problem before the war was greatly exaggerated. There was in fact a marked expansion in the industry in the 1930s.

To return to our brief historical survey, on the outbreak of war the overall export trade of the United Kingdom became of vital importance and a carpet export group was set up to encourage the export of carpets, but by 1941 this of course had become impossible. The carpet trade was regarded as a non-essential industry, looms were dismantled and the industry turned itself to the manufacture of a large range of war products.

In 1943, a Carpet Manufacturers Executive Committee was formed to represent the interests of all United Kingdom manufacturers of woollen and worsted carpets.

In June, 1944, a sub-committee of this executive committee was formed under the title "The Post-War Trade Terms Sub-"committee" and it formulated a number of recommendations (subsequently adopted by the executive committee) as to post-war trading. An important part of the recommendations dealt with transactions with wholesalers; broadly speaking they foreshadowed the terms of trading later adopted by the federation.

Towards the end of 1944, raw materials, including wool, became sufficiently available to enable allocations to be made for civilian industrial purposes and The Carpet Trade Rationing Committee, originally constituted on the outbreak of war, resumed its activities. The carpet trade began to resume its activities under a system of licensing from the Board of Trade and a strict system of control on maximum prices at all stages, manufacturing, wholesaling and retailing, was imposed.

The Board of Trade established certain quality standards by reference to the weight of surface yarn and designated each quality by reference to a symbol; maximum prices were established in each weave for each quality. Thus in the Axminster weave four qualities were defined numbered from A0 to A3. The A1 quality was the old Imperial Axminster. In the Chenille weave there were six qualities from C0 to C4. In the Wilton

weave there were thirteen qualities from W0A to W7. The W1 quality was the old Super Wilton. In each case the top quality was 0 and the qualities descended progressively.

The establishment of rigid price control which depended on the cost from time to time of raw materials and labour together with the great shortage of raw materials, particularly jute, necessitated continual discussion between the Board of Trade and the Carpet Manufacturers Executive Committee and a body representing the wholesalers known as The Wholesale Floor Covering Distributors Association (W.F.D.A.).

Terms of trading were also reviewed, among other matters. A wholesale list containing the names of wholesalers with whom members might deal was drawn up in 1945 and names were subsequently added to or deleted therefrom. A wholesale rate of discount was established at 10 per cent. with the approval of the Board of Trade. In 1946 a working party was set up by the Board of Trade to examine the carpet industry and it reported in 1947. Among many other recommendations it recommended [2] "That the Carpet Manufacturers' Executive "Committee should be reconstituted with wider functions to "assist in promoting the efficiency of the industry to act as a "channel of communication between the Government and the "industry and to satisfy the Government that proper progress is "maintained and the interests of the community served."

Arising out of that recommendation, the federation was founded in September, 1948. Control of qualities and prices by the Board of Trade came to an end in April, 1952.

The reference of the agreement between the members of the federation comprised the constitution and rules of the federation, a document entitled "Standards of Trading," a list of houses to whom the current rate of wholesale discount might be allowed and a supplementary list of such houses, the undertakings signed by the members of the federation and all resolutions and minutes of committees of the federation which were as such binding upon the members as if the same were contained in or formed part of the agreement or were otherwise expressly or impliedly deemed for the purposes of the Act to be binding upon them.

The agreement between the federation and the wholesalers whose names appeared on the list of houses to whom the current rate of wholesale discount might be allowed comprised a letter from the secretary of the federation to each of the carpet wholesalers on the list, a document signed by each carpet wholesaler on the list, a document containing particulars of the standards of trading together with and including all resolutions and minutes of committees of the federation which were as such binding upon the parties to the agreement as if the same were contained in and formed part of the agreement or were otherwise expressly

[2] (1947) Working Party Reports. Carpets (H.M. Stationery Office), p. 41.

R. P. Ct. (E. & W.)

1959

Federation of British Carpet Manufacturers' Agreement, *In re.*

or impliedly deemed for the purpose of the Act to be binding upon them or any of them.

The objects of the federation, admittedly a trade association as defined in section 6 (8) of the Act as set out in clause 2 of its constitution and rules, were "(a) to promote and advance the "interests of the carpet industry as a whole. (b) to carry into "effect, where practicable, the recommendations of the Working "Party Report for the Carpet Industry, 1947. (c) to assist, "advise, negotiate, and deal with Government Departments "and others on behalf of its members, and to promote, support "or oppose legislative or other measures affecting the carpet "industry. (d) to assist in the procurement of raw and processed "materials when necessary and in their equitable distribution to "the carpet industry. (e) to promote research, development, and "the study of design and colour, and, to assist in these objects, "to contribute to outside bodies dealing with these matters; "to collect and distribute information and statistics which may "be of interest to the carpet industry. (f) to arrange for "representation on the National Joint Committee and District "Joint Councils for the carpet industry and other bodies and to "contribute to the costs. (g) to collaborate with the appropriate "trades unions by supporting the Joint Advisory Council for the "Carpet Industry as a channel through which matters of interest "to the well-being of the carpet industry are discussed, wages "and working conditions being specifically excepted."

A manufacturer, upon applying for membership of the federation, was required to give an undertaking to abide by the federation's standards of trading so long as the manufacturer remained a member of the federation, unless specific notice to contract out had been given to the federation through the secretary in accordance with clause 22 of the constitution and rules concerning any particular clause, or unless the federation decided that the standards should be varied for all members. Clause 22 of the constitution and the rules was as follows: "Any "member shall have the right to contract out of any decision "of the executive committee that relates to a matter not included "in the objects clause 2 (b) to (g) without terminating his "membership of the federation, provided that thirty days' notice "in writing is given to the secretary. Confidential information "on that matter may, however, at the discretion of the executive "committee, be withheld from the member so contracting out."

As from September 1, 1959, the federation's Standards of Trading [3] (which did not apply to carpets with a jute nor cotton

[3] The federation's standards of trading as at the date of the hearing of the reference differed in certain respects from the standards of trading in force as at the date of notice of reference. The principal changes were effected as a result of the decision of the executive committee of the federation on August 26, 1959, that provisions relating to overseas markets should be omitted from the current standards of trading and incorporated with certain modifications into new standards of trading for overseas markets. It was also decided to authorise the sale of

pile or to tufted carpets known as such manufactured by members, or to any carpets exported from the United Kingdom) were as follows:

" 1. PRICES.

" (*a*) Federation Standard Qualities.

" (i) The following qualities known as Federation Standard " Qualities shall not be sold at prices other than the standard " prices fixed for the time being by the federation:

" W1 Figured Woollen	Five frame
" W1 Figured Worsted	Five frame
" A1 Woollen.	

" (ii) The finished surface yarn weights of the above- " mentioned standard qualities shall not be less than the " minima per square yard specified below:

		minima per sq. yd.
" W1 Figured Worsted	Five frame	2·35 lb.
" W1 Figured Woollen	Five frame	2·70 lb.
" A1 Woollen		1·35 lb.

" (iii) No five-frame figured worsted or woollen Wilton and " no woollen Axminster carpet containing less than the finished " surface yarn weights above mentioned shall be sold at a price " within 12½ per cent. of the price fixed in respect of the standard " quality in each type.

" (iv) The above does not prevent any carpet containing " more than the finished surface yarn weights above mentioned " from being sold at more than the price fixed in respect of the " standard quality.

" (v) The standard qualities shall be marked as ' Federation " ' Standard Quality ' by label.

" (vi) The above shall not apply to carpets the face yarn of " which is not composed wholly of wool or worsted.

" (*b*) Change in prices.

" On a change in prices, all goods shall be charged at prices " ruling at the date of invoice or despatch whichever is the " earlier except in the case of specials and contract orders " definitely known to be such and where a firm price regardless " of subsequent rise or fall has been quoted to the member's " customer at the time the order is placed and to be the ultimate " consumer, such goods being distinct from goods ordered for " ordinary stock.

" (*c*) Price lists.

" Members shall forward to the secretary of the federation a

any all-wool pile carpet at more than standard price, provided it contained more than the minimum finished surface yarn weight and was neither described as " A1 " or " W1," as the case might be, nor marked as a federation standard quality. This last alteration had been recommended by the federation's legal advisers as a natural corollary to the executive committee's earlier decision to remove the upper weight limits from the specifications for the standard qualities.

R. P. Ct. (E. & W.)

1959

Federation of British Carpet Manufacturers' Agreement, *In re.*

" copy of their current price list and shall inform him immediately " of any alteration therein.

" (*d*) Ministry of Works and Admiralty contracts.

" Ministry of Works and Admiralty orders for which tenders " are required shall be entirely free as regards price for com- " petitive quotations, but goods shall be charged up and paid for " on completion of normal manufacture. Normal manufacture " is defined as weaving and finishing and does not include " seaming and/or making up.

" (*e*) Charges for chlidema squares and for making up squares " other than chlidema.

" (i) Charge for supplying a made-up chlidema square.

" In the case of a made up bordered breadth square there " shall be made an additional charge of 5 per cent. on the price " of the piece goods involved in such square.

" (ii) Charge for supplying an unsewn chlidema square.

" In the case of a bordered breadth square supplied unsewn " the additional charge under clause 1 (*e*) (i) above shall be " reduced by 1s. per linear yard of piece goods included therein.

" (iii) Charge for making up a square other than a chlidema " square.

" In the case of all other carpets made up from piece goods " and offered for sale as squares, there shall be an increased " charge of not less than 2s. per linear yard of piece goods.

" (iv) Permissible reduction in making up charges.

" In the case of charges to be made under sub-clauses 1 (*e*) (i) " and 1 (*e*) (iii) above for squares, if these increase the price " above that of the corresponding standard seamless square the " charges may be reduced so that the prices are equivalent.

" (v) Additional charge—special squares.

" In the case of a chlidema or other square specially made to " a customer's requirements there shall, where applicable, be " made an additional charge in accordance with clause 1 (*b*) " below.

" (*f*) Charges for cut lengths or short lengths—narrow loom " goods only.

" (i) Narrow loom goods are defined as those of a width of " less than 6″.

" (ii) In the case of an order for one quality, width, design " and colour which does not include a full piece of not less than " 40 yards in length, involving cutting from a stock piece the " price shall be increased by 10 per cent.

" (iii) In the case of a number of short pieces required for " matching, a weaving charge may be made at the option of the " member in addition to the 10 per cent. short piece charge where " this is applicable.

" (*g*) Prices for squares, cut lengths or short lengths— " Broadloom goods.

" (i) Broadloom goods are defined as those of a width of 6″ " or over.

"(ii) A piece is defined as one of not less than 25 yards in "length.

"(iii) In relation to the prices for squares, cut lengths or "short lengths, there shall be maintained a differential amounting "to an increase of 5 per cent. as compared with the prices for "piece goods.

"(iv) In the case of a number of short lengths required for "matching a weaving charge may also be made at the option of "the member.

"(*h*) Charges for fringing.

"Where a square, broadloom, sofa rug, corridor rug, rug or "mat is supplied with ends fringed there shall be made an "additional charge.

"2. TERMS OF TRADING.

"(*a*) Wholesale List and rate of wholesale discount.

"(i) Wholesale discount shall be granted only to those firms "appearing on the federation's List of Wholesale Houses.

"(ii) Every member of the federation who contracts out of "clause 2 (*a*) (i) of the Standards of Trading shall send to the "secretary a full list of those firms, other than those whose "names appear in the federation's wholesale list, to whom he "proposes to grant wholesale discount. He shall also obtain "from each such firm and send to the secretary an undertaking "identical with that given by firms whose names do appear on "the federation's wholesale list. He shall keep the secretary "informed of any additional firm to whom he decides to grant "wholesale discount.

"(iii) The rate of wholesale discount allowed shall be that "authorised for the time being by the executive committee of "the federation.

"(*b*) Cash discount.

"Cash discount of $2\frac{1}{2}$ per cent. only shall be allowed for "payment by the 20th of the month following the date of "despatch or of the invoice whichever is the earlier, subject to "a tolerance, at the discretion of members, of not more than "five days, in special circumstances.

"(*c*) Quantity discounts.

"Quantity discounts, as under, shall be allowed on contract "orders, required by a retail customer or a buying agency for "one ultimate consumer, such goods being distinct from goods "ordered for ordinary stock:

"(i) 1,000 linen yards $\frac{3}{4}$ width (or equivalent in square yards "for other widths) of any one quality, width, design and colour, "ordered at one time for delivery as ready—5 per cent.

"(ii) Additional widths to complete the contract ordered at "the same time—5 per cent. The above quantity discounts shall "not apply to rugs, mats or squares.

"(*d*) Patterns, Pattern Books and Cuttings.

"(i) Patterns.

R. P. Ct.
(E. & W.)

1959

Federation of British Carpet Manufacturers' Agreement, *In re.*

"Patterns if sent for special inquiries shall be returnable but "if retained by the customer to hold on show they shall be "charged at list price less 25 per cent. and shall not then be "returnable.

"(ii) Pattern Books and Cuttings.

"Pattern books and cuttings may be supplied on approval.

"(*e*) Competing for customers own showrooms.

"A discount of 5 per cent. shall be allowed to retail customers "on competing for their own showrooms except in cases where "the 5 per cent. quantity discount is applicable, in accordance "with clause 2 (*c*) above.

"(*f*) Jobbing.

"When goods are jobbed, for whatever reason, there shall be "allowed minimum discounts as under:

"To the wholesale 10 per cent.

"To the retail 15 per cent.

"(*g*) Invoices shall not be forward dated.

"(*h*) No additional discount shall be allowed for prompt "cash.

"(*j*) Goods shall not be supplied on 'sale or return' or on "any analogous terms, unless specifically authorised by the "executive committee of the federation.

"(*k*) Sales shall not be made direct to consumer buyers, i.e., "public bodies, householders, hotels, restaurants, or cinemas. "This does not apply to recognised buying agencies with whom "members and wholesalers shall be free to deal if, in their "opinion, they conform to the definition set out in Appendix "'A.'

"(*l*) All goods supplied to buying agencies shall be charged "at manufacturers' list prices without deduction of trade discount "or any price concession, other than quantity discount if "appropriate.

"Appendix 'A.' Recognised buying agencies.

"1. A buying agency must be one that acts for a more than "normally large consumer of carpets, e.g., railway and steam-"ship companies, motor-car and aircraft manufacturers, cinema "and hotel furnishers.

"2. The agency shall be established on a permanent basis "and not merely set up to deal with a particular transaction or "requirement.

"3. The agency shall have a staff of carpet planners, fitters "and layers and shall have its own premises for undertaking the "work, or shall subcontract the work to bona fide planners to "the trade, other than retail stockists.

"4. Orders for H.M. Government shall only be supplied "through the Ministry of Works or the Admiralty.

"5. Local authorities. Hospital regional boards and manage-"ment committees and other national bodies shall not be in-"cluded in the definition of a buying agency, except:

"(*a*) H.M. Office of Works.
"(*b*) The Admiralty.
"(*c*) British Railways Executive.
"(*d*) British Airways Corporations.
"(*e*) Ministry of Transport."

A wholesaler, upon being added to the federation's list of wholesale houses to whom the current rate of wholesale discount might be allowed, was required to confirm that he would abide by the federation's Standards of Trading and to sign the following undertaking: "In consideration of receiving the current "wholesale trade discount from carpet manufacturers we agree:

"(1) To carry a stock of carpets, carpeting and/or rugs.

"(2) To buy in reasonably large quantities.

"(3) To accept the manufacturers' price as minimum price "to the retailer.

"(4) To retain the whole of the manufacturers' current "wholesale trade discount.

"(5) Not to give any cash discount on payment, or extension "of time for payment, in excess of the corresponding terms "received from carpet manufacturers.

"(6) To offer the goods openly and freely on the market to "any and all retail buyers who purchase for resale.

"(7) Not to sell direct to consumer buyers, i.e., public bodies "(other than H.M. Government), householders, hotels, restau-"rants or cinemas. This does not apply to buying agencies who "are the recognised channel through which purchases for certain "large consumers or groups of consumers are made, and who "conduct their operations in recognised business premises."

The federation formerly had another standard quality carpet —the Chenille Axminster known as C3—but that carpet ceased to be a standard quality carpet on December 7, 1955.

Since the date of decontrol, there had been six price changes in the standard qualities as follows:

	Axminster A1 per sq. yd.		Wilton W1 per sq. yd.	
	s.	d.	s.	d.
Maximum prices fixed by last statutory instrument	35	11	58	3
Minimum price at date of decontrol, April 25, 1952	32	4	51	1
June 2, 1952	29	1	48	6
December 1, 1952	32	0	54	7
August 28, 1953	33	7	57	5
September 5, 1955	35	0	60	2
March 28, 1957	36	9	63	3

Although the federation had not yet established its own research unit, it had a technical advisory sub-committee, which maintained contact with and exchanged information with research departments of other interested industries, including the Wool Industries Research Association, the British Jute Trade Research

R. P. Ct.
(E. & W.)

1959

Federation of British Carpet Manufacturers' Agreement, *In re.*

Association, the British Rayon Research Association, and the Linen Industries Research Association. The technical advisory sub-committee also issued regular bulletins on all developments regarding machinery, patents, and other technical matter, and it undertook investigation of all technical questions related to the production of carpets or their usage.

The federation maintained close contact with two outside bodies closely connected with the trade. It had a liaison sub-committee with the Wholesale Floor Covering Distributors' Association, and the National Association of Retail Furnishers. The federation also collaborated with and helped finance the British Carpets Promotion Council, a body formed in conjunction with the International Wool Secretariat to promote the sales of British carpets; the federation had its own Overseas Markets Research Sub-committee which prepared periodical reports on overseas markets.

On October 20, 1959, the executive committee resolved that members be recommended to send out letters to each of their wholesaler customers in the form of a draft letter, prepared by the federation's secretariat, inviting the wholesaler to enter into an individual agreement whereby the terms of trading between the member and wholesaler would be regulated by the conditions set out in a document accompanying the letter: which conditions were the same as those contained in the standards of trading.

The statement of case and answer in each reference were in identical terms. By their statement of case, the federation sought to justify the restrictions imposed under their agreement under section 21 (1) (*b*), (*f*) and (*g*) of the Act. The federation alleged that the public were provided with four specific and substantial benefits by virtue of the restrictions; first, the existence of a standard quality of Axminster all-wool carpet, a standard quality of Wilton figured worsted carpet and a standard quality of Wilton figured woollen carpet which was regarded by the public and by the trade as being constant and undebased in quality at a price which was regarded by the public and the trade as being proper and reasonable; secondly, a substantial degree of stability in the price of carpets resulting in a stable distributive trade, and the creation of sufficient confidence among wholesalers and retailers to maintain adequate stocks of carpets with the consequential advantage to the public of a large freedom of choice; thirdly, a system of distribution of carpets which ensured that the needs of the public were well served through wholesalers and retailers in all areas at a low cost; fourthly, the maintenance of promotional costs in connection with the sale of carpets at a low level.

It contended that removal of the restrictions would result in the following detriments to the public; first, the standard qualities would cease to exist or become so debased that the public and trade would have no confidence in the quality or price of the standard carpets or similar carpets and would be deprived of a

standard of comparison of qualities; secondly, the price of carpets would become so unstable that wholesalers and retailers would not maintain sufficiently adequate stocks with resultant lack of choice for the public; thirdly, persons would be enabled to set up as wholesalers or distributors of carpets without carrying sufficient stocks of carpets or providing any or any sufficient service to the public, and discounts paid to wholesalers would increase together with the introduction of discount rebates to retailers, resulting in a narrower choice of carpets being available to the public, the more remote areas of the United Kingdom being inadequately served, and the distributive costs of carpets being increased with consequential price increases to the public; fourthly, the joint advertising and promotion of carpets undertaken by the federation through the British Carpets' Promotion Council would cease and be replaced by individual advertising which would be more costly and be paid for in increased prices to the public or in a deterioration in the quality of carpets.

The federation also contended that the removal of the restrictions would be likely to cause a substantial reduction in the volume or earnings of the export business, in that sales of carpets to countries overseas depended on the maintenance of the standard qualities as constant and undebased qualities and upon their continued recognition as standard qualities, the standard qualities having been recognised and accepted throughout all countries to which carpets were exported from the United Kingdom.

The federation, further, alleged that, if one or more of the restrictions contained in the agreement were not contrary to the public interest, the other restrictions were reasonably necessary for purposes connected with the maintenance of the restrictions found by the court not to be contrary to the public interest.

By his answer, the registrar denied that the public enjoyed or were likely to enjoy any specific or substantial benefits or advantages by virtue of the restrictions, and, if (which was denied) any of the four matters relied on by the federation as being such benefits could be specific or substantial benefits to the public, it was denied that they were enjoyed by reason of the restrictions or any of them or from any arrangement or operation resulting therefrom. The registrar did not admit the existence of a standard constant or undebased quality of any carpet, and alleged, further, that the standardisation of surface weight of yarn did not ensure a good or constant standard of quality which depended upon many factors, and the registrar denied that the standard qualities were regarded as constant and undebased by the public or the trade. He denied that the prices fixed were proper or reasonable, or that they were so regarded by the public or by the trade. He did not admit that there had been a substantial degree of price stability and denied that stability of price was a benefit in itself without regard to the level at which prices

R. P. Ct. (E. & W.)

1959

Federation of British Carpet Manufacturers' Agreement, *In re.*

were stabilised or to variations in production costs. If (which was denied) stability of price resulted in a stable distributive trade, that was a benefit only to distributors and deprived the more far-sighted purchasers, whether traders or consumers, of the opportunity to meet their needs at lower prices. The registrar did not admit that the degree of price stability (if any) created confidence in stocks or that large stocks were held as a result of the restrictions; nor did he admit that the system of distribution of carpets ensured that the needs of the public were well served or served at all, nor did he admit that by virtue of the restrictions promotional costs were kept at a low level, nor that low promotional costs were a benefit to the public.

The registrar denied that the removal of the restrictions would deprive the public of any specific or substantial benefits enjoyed or likely to be enjoyed by them, or would cause the standard qualities to cease or become debased, or the public to lose confidence in the quality of carpets, or the price of the standard quality or similar carpets to become unstable or an unstable distributive system to result. He did not admit that the removal of the restrictions would lead to inadequacy of stocks held by retailers or wholesalers or to the entry into the trade of wholesalers carrying insufficient stocks or providing insufficient service or to increased discounts to wholesalers or to the introduction of retail rebates or to a narrower choice of carpets being available to the public or to more remote areas of the United Kingdom being inadequately served. The registrar, in any event, denied that increased discounts or the introduction of retail rebates would increase the cost of distribution or the selling price of carpets to consumers. He denied that the removal of the restrictions would result in increased costs of distribution or in increased prices to the public, and did not admit that the arrangements made in respect of joint advertising were dependent upon the existence of the restrictions or that if they were removed manufacturers would be forced to abandon the arrangements or that they would do so. The registrar denied that the removal of the restrictions would be likely to cause a reduction in the volume or earnings of the export business of the carpet industry. He further denied that, if one or more of the restrictions were found not to be contrary to the public interest, the other restrictions or any of them were reasonably necessary for purposes connected with the maintenance of the restrictions found by the court not to be contrary to the public interest.

Finally, the registrar submitted that all the restrictions contained in the agreement were unreasonable having regard to the balance between the circumstances relied upon by the federation and the detriment to the public resulting or likely to result from the operation of the restrictions. The registrar invited the court's attention to the following matters of detriment: (i) low cost manufacturers were deprived of the opportunity to quote lower prices and so obtain a larger share of the total demand for their

products; (ii) the exclusion of competition in price between members, and the consequent removal of a powerful incentive to efficient and economic production and distribution; (iii) the activities of efficient distributors was stultified by the fixing of common discounts and the limitation upon wholesalers entitled to receive discount; (iv) the elimination of scope for special arrangements between manufacturers and particular retailers, having particular requirements to satisfy; (v) the prevention of manufacturers from reducing their prices below the fixed minimum prices; (vi) the discouragement of specialisation aimed at reducing costs, since such manufacturers could not quote lower prices for goods manufactured more efficiently and cheaply; (vii) the veto of the manufacturers over persons wishing to remain in business or establish themselves as wholesalers; (viii) the deprivation to the public as consumers of the benefits likely to be derived from increased competition between wholesalers as the result of the removal of the restrictions concerning wholesalers.

Further facts are stated in the judgment.

J. G. Foster Q.C., *R. O. Wilberforce Q.C.* and *A. R. Barrowclough* for the federation and the Wholesale Floor Covering Distributors' Association.

A. A. Mocatta Q.C. and *W. A. Bagnall* for the registrar.

The following case was cited in argument, in addition to those mentioned in the judgment: *In re Wholesale and Retail Bakers of Scotland Association's Agreement and In re Scottish Association of Master Bakers' Agreements.*[4]

Cur. adv. vult.

December 17. UPJOHN J. read the following judgment of the court which, after stating the facts set out above, continued: We think that during the period of statutory price control, the symbols A1, W1, C1 and so on were greatly used and became well known in all sections of the trade; manufacturing, wholesaling and retailing. There is no doubt that rightly or wrongly these symbols were regarded in the trade as denoting standards of quality and this was particularly true of the A1 and W1 qualities. If a wholesaler or retailer was offered an A1 or W1 quality he accepted it as such without question.

We are not satisfied that these symbols A1 and W1 became well known as standards of quality in the minds of the general public.

Some no doubt did regard them as denoting a general standard of quality but we believe that many did not and relied entirely on the sales talk of their retailer. Many purchasers were governed entirely either by price considerations or by general appearance, design or colour.

[4] (1959) L.R. 1 R.P. 347; [1959] 1 W.L.R. 1094; [1959] 3 All E.R. 98.

R. P. Ct.
(E. & W.)

1959

Federation of British Carpet Manufacturers' Agreement, *In re.*

Whatever may have been the position when Board of Trade controls applied, we are satisfied that since then so far as the general public is concerned the use of the symbols A1 and W1 in the United Kingdom has virtually come to an end. Manufacturers increasingly sell under their own trade names and not under A1 and W1. No doubt as one of the more important witnesses for the federation stated in his proof, those in the trade would know that the X (trade name) carpet is the Y firm's A1 product but to the general public the symbol A1 or W1 if (as we doubt) it ever carried the assurance of a particular quality, has long since ceased to have any precise meaning in the minds of the general public.

The federation consists at present of some 58 members. Membership has fluctuated and since the end of 1949 there have been eight additions and eighteen resignations. There are about fourteen manufacturers outside the federation. Members of the federation make about 75 per cent. of the total United Kingdom production of "traditional" carpets, i.e., all wool or worsted, mixtures, hair and rayon. Of the outside manufacturers, one who is very large makes about 10 per cent. of total production and two others who resigned from the federation in 1957 together account for another 10 per cent. leaving the remaining 5 per cent. to be split among the remaining twelve outside manufacturers.

There is a remarkable diversity in the range of manufacture by the members of the federation. Some members concentrate largely on A1 and W1 qualities and their major production (up to, in one case, in one year, 100 per cent.) is in these qualities.

At the other end of the scale some members make no A1 or W1 qualities at all.

Then again the proportion of production by any one firm of the various qualities may differ considerably year by year.

Statistics of production within the industry are not important in this case and have not been easy to obtain, but we think such statistics as have been put before us together with the oral evidence, justify the following brief conclusions:

1. The industry as a whole is and has been since the war a prosperous expanding industry. Its condition was described by a federation witness as buoyant.
2. Over the past three years the production of A1 and W1 by federation members taken as a whole has been fairly constant and it is not yet possible to say with any certainty whether there is a trend away from these qualities and other woollen carpets in favour of newer types such as tufted or mixtures containing man-made fibres.
3. Foreign imports have greatly increased since 1953 mainly in carpets containing less than 50 per cent. wool.

It is fair to say that conditions within the industry are competitive.

The federation has in conjunction with the British Carpets Promotion Council undertaken to advertise British carpets. Over 400,000 copies of a booklet "How to Choose and Care for "British Carpets" and 500,000 copies of a booklet entitled "How to Look After Your British Carpet" have been issued to the public. Copies have been in evidence before us. They do nothing to extol any particular qualities. Indeed the first-mentioned publication is at pains to explain Axminster and Wilton are NOT brand names but two major weaving processes. The second publication merely gives hints on the care of carpets generally. The object of this advertising campaign as appears plainly from the Promotion Council's Report for 1957, is to advertise generally the advantages of traditionally woven wool carpets including Wilton and Axminster to try to stem the greatly increased sales of new types of tufted carpets.

The International Wool Secretariat has published brochures for the use of salesmen entitled "Selling Carpets" and "The "Care of Carpets." They are written to promote the sales of British wool carpets in quite general terms.

"Selling Carpets" contains some imaginary conversations with an intending customer and are skilfully devised to induce a sale; it is noteworthy from start to finish that there is no mention of particular qualities.

The International Wool Secretariat has also organised certain training courses for salesmen to educate them to sell more effectively to the public. In addition, carpet fortnights are organised, when retailers make a special display of their goods and there is an advertising campaign in the national press. A slogan may be chosen such as "Carpets Make a Home."

The joint advertising campaign by the Promotion Council is contributed to by members of the federation but in addition there is a grant, which over the past three or four years has been £30,000 annually, made by the International Wool Secretariat and British Wool Marketing Board.

We propose now to summarise the main restrictions which the federation and its members have adopted, leaving over for later consideration a number of ancillary or subsidiary restrictions.

We start with the relevant restrictions as they stand upon the Register of Restrictive Trade Practices today mentioning any previous amendments which may seem material.

The restrictions are contained in a document headed "Stan-"dards of Trading," and at the outset the reader's attention is drawn to the fact that members are entitled to contract out of any particular clause in accordance with clause 22 of the federation's constitution. Then there is a note that the Standards of Trading do not apply to jute or cotton pile carpets nor tufted nor to carpets exported.

Main clause 1 deals with Prices. It provides as follows:

"(a) *Federation Standard Qualities*

"(i) The following qualities known as 'Federation Standard

R. P. Ct. (E. & W.)
1959
Federation of British Carpet Manufacturers' Agreement, *In re.*

" ' Qualities ' shall not be sold at prices other than the standard " prices fixed for the time being by the federation:

" W1 Figured Worsted	Five frame
" W1 Figured Woollen	Five frame
" A1 Woollen	

" (ii) The finished surface yarn weights of the above-" mentioned standard qualities shall not be less than the " minimum per square yard specified below:

		" *Minimum* " *per sq. yd.*
" W1 Figured Worsted	Five frame	2·35 lb.
" W1 Figured Woollen	Five frame	2·70 lb.
" A1 Woollen		1·35 lb.

" (iii) No five-frame figured worsted or woollen Wilton and " no woollen Axminster carpet containing less than the finished " surface yarn weights above mentioned shall be sold at a price " within 12½ per cent. of the price fixed in respect of the standard " quality in each type.

" (iv) The above does not prevent any carpet containing more " than the finished surface yarn weights above mentioned from " being sold at more than the price fixed in respect of the standard " quality.

" (v) The standard qualities shall be marked as ' FEDERA-" ' TION STANDARD QUALITY ' by label."

There follow a number of ancillary and subsidiary provisions such as making charges for cut lengths and so on.

Sub-clause (iii) has been referred to as the quarantine clause.

Originally a maximum as well as a minimum weight was laid down but a resolution of the Executive Committee of the federation on December 3, 1958, abolished the maximum weight and introduced sub-clause (iv).

Originally too, the prices fixed were minimum prices and the 12½ per cent. quarantine operated above as well as below the minimum price but by a similar resolution on August 26, 1959, a fixed price was substituted and the quarantine only operated on lower qualities. At the same time exported carpets were for the reasons appearing later excluded from the Standards of Trading.

Originally the Chenille Axminster quality C3 was treated as a Federation Standard Quality but that was abandoned on December 7, 1955.

A number of the labels referred to in sub-clause (v) have been put in evidence. An examination of them coupled with the oral evidence we have heard establishes conclusively that in recent years the whole weight of advertising in and by these labels is for the individual manufacturer's brand or trade name. Sometimes the "Federation Standard Quality" is omitted altogether as an act of deliberate policy. In nearly every case where the phrase is still used it is in small unimportant lettering

scarcely calculated to bring to the mind of the purchaser that there is such a thing as an A1 or W1 standard or even a British Federation Standard. It strongly supports the view we have already expressed that the ordinary purchaser is quite ignorant nowadays of any such standard or more particularly what is assured by it.

Two things are clear. First, subject only to the 12½ per cent. quarantine, there is no limitation on the prices that may be charged by the manufacturer for carpets outside the standard qualities; this applies whether the carpets in question are above or below the standard. Secondly, the prices fixed for the standard qualities are prices to the retailer. No attempt is made to control the price at which the retailer may sell to the public; he can add whatever "mark-up" he thinks commercially wise to the price he pays the manufacturer or wholesaler.

It was also established that though there is no fixing of prices for other than standard qualities yet the prices of other qualities of woollen and worsted carpets do in fact tend to move in accord—as it was put in evidence—with the price fixed for the standard quality.

Finally, when selling their non-standard ordinary range of carpets appearing in their retailers' price lists from time to time, it does seem customary for manufacturers to refuse to quote prices below the listed prices although we can see nothing in the Standards of Trading to preclude them from doing so. The reason for this will appear later. However, the manufacturer does quote special prices to wholesaler or retailer for special exclusive designs or special non-listed qualities.

We may conveniently deal here with one submission of the registrar. He submits that a standard defined solely by reference to the weight of surface yarn is no true standard at all. The standard provides no test as to the quality of the wool to be woven or the dye to be used and there is no definition of the structure of the carpet or the backing. Hence the standard laid down provides but little guide as to durability, as to fastness of colour and so on. We agree, as indeed did many of the federation's witnesses, that the standard laid down is neither comprehensive nor perfect but the difficulty is to know what more comprehensive yet workable standard can be laid down. The British Standards Institute have been considering this problem for some time and have not yet solved it. The Board of Trade adopted it for the purposes of their controls and, imperfect though it may be, we think it is probably the most useful single standard that can be devised and is entitled to recognition as such. The real truth of the matter is that the manufacturers, always jealous of their reputation, have made the standards A1 and W1 become known within the trade as good and reliable standards because they have in fact put good quality materials, wool, dye, backing, into the standard carpets. One reason for this is the existence of the 12½ per cent. quarantine.

R. P. Ct. (E. & W.)

1959

Federation of British Carpet Manufacturers' Agreement, *In re.*

For example, the standard price of A1 to retailers is now 26s. 3d. so that no member of the federation can sell a lower quality all wool Axminster for more than approximately 23s. This prevents what has been called "debasement," i.e., that if all price controls on the quality standards are removed there will follow (so it is said) a secret and commercially dishonest process of lowering the quality of carpets ostensibly offered as of the standard qualities.

We turn to the second main clause of the Standards of Trading.

"(a) *Wholesale List and Rate of Wholesale Discount.*

"(i) Wholesale discount shall be granted only to those firms "appearing on the federation's List of Wholesale Houses.

"(ii) Every member of the federation who contracts out of "clause 2 (a) (i) of the Standards of Trading shall send to the "secretary a full list of those firms, other than those whose "names appear in the federation's wholesale list, to whom he "proposes to grant wholesale discount. He shall also obtain from "each such firm and send to the secretary an undertaking "identical with that given by firms whose names do appear "on the federation's wholesale list. He shall keep the secretary "informed of any additional firms to whom he decides to grant "wholesale discount.

"(iii) The rate of wholesale discount allowed shall be that "authorised for the time being by the Executive Committee of "the federation."

These provisions apply to all types of carpets not excluded from the Standards of Trading and not merely to A1 and W1.

There follows in paragraphs (b) to (j) inclusive a number of ancillary or subsidiary provisions dealing with cash discounts, quantity discounts and so on.

Closely bound up with and an integral part of these provisions are the arrangements which members agree to make with the wholesalers on the wholesale list. This forms the subject-matter of the second consolidated reference before us. The respondents are the wholesalers on the wholesale list and are represented before us by the Wholesale Floor Covering Distributors' Association.

Each wholesaler on the wholesale list is required to sign a letter to the secretary of the federation, whereby in consideration of receiving the current wholesale trade discount from carpet manufacturers he agrees (so far as material to this case):

(a) to accept the manufacturer's price as the minimum price to the retailers;

(b) to retain the whole of the manufacturer's current wholesale trade discount;

(c) not to give any cash discount on payment or extension of time for payment in excess of the corresponding terms received from carpet manufacturers;

(d) not to sell to consumer buyers.

The distribution scheme of the federation is thus a clear and coherent whole.

The retailer obtains his carpets whether it be from manufacturer or wholesaler at, but not below, the list price and that no doubt is why the manufacturer will not quote special prices for his ordinary listed range of qualities to the retailer; he must not undercut his wholesaler. The wholesaler (if he is on the wholesale list) for the services he performs in carrying stock and having adequate showrooms receives the wholesale rate of discount. This rate was originally fixed by the federation at 11 per cent. and it is clear this is a low rate of discount compared to similar trades. Between 1952 and 1958, there was much pressure to increase this rate of discount and a number of small members of the federation contracted out of paragraph 2 (a) (i) of the Standards of Trading as they were entitled to do under clause 22 of the constitution. Finally, in 1957, two substantial members (one involving two companies) contracted out and in fact resigned from the federation. Apparently they now allow 12½ per cent. on all sales. It became evident that the line could no longer be held and as from September 1, 1958, the federation fixed a wholesale rate of discount on all carpets below the quality of A1 and W1 at 12½ per cent. It remains at 11 per cent. for A1 and W1 and higher qualities.

The last restriction in the home market with which we propose to deal is that in clause 2 (*k*) of the Standards of Trading.

Shortly stated, sales must not be made direct to consumer buyers, i.e., public bodies, householders, hotels, restaurants or cinemas.

There are excepted from this provision recognised "buying "agencies" which are defined in an appendix. Briefly, buying agencies are those who supply more than normally large consumers of carpets, e.g., railway and steamship companies, certain government departments but not local authorities, Hospital Boards or nationalised industries except British Railways or British Airways Corporations.

This restriction stands very much on its own and is designed to prevent large consumers from obtaining wholesale terms direct from manufacturers. The argument is that such consumers require a retail service and should therefore be compelled to buy through retailers. Thus, for example, the London County Council whose total requirements for carpets for their own offices, hospitals and schools come to about £20,000 per annum, are compelled to purchase through retailers. Of course, retailers will be prepared to give big local authorities and other large purchasers very favourable terms and one case was proved before us where a retailer was content on one occasion to pass on carpets to the London County Council at the price which he (the retailer) paid; his only profit was the 2½ per cent. discount he received for cash.

R. P. Ct.
(E. & W.)

1959

Federation of British Carpet Manufacturers' Agreement, *In re.*

These large purchasers naturally argue that they should have the opportunity of striving to get the wholesalers' rate of discount or at any rate some part of it.

We shall deal with restrictions on trading in overseas markets at a later stage of this judgment.

We now propose to consider how these restrictions are operated by the federation in practice. We shall consider first the fixing of prices of the standard qualities by the federation and then the method of selection of wholesalers for inclusion on the wholesale list.

The federation do not claim that the price fixed is a low price or a minimum price in the sense of being a stop loss price. They claim it is a proper and reasonable price, a phrase we shall examine later. In marked contrast to the elaborate costings and calculations which we had to consider in the *Yarn Spinners'* case [1] and the *Blankets'* case,[2] there is no costings procedure in any accountancy sense whatever. The registrar's accountant made an investigation into the accounts of fourteen firms who were treated as representative. In only two cases were any standard forms of costing adopted and it was difficult to extract any completely accurate or truly comparable figures of cost. However, the accountant's evidence established all that it really set out to do; to prove, namely, that there was a substantial range of cost between the high cost producer and the low cost producer and the price fixed by the federation had no relationship to the costs of individual firms.

As we have stated earlier, the prices were fixed down to the time of decontrol in 1952 by the Board of Trade after negotiations with the old executive committee. When the Board of Trade's accountants were investigating these matters, a figure of 7½ per cent. was taken as a basic margin of profit to be allowed on top of costs.

On decontrol the federation was then in a position to start from those figures and the practice has been to consider not basic costs of materials and costs of conversion but differences in costs of materials or of conversion since the price was last fixed.

Prices are first considered by bodies known as Area Costings Committees. These are not truly sub-committees of the federation but are meetings of manufacturers in each of the three areas. Discussion is very informal and in the more remote areas sometimes merely by telephone. Apparently some information is exchanged but the evidence was very vague. These meetings are no more than preparatory discussions for the quarterly meeting of the Costing and Prices Sub-committee of the federation.

This meeting is attended by the members of the sub-committee and their cost accountants and they have before them reports from the area committee sometimes verbal, sometimes

[1] (1959) L.R. 1 R.P. 118; [1959] 1 W.L.R. 154; [1959] 1 All E.R. 299.

[2] (1959) L.R. 1 R.P. 208; [1959] 1 W.L.R. 442; [1959] 2 All E.R. 1.

in the form of an aide memoire. As the cost of raw material accounts for about 60 per cent. of the total cost of a carpet the sub-committee first consider any changes in raw material prices and, after discussion, decide what should be accepted as the current price of the raw material. They then go through the same procedure with the costs of conversion.

They, then, consider whether any change in the prices for the standard qualities is justified, but in doing this the committee does not rely on figures only. As the principal witness on this part of the case said in his proof of evidence, "We rely at "least as much on our collective knowledge and experience of "the carpet business as on the figures themselves. Perhaps "the best way of explaining the matter is to say that the "costings figures produced are relied on as showing trends in "costs and are used as a basis for discussion." The sub-committee then makes a report to the executive committee indicating whether any change of price is justified. The matter is then discussed by the executive committee who make the decision as to any change. This committee meets regularly shortly after the sub-committee and it also takes a very broad view. To quote from the federation's answer to the registrar's questionnaire:

"The Executive Committee reviews the current minimum "prices in the light of the report from the sub-committee but "it also takes account of many other factors, such as current "and future conditions and trends, the season of the year in "relation to sales programmes and other matters not directly "related to costs, before it takes a decision as to whether the "current minimum prices should be changed."

It may fairly be stated that the executive committee has never decided to make any greater increase of prices than that recommended as justifiable by the sub-committee, and, on a number of occasions, has either made no increase or a lesser increase than that suggested by the sub-committee. Since this scheme started in April, 1952, there have only been five changes in prices, one in June, 1952 (downwards), and subsequently in September, 1952, December, 1953, September, 1955, and March, 1957, all upwards. We observe that though the price was last changed in March, 1957, when the price of wool was 108d. per pound and it rose to 110d. for the months of August–October, 1957, it then fell to 106d. in November, 1957, and to 100d. in April, 1958, yet no downward revision has been made. There was no evidence before us that conversion costs have risen during this period to balance the fall in raw material prices.

However, looking at the matter generally, it seems to us clear that prices admittedly fixed by the methods we have stated, give no assurance that they will be reasonable in the interests of the public, whose interests indeed do not seem to be considered at all. Changes in carpet prices for the standard qualities seem to be no more than informed guesses taking into account a large

R. P. Ct.
(E. & W.)

1959

Federation of British Carpet Manufacturers' Agreement, *In re.*

number of factors, many of them not related to costs at all. Prices so fixed cannot fairly be described as other than arbitrary.

We return to the wholesale list. Its avowed object is to keep brassplaters out of the trade and ten criteria have been laid down by the federation as the principal factors to be taken into account when judging suitability for admission to the list. We propose to summarise the more important of them. The applicant must have adequate storage space and showrooms; adequate finance and coverage by travellers. His standing in the carpet trade is considered. The size of his carpet turnover is considered and if it drops to less than £10,000 per annum, he is warned that he may be taken off the list. His general reputation, connection with the retail trade and the general nature of his business are also among the criteria.

Before considering the operation of admissions to and removals from this list, we must give a few statistics. There are at present 193 wholesalers on the list. In their replies to the registrar's questionnaire, the federation stated that between June 1, 1955, and January, 1959, fourteen applicants to the wholesale list had been admitted, 134 rejected and nine deferred. The reason given for rejection of this large number was that the applicant was not a proper firm to be admitted to the list. There seems to be an annual review of those on the list in March of each year. Four were removed and ten warned in March, 1957. As a big manufacturing group resigned in March, 1957, no firm was removed in 1958 but fifteen were warned. Six were removed and seven warned in 1959. Some of those warned had for two or three years turnovers substantially below the critical figure of £10,000 and it is difficult to see why such firms were not removed if the general scheme of the wholesale list was really being operated as it was represented to be. However, it is fair to say that (allowing for readmissions) between 1952 and 1959, 26 have been removed for low turnover and ten for other reasons.

The question of admission to and removal from the wholesale list is dealt with by the federation's Terms Sectional Committee.

We have already pointed out that a manufacturer may contract out of this provision (and we have been told fourteen have done so) but he may not want to do so; however, he may want to see a wholesaler on the list but the committee as a whole think otherwise. In that event, the manufacturer is entitled to put that particular wholesaler on a supplemental list and provided the wholesaler is willing to sign the common form agreement (as to discounts and terms of resale to retailers) that particular member, but no other, is entitled to treat that particular wholesaler as being on the list. A number of manufacturers have exercised this privilege.

When a wholesaler applies to be put on the wholesale list he is sent a questionnaire so framed as to enable the committee to consider which of the criteria he satisfies. The matter is then put before the committee. Any member of the federation may

attend these meetings if he is interested but usually there are fifteen or sixteen members who attend regularly.

Two leading members of the federation have given evidence before us as to the operations of the committee and the registrar has called a number of carpet wholesalers and intending carpet wholesalers who have applied for admission to the wholesale list and have been refused.

We are prepared to accept that admission to the wholesale list when it was first administered by the committee was intended to be regulated to keep out the brassplater. However, we are completely satisfied upon the evidence that for some years now the committee has ruled upon applications for admission in an arbitrary manner entirely for the benefit of the manufacturers and the ten criteria are seldom if ever applied in a bona fide way. Their decisions in practice go far beyond the ostensible object of keeping out the brassplater. They keep out, quite arbitrarily, a number of genuine wholesalers who would satisfy, and well satisfy, the principal criteria, and we saw in the witness-box some wholesalers who, if the ten criteria had been seriously applied, must have been admitted to the list. We were told that these matters were discussed at great length in the Terms Sectional Committee, yet the secretary never recorded anything more than the decision. He made no attempt to record the sense of the meeting or state the reasons for any decision and the normal practice is never to give to the applicant any reason for refusal of his application. That, in itself, indicates a failure to operate the ten criteria for the purposes of which the applicant has laboriously but so often, uselessly filled in the questionnaire.

The truth of the matter is that there is no plan for an efficient wholesale coverage of the United Kingdom based on density of populations in geographical areas at all. Each member present at the committee consults only his own interest, that is to say, if he is not concerned to have an extra wholesaler in the particular area where the applicant happens to have his place of business, the manufacturer will not support his application. If it so happens that no one is concerned to support the applicant for this reason, the applicant, however deserving and qualified, has no chance of election, and that is why such a large number of applicants have been rejected.

The witnesses for the federation (who, to be fair to them, gave their evidence with great candour) seem to confuse election to the list with the obligation to supply to those on the list. No manufacturer is bound to supply a wholesaler merely because he is on the list. The federation's principal witness on this part of the case gave perfectly understandable reasons why he, personally, would not supply some of the wholesalers called before us by the registrar. He seemed unable to appreciate the distinction between that and election to the list.

Harm has been done to the public in this arbitrary manner

R. P. Ct. (E. & W.)

1959

Federation of British Carpet Manufacturers' Agreement, *In re.*

of selection to the list. For example, there is no carpet wholesaler in the Channel Islands. Retailers there can of course see patterns brought by travellers from the manufacturers or wholesalers but if a retailer wants to see a display of carpets he must go to the mainland; yet a perfectly genuine wholesaler in Jersey who would have been capable of providing just that service was refused admission to the list. Notwithstanding the post-war introduction of the large pattern trade (i.e., where travellers take round a large selection of lithographs and big pattern books), this seems to us a serious drawback to local retailers.

The effect of the joint operation of the wholesale list and the wholesale discount is quite obvious. The wholesalers on the list reluctantly accept these low rates of discount, primarily, because they are on this very select list which diminishes though it does not destroy competition and, secondly, because they hope to make another breach in the rate of discount. The manufacturers have to pay only a low wholesale discount and if they are dissatisfied with the present structure of their selling and distribution organisation, can either actively sponsor an applicant for admission to the list or can put him on the supplemental list.

The federation supports its case on the restrictions agreed between members of the federation under section 21 (1) (*b*) (*f*) and (*g*) of the Act of 1956. It supports its case on the common form agreement with wholesalers under paragraphs (*b*) and (*g*) only. We shall consider paragraph (*b*) first.

We have to decide whether the removal of the restriction would "deny to the public as purchasers, consumers or users "of any goods other specific and substantial benefits or advantages "enjoyed or likely to be enjoyed by them as such whether by "virtue of the restriction itself or of any arrangements or "operations resulting therefrom."

The benefits alleged to be enjoyed by virtue of the restrictions as pleaded and argued before us are as follows:

(1) The existence of the A1 and W1 standards are in themselves of great benefit to the public and to the trade for they are confidently regarded by the public and by the trade as being constant and undebased in quality at prices which are regarded by the public and by the trade as being proper and reasonable and as indicating a constant and undebased quality.

If the scheme is abolished the substantial benefits and advantages which would be denied to the public are alleged to be that these standards would cease to exist or would become debased and the public would have no confidence in the quality or price of such carpets and would be deprived of a standard of comparison of qualities.

(2) The fixing of prices for A1 and W1 qualities ensures a substantial degree of stability in the price of these and of other qualities which results in a stable distributive trade, creates

confidence in stocks on the part of wholesalers and retailers so that they maintain adequate stocks.

If the scheme is abolished the substantial benefits and advantages which would be denied to the public are alleged to be that prices would become unstable, there would be in the distributive trade, a lack of confidence and a consequent holding of inadequate stocks for the public and with a resultant lack of choice for them.

(3) The scheme of distribution of carpets ensures that the needs of the public are well served through wholesalers and retailers throughout the country at a low cost.

If the scheme is abolished the substantial benefits and advantages which would be denied to the public are alleged to be that brassplaters will enter the trade, discounts to wholesalers would be increased, allowances by way of annual rebates would be introduced, a narrow choice of carpets would be available to the public, the more remote districts would be inadequately served and the cost of distribution would rise.

(4) The scheme ensures the maintenance of "promotional "costs" that is, advertising costs in connection with sale of carpets at a low level.

If the scheme is abolished, the substantial benefits and advantages, which it is alleged would be denied to the public, are alleged to be that the joint advertising scheme would be abandoned and greatly increased sums expended by individual firms on advertising leading to more expensive carpets or a deterioration in quality.

Counsel have quite properly taken each set of restrictions and examined them in turn and we propose to follow the same course but in the end we shall review the restrictions as a whole, that is, as a planned system of trading activity.

Paragraphs (1) and (2) are directed to the maintenance of a quality price standard and paragraph (3) to the arrangements with wholesalers and we (like counsel) shall so deal with them. Paragraph (4) stands on its own.

As to (1), standard cum price quality. We agree that the maintenance of a standard quality well known to the public is an advantage to it, though whether it would be a specific or substantial advantage is a matter on which we express no opinion, but for the reasons we have given, we are not satisfied that so far as the general public is concerned, the A1 and W1 standards signify any standard of quality. Nevertheless we agree that within the trade A1 and W1 do indicate a quality standard. They are widely accepted as standards for comparison with other qualities and to that extent make it easier for the retailer to form a judgment. If therefore the result of an adverse decision of this court would be to destroy not only the price element but the quality element (an argument we shall examine in a moment) would the loss of a standard quality by itself deny substantial and specific advantages to the

R. P. Ct. (E. & W.)

1959

Federation of British Carpet Manufacturers' Agreement, *In re.*

public? In the circumstances mentioned above, the denial of advantages (if any) to the general public is de minimis.

Then as to the position of the retailer section of the public. If the quality standard disappears, it is true he will be deprived of standards of comparison at present available to him. But this is no more than an inconvenience to him. The retailer is in the trade to serve the public, and there was ample evidence that, before the war, experienced retailers were capable of comparing carpets for quality and detecting debasement. If these drills have been forgotten during the post-war control, they must be relearnt and, until they are relearnt, retailers who want good quality carpets will have to go to manufacturers or wholesalers of a high reputation. We feel sure they will not be disappointed.

But what if our conclusions are wrong as to the importance of the quality standard to the general public?

It was the essence of the federation's case that the loss of the quality/price standard would be a serious loss.

It is said that if owing to an adverse decision of this court the price cum quality standard is abolished, that the quality standard must necessarily disappear at the same time because, so it was said, quality not coupled to a price and buttressed by a quarantine was a meaningless phrase. It was urged upon us that the abolition of the price standard would lead to debasement almost overnight and the public would suffer accordingly. Evidence was given as to the position before the war when it was said that lack of price cum quality control led to hopeless debasement of the Axminster qualities in the United States of America; in England it was said that the Brussels weave was debased to virtual extinction

This evidence, we think, was greatly exaggerated. We draw attention to the fact that before the war the industry was an expanding industry and in fact the Axminster Imperial quality was upgraded.

However, pre-war history is not a reliable guide to post-war events. The position today is that this is an expanding, prosperous and buoyant industry. We were told that large sums out of the earnings of the industry have been retained in the industry since the war, and were used to improve premises, plant and machinery. The manufacturers are jealous of their reputations and trade names at home and, as we shall show later, overseas. Little has been heard of federation standards lately. Furthermore, there was no evidence of debasement by firms outside the federation to compete with the latter's A1 and W1 qualities.

If the quality cum price control is abolished, some firms may possibly debase, but we believe that many manufacturers will seize this opportunity to take advantage of the increased standards of living of the public and put on the market, probably under their own trade names, carpets of as high quality as today so that there will be readily available to the public a large range of high quality carpets.

Then as to price. We have already criticised the price fixed by the federation to retailers as being arbitrary. To suggest, as the pleadings do, that the price is regarded by the public as proper and reasonable, is a meaningless phrase. First, because the public are wholly ignorant of the standard price; secondly, because they have to pay a price arbitrarily imposed upon the retailer by manufacturers and in addition whatever mark up the retailer thinks it is commercially prudent to add. If the pleadings intend to suggest that the retail price charged to the public is regarded by them as reasonable, that was not established by evidence and we do not accept it. We believe that if the quality price restriction goes, the force of competition will tend to lower prices and that the public will be offered a large range of excellent carpets at competitive prices.

We shall deal with discounts when dealing with paragraph (3).

We have come to the conclusion that the abolition of the price cum quality standard will deny to the public no benefits whatever.

As to (2), stability of prices. Some degree of stability of prices may be sacrificed if the standard quality price is abolished. But as has been pointed out, in earlier cases in this court,[3] that is not necessarily a bad thing. In any event, after an initial shake-out there seems no reason to expect any undue instability of prices and certainly no instability comparable with the incidence of charging purchase tax.

Increasing competition in both wholesale and retail trade will compel traders who are determined to stay in business to continue to hold adequate stocks giving the public a large variety to choose from. Stability of prices confers no benefit on the public in this case.

Then as to (3), which, in effect, supports the wholesale list and the wholesale rate of discount.

The wholesale list is in our view the most objectionable feature of the whole scheme. It prevents new and enterprising wholesalers from having an opportunity to purchase a proper range of carpets, for we are satisfied that though some manufacturers may refuse to supply some newcomers whom they regard as undesirable wholesalers or as competitors, other manufacturers would do so.

The list also prevents many existing and well-established wholesalers who have not been admitted to it from increasing their range of carpets.

Those now on the list are not subject to so great a spur of competition as they otherwise would be; in short their turnover may to some extent be determined not by their efficiency but by their comparative exclusiveness.

The only possible excuse for such a list is to keep out the brassplater. If the list was operated bona fide in accordance with

[3] In *In re Yarn Spinners' Agreement* (1959) L.R. 1 R.P. 118, 189; *In re Scottish Association of Master Bakers' Agreement.* Ibid. 347, 376.

R. P. Ct. (E. & W.)

1959

Federation of British Carpet Manufacturers' Agreement, *In re.*

the ten criteria (which we have found as a fact it is not), those criteria go much further than can be justified for that limited purpose. Furthermore, though we understand the anxiety of the industry in connection with the brassplater, the problem is one which is not peculiar to this industry but is a common one particularly in the textile trade. The industry faced it before the war and survived. We have already pointed out that no less than fourteen manufacturers have contracted out of the wholesale list and that is a powerful pointer to the fact that it acts as a drag on freedom of trading. The problem of the brassplater must again be faced and dealt with by the industry and the remedy lies in the hands of the members. This provision certainly does not fall within section 21 (1) (*b*).

Then as to the wholesale rate of discount. It is possible that the wholesalers will force an increase in the wholesale rates of discount if the list is abolished. Competition may force members to offer bigger discounts for bulk orders or give to retailers quantity discounts of some kind based on orders over the year. These are problems common to every industry and again this is no case for 21 (1) (*b*); nor is there any ground for believing that these matters will either increase the price of carpets to the general public or decrease the range of carpets available. A number of members have contracted out of this provision and they together with outside manufacturers no doubt give higher rates of discount, yet their prices remain fully competitive. As for inadequate service to remote areas the evidence points to, as we have shown, exactly the opposite result to that claimed.

As to (4), maintenance of promotional costs. Two points arise. One of the witnesses said that without the maintenance of the restrictions, it would be impossible to maintain co-operative advertising. We do not understand why this should be so. We have already pointed out that the whole object of this effort is generally to promote the sale of wool or worsted British carpets regardless of manufacturer or qualities and if it be worth while to continue the scheme supported as it is by a substantial annual grant, the federation will, we believe, do so.

Secondly, it was said that much greater expenditure on advertising by individuals would be required if the promotional costs effort goes.

Even if the abolition of the scheme does lead to greater expenditure on advertising, it by no means follows that the price of carpets will rise and we do not think they will. Some outside manufacturers spend very large sums on advertising compared with members, yet their prices at home are no higher. Advertising is undertaken in the expectation that it will be remunerative by increasing turnover in an expanding market or obtaining a larger share of the existing market. This again is a feature common to all industries and does not satisfy section 21 (1) (*b*).

Then, we must look at the scheme as a whole for the

purposes of section 21 (1) (*b*). We are prepared to accept the view that the scheme was introduced with the honest intention of giving the public a good service though plainly the federation was in nowise neglecting its own interests.

As the scheme has been operated, however, the result seems to be as follows. The manufacturers benefit greatly by getting from their point of view good prices for their carpets which they fix and by paying a low rate for distribution. The wholesaler fortunate enough to be on the wholesale list has some benefit by reduction in competition. It is a convenience (no more) to the retailer not to have to take some trouble in appraising the quality of carpets, but, on the other hand, he has a less good wholesale coverage. To the general public, we can see no benefit at all. They are paying prices which are probably too high and the retailer to whom they go may not have the range of carpets which he otherwise would have. We think the public will continue to obtain an adequate range of carpets of all qualities if the restrictions are abolished.

The claim under section 21 (1) (*b*) fails.

Next, we must deal with the restriction prohibiting sales to consumers except through retailers. We do not find any justification for this restriction in the pleadings which appear to be directed only to matters which we have earlier discussed in this judgment. Nor have we been persuaded in argument that there is any justification for it to be found in section 21 (1) (*b*). It was said that without it the retailer would refuse to deal in the goods of the manufacturer. We do not accept that for a moment. This restriction is plainly bad.

We next consider the federation's case under section 21 (1) (*f*) in relation to the home trade. The federation have to satisfy us that the removal of the restriction would be likely to cause a substantial reduction in the volume of earnings of the carpet trade export business in relation to the whole business including export business of the carpet trade. The other alternative in the sub-paragraph is plainly inapplicable.

We must start by quoting some statistics though both the registrar and the federation have found it difficult to put reliable statistics before us. Values of export sales ex factory of the whole carpet industry of wool, worsted and mixtures excluding mohair and tufted carpets declined steadily from rather over £12,000,000 in 1954 to just under £8,000,000 in 1958. This must be compared to total home and export sales of such carpets which increased from £65,000,000 in 1954 to £71,000,000 in 1958. It follows that the export trade expressed as a percentage of total sales declined from 18·5 per cent. in 1954 to 11 per cent. in 1958. The export trade is steadily and rather rapidly declining despite the maintenance of the price quality standards of W1 and A1.

During this time, the exports of 48 of the federation's members (who, however, exported 98 per cent. of all federation

R. P. Ct.
(E. & W.)

1959

Federation of British Carpet Manufacturers' Agreement, *In re.*

exports of woollen and worsted carpets) of A1 quality fell from nearly £5,000,000 in 1954 to just over £3,000,000 in 1958. Exports of W1 during this time were, apparently, much smaller. During this time the percentage of exports of A1 to total exports of the 48 federation members fell from 56 per cent. to 45 per cent.

It is clear that in a rapidly declining export market the proportion of exports of A1 is also declining. There seems little ground, therefore, for anticipating that the abolition of the standard quality cum price would be likely per se to cause a substantial reduction in the export trade. The figures suggest that a reduction is likely to occur in any event. This case fails on these figures.

However, we heard some evidence upon this matter. Exports to Australasia account for rather more than half of the total exports of United Kingdom carpet manufacturers. It was proved by evidence called by the federation that the exports of British manufacturers to these Dominions depend on their ability to offer goods of high quality.

Since the war, a substantial local carpet manufacturing industry has been built up in Australasia. They still use the same symbols as were in earlier days in use in the trade here such as A1, 2, 3. Moreover it is clear from the Australian and New Zealand newspaper advertisements that we have seen that these qualities are brought to the notice of the purchasing public in a way that was never, so far as the evidence goes, done in this country. The evidence was that many of the products of Australian manufacturers although advertised in various standard qualities, are in fact of lower quality, in other words debased. British manufacturers have only been successful in exporting to these Dominions in the face of difficult quota regulations and import duties, by offering a uniformly high undebased quality and there is no doubt that, e.g., a British A1 quality stands much higher in the estimation of the Australian buying public than an Australian A1. Furthermore, these newspaper advertisements bring to the notice of the buying public again in a way which so far as the evidence goes has never been done in this country, the names of the leading British manufacturers as an indication of excellent quality. Exports to Australia and New Zealand have declined from rather under £9,000,000 in 1954 to under £5,000,000 in 1958 and, if this decline is to be arrested, it can only be done by maintaining high and undebased qualities.

It is said that this will be impossible, for debasement in the home market will inevitably follow if home restrictions are abolished and it will then be administratively impracticable to maintain undebased qualities for export. This is contrary to the evidence and to common sense. Contrary to the evidence, for it was established, first, that a non-federation manufacturer who makes little A1 for the home market, makes a substantial line of A1 for export and, secondly, that the general Australasian

taste is for a rather different type of design to the popular lines in the United Kingdom; the lines which sell best there being chintz and floral designs. It is contrary to common sense, for British manufacturers who wish to remain in the Australasian market will so organise their factories as to compete on the only possible basis with the local product, by producing better quality and by enhancing their reputations as leading British manufacturers. If any manufacturer decides to go out of the Australasian market, it will not be because of the abolition of the restrictions at home, but because the export market is proving unprofitable to him on any footing.

Finally, although counsel have dealt with this particular matter when arguing another part of the case, we think it is relevant to refer to the progressive removal of federation restrictions in relation to the export market. At the date of the reference in July, 1957, there was a general restriction binding on members that in sales overseas, except to the United States of America, carpets were not to be sold at prices below those for the home market. Then, in December, 1957, Europe was excluded from that restriction. A year later Central and South America, Canada and parts of Africa were excluded.

It seems that the federation has come to believe that freedom of action is the best policy in the export trade. It is a little difficult to see then why freedom of action in the home market should be said to lead to a substantial reduction in exports.

This point fails.

It follows that, as the federation has failed to establish any case under section 21 (1) (*b*) or (*f*), that sub-paragraph (*g*) has no application. It also follows that it is unnecessary for us to consider the balancing provisions at the end of subsection (1), for there is no benefit to be weighed in the balance against the detriment to the public. It is implicit in what we have already said that we regard the detriment to the public flowing from the operation of the federation scheme as very considerable.

There remain two matters with which we must deal. The first is in regard to the restrictions entered into by members of the federation in relation to their overseas trade. These restrictions are based upon and follow substantially the restrictions relating to the home market. Until August 26, 1959, these restrictions all formed part of the "Standards of Trading" and were contained in main clause 3 of those standards. The cardinal provision was that carpets were not to be sold in overseas markets at prices below those for the home market.

The home wholesalers are not so far as we are aware concerned with exports, so there was no wholesalers' list but there was a provision that no wholesale or retail discounts should be allowed other than those authorised by the federation.

By resolution of the executive committee of August 26, 1959, however, the restrictions were removed bodily from the Standards

R. P. Ct. (E. & W.)

1959

Federation of British Carpet Manufacturers' Agreement, *In re.*

of Trading and reinstated in what was alleged to be a new agreement.

This was admittedly done in case the federation should lose their case before this court. Their case is that by removing bodily the provisions relating to overseas trading from the Standards of Trading and reinstating them in another document, they have entered into a new agreement to which the Restrictive Trade Practices Act, 1956, does not apply by virtue of section 8 (8) of that Act. The registrar contends that the alleged new agreement is only a variation of the old agreement (a variation without a difference) and should be entered upon the register maintained by him. That is a question which can only be determined by the High Court.

It has been admitted by the federation that, having regard to section 20 of the Act of 1956, restrictions on the register in relation to overseas trading down to August 26 last are justiciable by us and that we have a discretion to adjudge upon them if we think proper to do so. But the federation, nevertheless, submit that in the exercise of our discretion we ought not to do so.

The question really is whether we ought to decide upon the validity of the whole scheme as registered down to August 26, 1959, or only on the provisions relating to the home trade.

We think we should decide upon the whole scheme for two reasons. First, the old overseas scheme was an integral part of and depended upon the existence of a scheme for the home market. If the price quality standard is abolished at home all reason for a scheme abroad based on home prices seems to go. If any manufacturer at home can charge any price he likes for an A1 carpet, there seems no reason to compel him to charge the same or a higher price for an A1 carpet overseas.

There was no evidence to show that the old scheme could have any useful operation abroad in the absence of controlled prices at home, or that it could be justified under section 21 (1) (*b*) of the Act.

But there is another reason why we think we should deal with the whole scheme today.

The federation having, as they put it, severed their overseas trading restrictions from the home trading restrictions by a pair of scissors on August 26, applied to this court for an order that all restrictions relating to the supply of goods by export contained in the registered agreements be excluded from consideration by the court in these proceedings. That application was heard by us on October 14 last and we refused it. The federation and their advisers, therefore, knew that we might consider the export restrictions and they knew that the registrar would invite us to do so. They have not in the least been taken by surprise and yet although the onus is clearly upon them, they have elected to call no evidence to justify the

continuance of the overseas restrictions; they must be taken to have decided upon that course deliberately.

We must declare that the restrictions contained in main clause 3 down to August 26 last are contrary to public policy.

If the High Court decides that the registrar's contention is correct, and the so-called new severed agreement is in law only a variation which ought to be registered with the registrar, we see no reason why he should be put to the expense of a fresh reference. In that event, we propose to give him liberty to apply for a declaration of invalidity as to the variation made on August 26 last to which in the absence of any change of circumstances he will plainly be entitled.

The second matter with which we must deal is an even later last-minute decision to try to avoid the consequences of an adverse finding by this court.

On October 20, the executive committee of the federation resolved as follows:

"The committee considered the draft of an agreement "between individual manufacturers and their wholesale "customers, which had been prepared by the secretariat, at "the request of the Chairman's Sub-Committee, in the form of "two draft letters, together with an appendix and an annexure, "as a means by which whatever the outcome of the case "members of the federation, if they wished to do so as "individual firms, might be able to continue to trade with their "wholesale customers under the rules at present embodied in "the Standards of Trading for the home market.

"After considerable discussion on the details of the drafts, "in which the secretary was instructed to include a section to "cover the position of wholesalers with retail connections, the "committee agreed that the draft agreements, as amended, "should be sent to the Council of the Wholesale Floor Covering "Distributors' Association for comment; and that subsequently "the drafts should be sent to each member of the federation "with a recommendation that each member should, without "delay, send letters on the lines of the drafts, to each of his "wholesale customers, with a view to establishing individual "agreements on terms of trading. A copy of the drafts, as finally "amended, is at appendix 'B.'"

Members of the federation have been circularised accordingly. The resolution has been registered with the registrar.

We do not pause to read the drafts at appendix B for they do in substance carry out the plain intention of the federation as expressed in the resolution, i.e., on the footing that all the present restrictions are found contrary to public interest by this court, the drafts enable individual manufacturers to continue trading with their wholesale customers under the rules embodied in the Standards of Trading.

R. P. Ct. (E. & W.)

1959

Federation of British Carpet Manufacturers' Agreement, *In re.*

During the hearing, we were told that some 28 out of 58 members have acted on this resolution.

The resolution is a recommendation to which section 6 (7) of the Act is plainly applicable, so that the constitution of the federation must be construed as though it contained a term whereby members agree to comply with those recommendations. The members, therefore, are deemed to be bound to send out draft letters on the lines of the drafts circulated. Those drafts as we have said contain terms similar in substance, though not in form, to the letters which wholesalers are bound to sign as a condition of being entered on the wholesale list. We have not yet considered those undertakings in detail and we think the convenient course will be to consider all those matters together.[4]

Accordingly, today, we decide that the following restrictions contained in the Standards of Trading are contrary to public policy:

(1) The main price quality standards contained in main clause 1 (a).

(2) The restrictions relating to the wholesale list and rate of wholesale discount contained in main clause 2 (a).

(3) The consumer-buyer provisions contained in main clause 2 (k); and finally,

(4) The main provisions of the overseas market restrictions contained in main clause 3 down to August 26 last.

Declaration accordingly.

Solicitors: *Simmons & Simmons; Treasury Solicitor.*

N. P.

[4] On December 21, 1959, the court formally declared that the restrictions scheduled to its order [the restrictions contained in the standards of trading, ante, pp. 363–367, other than those relating to the definition of standard qualities] agreed to be the registrable restrictions in the agreements, were contrary to the public interest. Upon receiving undertakings from the Federation of British Carpet Manufacturers and from the Wholesale Floor Covering Distributors' Association on behalf of themselves and their members that they would not give effect to, nor enforce the restrictions, nor enter into or make any agreement to the like effect in respect of the restrictions, without giving the Registrar of Restrictive Trading Agreements twenty-eight days' notice of their intention to do so, the court by consent made no order on the registrar's application for injunctions.

[RESTRICTIVE PRACTICES COURT.]

* *In re* FEDERATION OF WHOLESALE AND MULTIPLE BAKERS' (GREAT BRITAIN AND NORTHERN IRELAND) AGREEMENT.

R. P. Ct.† (E. & W.)

1959 *Nov.* 2, 3, 4, 5, 6, 9, 10, 11, 12; *Dec.* 16.

[1957 No. 11 (E. & W.).]

Restrictive Practice—Restriction—Whether contrary to public interest—Price restriction—Baking industry—Fixed retailers' margin—Ascertainment of retail price from average costs—System based on method evolved by Government Department during period of price control—Recommended prices low for high cost section of industry—Whether a true maximum—Whether retail prices in general lower by reason of recommendation—Whether benefits or advantages conferred on public—Restrictive Trade Practices Act, 1956 (4 *&* 5 *Eliz.* 2, *c.* 68), *s.* 21 (1) (*b*).

Restrictive Practice — Recommendation — No powers for enforcing observance—Restriction deemed in law to arise by virtue of recommendation — Whether "restriction accepted in pursuance of any "agreement" — Whether presumption that contrary to public interest — Restrictive Trade Practices Act, 1956 (4 *&* 5 *Eliz.* 2, *c.* 68), *ss.* 6 (1) (7) (8), 21 (1).

From 1941 to September, 1956, the price of bread was subject to Governmental control and a subsidy system was in operation, subsidy rates being determined by the Ministry. After decontrol, the Federation of Wholesale and Multiple Bakers (Great Britain and Northern Ireland), a trade association within the meaning of section 6 (8) of the Restrictive Trade Practices Act, 1956, issued recommedations to its members as to the retail selling price of standard bread. In July, 1957, the registrar referred the federation's agreement to the court. In April, 1958, the federation adopted a memorandum under which any specific recommendations as to the retail prices of standard bread were to be in the form of a maximum price, members being free to charge less "but should "not charge more," and incorporating an elaborate formula regulating the price to be recommended and setting out a system of costing. The costings system adopted, based on "volunteered" samples of production and distribution costs, was in substance based on that adopted by the Ministry during the period of control, but the calculations for ascertaining the margin upon which the recommended price was based included a 7½ per cent. deduction as an "efficiency factor," and provision was made for a ceiling, above which no price could be recommended, by adding to a certain sum one quarter of any shortfalls and deducting one quarter of any excesses in the preceding four quarters. The federation also issued recommendations as to a fixed retailers' margin for standard bread.

The federation was formed in 1942. Its members were all large plant bakers, multiple bakers using a travelling oven, a highly mechanised method of bread production, and it formed one of the three main sections of the bread industry in England and Wales; in 1956 members had about 37 per cent. of the total bread production, and in 1958 to 1959 51 per cent. Membership comprised three groups and some individual members, but the groups were growing.

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† PEARSON J., MR. W. WALLACE and MR. W. G. CAMPBELL.

R. P. Ct.
(E. & W.)

1959

Federation of Wholesale and Multiple Bakers' (Great Britain and Northern Ireland) Agreement, *In re.*

Trade in standard bread was either direct from baker to consumer or from baker to retailer; there was no intervening wholesaler. Demand was declining and the decline was likely to continue, or, at best, would become stationary. The sample returns showed a wide range of profits, but while the recommended maximum prices were low as regards high costs sections of the industry they were not low for low cost producers and most of the members were making good profits. The evidence was that sales below the recommended maximum had hardly ever taken place.

The federation had no power in its rules to enforce the observance by members or retailers of the recommended prices, and it contended, inter alia, that its members had not by reason of the issue of the recommendations accepted any restriction under any agreement as defined in section 6 of the Act, and that the restriction deemed in law to arise thereby under section 6 (7)[1] was

[1] Restrictive Trade Practices Act, 1956, s. 6: "(1) . . . this Part of this "Act applies to any agreement "between two or more persons carrying on business within the United "Kingdom in the production or supply "of goods, . . . being an agreement "under which restrictions are accepted ". . . in respect of the following "matters, that is to say: (*a*) the "prices to be charged, quoted or paid "for goods supplied, . . . (3) In this "Part of this Act 'agreement' "includes any agreement or arrangement, whether or not it is or is "intended to be enforceable . . . by "legal proceedings, and references . . . "to restrictions accepted under an "agreement shall be construed accordingly; and 'restriction' includes any "negative obligation, whether express "or implied and whether absolute or "not. . . . (7) Where specific recommendations (whether express or implied) "are made by or on behalf of a trade "association to its members or to any "class of its members, as to the action "to be taken or not taken by them in "relation to any particular class of "goods or process of manufacture in "respect of any matter described in "the said subsection (1), this Part of "this Act shall apply in relation to "the agreement for the constitution of "the association notwithstanding any "provision to the contrary therein, as "if it contained a term by which each "such member, and any person represented on the association by any "such member, agreed to comply with "those recommendations and any "subsequent recommendations made "to them by or on behalf of the "association as to the action to be "taken by them in relation to the "same class of goods or process of "manufacture and in respect of the "same matter. (8) In this section "'trade association' means a body of "persons (whether incorporated or not) "which is formed for the purpose of "furthering the trade interests of its "members, or of persons represented "by its members; and for the purposes of this section, two or more "persons being inter-connected bodies "corporate or individuals carrying on "business in partnership with each "other shall be treated as a single "person."

S. 20: "(1) The Court shall have "jurisdiction, . . . in respect of any "agreement of which particulars are "for the time being registered . . . "to declare whether or not any "restrictions by virtue of which this "Part of this Act applies to the agreement . . . are contrary to the public "interest. . . . (5) The powers of the "Court under this section shall not be "affected by the determination of an "agreement effected after the commencement of the proceedings, and "where an agreement is varied after "the commencement of the proceedings, the Court may make a declaration and, if it thinks fit an order "under subsection (3) or subsection (4) "of this section, either in respect of "the agreement as at the commencement of the proceedings or in respect "of the agreement as varied, or both."

S. 21: "(1) For the purposes of any "proceedings before the Court . . . "a restriction accepted in pursuance "of any agreement shall be deemed "to be contrary to the public interest "unless the Court is satisfied of any "one or more of the following circumstances, that is to say— . . . (*b*) "that the removal of the restriction "would deny to the public as purchasers, consumers or users of any "goods other specific and substantial "benefits or advantages enjoyed or "likely to be enjoyed by them as such, "whether by virtue of the restriction "itself or of any arrangements or

not "a restriction accepted in pursuance of any agreement" within section 21 (1),[1] so that the statutory presumption created by that subsection that such a restriction was contrary to the public interest did not apply to the reference. Alternatively, the federation sought to justify its retail price recommendations under paragraph (*b*) of section 21 (1) on the ground that their removal would deny to the public the specific and substantial benefits or advantages of the limitation of upward movement of prices inherent in a maximum price, it being part of the federation's case in this respect that by reason of its strength, the maximum price influenced non-members as well as members and that if the recommendations were withdrawn, there was a real risk that prices would rise. Both sides asked the court, in exercise of its powers under section 20 (5),[1] to pronounce upon the price recommendations made prior to the adoption of the memorandum in April, 1958:—

Held, (1) that since the federation was a trade association as defined in section 6 (8) and had made specific recommendations to its members in respect of matters therein set out, the conditions for bringing section 6 (7) into operation were satisfied, and the position, for the purposes of section 21 (1), was that the agreement for the constitution of the federation, notwithstanding appearances to the contrary, contained a term whereby each member agreed to comply with the recommendations so that the members had "accepted" a restriction in pursuance of an agreement within the opening words of the section, and the prima facie presumption, which it was for the respondents to disprove, applied (post, pp. 412–414).

(2) That on the true construction of section 21 (1) (*b*) the court could and should adopt a realistic approach and consider on the merits whether in fact removal of the restrictions would have the effect alleged: the court, therefore, was not bound to confine its attention to the quasi-legal or formal effect of the recommended maximum prices, but should consider how they had been, were, and would be likely to be, effectively operating in practice, and whether as maximum, or fixed, or minimum prices, those being questions of fact to be decided on the evidence (post, p. 412).

(3) (a) That where a collective price control stated in terms of maximum prices actually operated as such, the maximum price might in certain circumstances safeguard the buyer against paying more while giving him a chance of paying less, which chance might be a benefit; but whether that benefit was real or notional, substantial or insubstantial, depended upon what in fact happened or was reasonably estimated as likely to happen in the future, and if it appeared that sales at prices below the maximum had been made very infrequently, that would tend to show that the benefit of having the price stated as a maximum was insubstantial or even negligible (post, pp. 418–419).

(b) That, in fact, the federation's recommendations did not operate as maximum price recommendations and, therefore, were

"operations resulting therefrom; . . .
"(*g*) that the restriction is reasonably
"required for purposes connected with
"the maintenance of any other restric-
"tion accepted by the parties, whether
"under the same agreement or under
"any other agreement between them,
"being a restriction which is found
"by the Court not to be contrary to
"the public interest upon grounds
"other than those specified in this
"paragraph, or has been so found
"in previous proceedings before the
"Court, and is further satisfied (in
"any such case) that the restriction is
"not unreasonable having regard to
"the balance between those circum-
"stances and any detriment to the
"public or to persons not parties to
"the agreement (being purchasers,
"consumers or users of goods produced
"or sold by such parties, . . .) result-
"ing or likely to result from the
"operation of the restriction."

R. P. Ct.
(E. & W.)

1959

Federation of Wholesale and Multiple Bakers' (Great Britain and Northern Ireland) Agreement, *In re.*

not substantially beneficial by virtue of their description of the price as a maximum. Sales below the maximum had hardly ever taken place; there were indications, such as the absence of any public announcement at the time when the change from a fixed to a maximum price was made, that the new description of the prices was not expected or intended to have far-reaching effects; the intervention of the fixed retailer's margin, which introduced an element of rigidity into the price structure, hindered sales to retailers at reduced prices; and, as a matter of common sense, the natural consequence of the publication of a recommended price by a body such as the federation was that members and other traders would regard the price recommended as fair and reasonable and would be unlikely to sell at any lower price (post, pp. 419, 422).

(4) That the recommendations of retail prices arrived at under the formula did not and would not tend to keep prices of standard bread below what they would be if there were no such recommendations, and the court was not satisfied that there was any serious risk that their abolition would cause bread prices to rise.

(a) From the financial aspect, the profits shown by the formula were too favourable to justify a claim that it adequately protected the consumer. The basis of the formula itself was open to criticism: it was neither realistic nor necessary to take as a foundation the methods adopted by the Minister in the control period, evolved during the stress of war and directed to the condition then existing, for the present composition of the federation, the importance of standard bread and general conditions were not comparable (post, p. 422).

If there was to be a collective regulation of prices on the basis of cost, it would be a sounder principle (though perhaps not without its difficulties) that it should be based on the lowest cost with an addition calculated to keep in business enough higher cost producers to provide the supplies required by the public (post, p. 423).

(b) From the economic aspect, important factors were the declining market for standard bread and the need of plant bakers to maintain a steady turnover so that in conditions of price freedom a plant baker would be more likely to reduce than to increase his prices in order to retain his existing market, and the fact that members on average made good profits from standard bread and probably higher profits on other breads and flour confectionery; in the face of a declining demand and ample and increasingly efficient productive capacity, the long-term natural forces of competition, which it was important to preserve as the ultimate safeguard (it being the local competition of members rather than the existence of the recommendations which had tended to keep down the prices of other bakers), would seem to favour some reduction in the level of prices (post, pp. 423–426).

The federation, accordingly, had not satisfied the court that removal of the recommendations would deny to the public any specific or substantial benefit within section 21 (1) (*b*) and there must be a declaration that the restrictions involved in the present system were contrary to the public interest.

Dicta in *In re Wholesale and Retail Bakers of Scotland Association's Agreement* and *In re Scottish Association of Master Bakers' Agreement* (1959) L.R. 1 R.P. 347, 379, 382 applied.

Held, further, that the powers of the court under section 20 (5) were discretionary, and that since the recommendations made under the agreement prior to its variation by the resolutions of April, 1958, were now a matter of past history, it would not be appropriate to make any declaration in respect of them (post, pp. 426–427).

REFERENCE.

By a notice of reference, dated July 12, 1957, the Registrar of Restrictive Trading Agreements, pursuant to section 20 (2) (*a*) of the Restrictive Trade Practices Act, 1956, referred to the court an agreement, numbered 962 on the register of agreements, subsisting between all the members of the Federation of Wholesale and Multiple Bakers (Great Britain and Northern Ireland) and contained in the federation's constitution and rules, list of members, recommendations bearing various dates and memorandum of the term implied by section 6 (7) of the Act, expressly or impliedly deemed to be binding upon them for the purposes of the Act. By an order made on January 14, 1958, the federation was made sole respondent to the proceedings on behalf of all its members, it being agreed that the registrar would not in the reference seek any relief against the Scottish or Northern Irish members.

The following statement of facts is taken from the judgment of the court.

There are several types of bread. First and foremost there is the standard loaf, which may be white or brown and is made from normal bread dough with some fat enrichment and is baked in a tin. It is sometimes sold whole and unwrapped, but in the great majority of cases nowadays it is sliced and wrapped in wax paper. There is the enriched loaf, often known as the American or top-grade loaf, which is similar in appearance to the standard loaf, but contains added fat, milk powder and sugar and is usually sold at a price 3d. more than the price of the equivalent standard loaf. There are loaves called "Farmhouse" or "Long Tin" or "Tin Coburg," which are baked in tins of various sizes and usually sold at the same price as the standard loaves, though they are produced in very much smaller quantities. There are the so-called "oven bottom" types of loaf which are baked in the oven without being placed in a tin, and are usually sold at about 1d. above the price of the standard loaf owing to additional costs of production and the preference of some customers. In addition there are certain proprietary and specialised types of bread. Of the methods of production the least modern is that of the family baker using what is called a "peel oven." The loaves are baked on the oven bottom and are withdrawn by means of a "peel," which is a wooden shovel. Intermediate is the semi-automatic bakery, which is partly mechanised and can supply several retail shops. The modern highly mechanised method of production is that of the plant bakery, using a travelling oven, which is in effect a baking chamber with a conveyor. One type of travelling oven is the swing-tray type, suitable for the baking of standard loaves and other tinned loaves. Methods of distribution have advanced from the handcart to motor transport, but there is an economic limit to the radius of profitable distribution owing to congestion of traffic, the need for bread to be delivered fresh to the customers and the large bulk of bread and its low value per cubic foot.

R. P. Ct. (E. & W.)

1959

Federation of Wholesale and Multiple Bakers' (Great Britain and Northern Ireland) Agreement, *In re.*

These limit the expansion of the business of any particular bakery and may account for the growth of groups of bakeries in this industry.

There has been a decline in the consumption of bread in general and standard bread in particular. The statistical and oral evidence on this point will be referred to at a later stage.

The baking industry in England and Wales can conveniently be divided into three main sections: 1st Section. The National Association of Master Bakers, Confectioners and Caterers, formed in 1887, has in its membership a large number of family bakers and a few plant bakers including J. Lyons & Co. Ltd. They had about 45 per cent. of the total bread production in 1956, but only a reduced percentage, estimated at 34 per cent., in 1958–59. The number of family bakers had declined from 24,000 in 1935 to 12,700 in 1955. Probably the decline both in share of output and in number is continuing. 2nd Section. There is the respondent federation, formed in 1942. The members are all plant bakers. They had about 37 per cent. of the total bread production in 1956, and a larger percentage, estimated at 51 per cent., in 1958–59. There are three groups and some independent members of the federation. One group is controlled by Allied Bakeries Ltd., formed in 1935 by Garfield Weston, who has bakery interests in Canada and other countries but has no flour-milling interests in the United Kingdom. A second group is controlled by British Bakeries Ltd., which was formed in 1955 and is controlled by Rank Ltd., who have large flour-milling interests. The third group is controlled by United Bakeries Ltd. which was formed in 1955 and is controlled by Spillers Ltd., who also have large flour-milling interests. The groups have been growing, and the independent members of the federation have become fewer. In 1953 there were 43 group members and 120 independent members. In 1959 there are 142 group members and only 51 independent members. Comparative figures for present output are not available, but in 1955–56 the aggregate output of the independent members was less than half of the aggregate output of the three groups. 3rd Section. There are the Co-operative Societies which in the year 1956 had about 18 per cent. of the total bread production and in 1958–59 about 15 per cent. Most of their production is in plant bakeries. There is also a small residue of family bakers who are not members of any association.

The declared objects of the federation are (inter alia): (a) to promote commerce and in particular in relation to the baking industry; (b) to promote and to protect the industrial interests and the trade of its members; (c) to encourage co-operation between any two or more members for the furtherance of any one or more of the above-mentioned objects by any means which are not contrary to the public interest or registrable under the Restrictive Trade Practices Act, 1956; (d) to do all or any acts or things as may be incidental or necessary to the carrying out of any of the said declared objects.

Under article 3 of the constitution and rules of the federation membership shall be open to: (a) such bread and flour confectionery bakers who use in the manufacture of bread an average sackage of not less than 200 sacks of flour a week or whose output of bread and flour confectionery together or of flour confectionery alone exceeds £100,000 per annum measured in terms of retail prices; (b) such other bread and flour confectionery bakers as may be elected by the main committee of the federation.

The costing system used by the federation is, in essence, a continuation of that utilised, during the period of Government control, for the determination of the subsidies payable to bread producers. A short review of the subsidy period is necessary, therefore, as a preliminary to the consideration of the present system.

In 1941 the price of bread (under the description of "national" bread) became subject to control and a subsidy system was instituted, for the benefit of bakers producing and distributing this bread, in order to compensate them for selling it at uneconomic prices. From 1941 to 1949 nearly all the output of the baking industry consisted of these "national" loaves, baked from "national" flour and neither sliced nor wrapped; the output of other breads and of flour confectionery was negligible. During the war and afterwards, until September, 1956, the retail selling price of "national" bread was fixed under Statutory Order. The subsidy rates were usually determined at half-yearly intervals by the Ministry and were based on sample returns of information as to the proceeds and costs of production and distribution of "national" bread covering the whole industry, which then included the federation, the National Association of Master Bakers, the Co-operative Societies, and a minority of family bakers not covered by any association. Each of these submitted returns to the Ministry, who then calculated the amounts payable as subsidies, after making, when appropriate, adjustments to allow for known changes in material items, such as wages, when they became effective. The decisions as to rates of subsidy were sent to the industry, with details of the computations in support. These computations averaged the returns from these sources of proceeds and costs of "national" bread produced, after weighting the returns to the extent that each participant was regarded or estimated as representing the whole industry. For this purpose the weighting of the federation returns was 37½ per cent., that being the estimate of their production proportionately to the total production in England and Wales. There was, inevitably, a considerable lapse of time between the end of each costed period and the date of the eventual subsidy decision based on that period. At first the successive rates of subsidy operated from the date of the decision but, latterly, the subsidy changes were made retroactive to the date to which the costings had been made. The unit of costing was by reference not to the loaf but to the sack of flour used in bread production, on the assumption that the loaves

R. P. Ct. (E. & W.)

1959

Federation of Wholesale and Multiple Bakers' (Great Britain and Northern Ireland) Agreement, *In re.*

of a given weight, produced from each sack of 280 lb. of flour, would be a reasonably constant number. After the war, in May, 1946, the weight of the larger "national" loaf was reduced from 2 lb. to 28 oz. and of the smaller loaf from 1 lb. to 14 oz. The number of larger loaves which it was possible to produce from a sack of flour increased from 192 to as many as 218. In practice it is usual to assume the latter number to be 216.

The permitted profit margin on each sack for subsidy purposes, was 5s. with (in later years) an additional 4s. per sack for the first 25 sacks of flour converted to "national" bread, each week, by each bakery undertaking. This 5s. remained, in spite of the increased number of loaves allowed in 1946, until October, 1954, when it was increased to 7s. This increase was given, inter alia, to remunerate the additional capital employed between 1941 and 1954, to allow for greater usage of plant owing to the greater number of units produced, and to allow for the reduced value of the £ sterling. Until the weight of loaf was reduced in 1946 the bakers had been allowed to retain the extra profit arising on production and distribution of the smaller loaf, of 1 lb. weight, of which the retail price was usually more than half the price of the larger, 2 lb. loaf. When the downward change in weight was permitted it was assumed that this additional profit would increase and the Ministry assessed it at 3s. 6d. per sack, for subsidy purposes. In the costings covering the period to March, 1956, the percentage of national bread produced and sold as small loaves, by members of the federation, was 11 per cent. of their total output of "national" bread; this percentage of 3s. 6d. gives 5d. per sack, approximately, so that, at the end of the subsidy period, the overall permitted profit margin was 7s. 5d. per sack. This margin did not take account of other sources of profit, arising from the production of "national" bread, which successively arose in the later years and which the bakers had been allowed to retain. These were: (a) profits from wrapping and slicing; (b) deferred rebates on flour under the scheme operated by the Incorporated National Association of British & Irish Millers Ltd., from March 1, 1954; and (c) cash discounts allowed by the millers for prompt payment.

F. W. Charles, the federation's accountant, gave evidence that the information available to the federation from the subsidy computations of the Ministry, showed that the production and distribution costs of members of the federation were lower in amount than those attributable to the other sections of the industry. The computations based on the costings to March, 1956, which determined the rate of subsidy ruling for the final six months, to September, 1956, of the subsidy period showed the average costs of federation members to be 2s. 10d. lower than the average costs of the industry as a whole. The average margin effectively available to federation members at the end of the

subsidy period may, therefore, be regarded as 10s. 3d., representing the 7s. 5d. margin increased by 2s. 10d. The average profit arising from production and distribution of standard bread by members of the federation, inclusive of the profits of wrapping and slicing and of the millers' rebate but exclusive of cash discounts, on the above bases as on April 1, 1956, has been estimated by the respondents as follows:

Ministry margin, and increase above	10s. 3d.
Profits of wrapping and slicing	5s. 0d.
Millers' rebate	1s. 7d.
Total profit, exclusive of cash discounts	16s. 10d.

The controlled price of the 28 oz. loaf at the end of the subsidy period was 8½d., and the final subsidy was just over 1½d. The baker normally received just over 10d. per loaf. If "long-"hauled" flour was used an additional subsidy adjustment brought the proceeds to 10¼d.

For some time prior to September, 1956, with the removal of price control imminent, members of the federation were in some doubts as to the situation which might develop. The fifteen years of control, during which the sections of the trade had provided costings the average of which had been made known to the other sections, had produced a similarity of pattern in the costs of members. It was decided, in June, 1956, that the main committee should recommend prices to federation members before the end of September. Two main reasons were given for this decision: members had no knowledge what the then current rate of subsidy would be (it was not agreed till February, 1957); and a considerable number of members were convinced that the recommended price should be as low as was consistent with a reasonable profit. Behind this conviction was the desire to retain a steady turnover, since a fall in production would have resulted in uneconomic labour costs and idle capital equipment, added to the fact that bread which is not sold within a short time of baking becomes unsaleable; unlike many other products it cannot be stored for sale if and when demand revives.

Before control was removed, the Minister asked representatives of bakers' organisations to attend a meeting at which he is stated to have expressed the hope that the trade, following the withdrawal of the bread subsidy, would use its freedom to fix bread prices in a statesmanlike manner, having regard to the economic position of the country.

Following this, in September, 1956, the main committee recommended, from October 1, a retail price for the standard 28 oz. loaf of 10d. for port areas and 10½d. for inland areas where the price of flour was 2s. per sack, or more, over the basic price; the recommended price for the 14 oz. loaf being 6d. In each

R. P. Ct.
(E. & W.)

1959

Federation of Wholesale and Multiple Bakers' (Great Britain and Northern Ireland) Agreement, *In re.*

case one penny was allowed extra for wrapping and slicing. The port areas' bakeries thus received a small fraction of a penny less than they had done in the subsidy period; and the remainder almost exactly the same as before. Dissatisfaction with these recommendations was expressed by some members and, after consideration of the rising cost of flour, it was decided, on December 6, 1956, to remove the port-area differential and to recommend a uniform national price of 10½d. for the unwrapped 28 oz. loaf, no change being made in the price of the 14 oz. loaf nor in the wrapping and slicing allowances. The cost of flour continued to rise, with increased distribution and other costs, and, on February 14, 1957, the unwrapped large loaf was raised to a recommended price of 11d., the smaller loaf in most areas being raised to 6½d. The price of flour was then 10s. per sack higher than at the end of the subsidy period, and this increase, together with the trend of costs shown by the abridged form of costings then available, was considered to justify an increased price for the loaves. Subsequently the price of flour fell and, on May 29, 1957, it was recommended in spite of considerable opposition that the price of the unwrapped standard 28 oz. loaf should be reduced to 10½d. for all areas.

This recommendation was the last of those made in the immediate post-subsidy period, a difficult time during which, it is claimed, the federation was concerned to keep price changes reasonably in line with cost variations so far as these could be ascertained. From the evidence it appears that the federation made every effort to satisfy the Minister's request for moderation in the period following decontrol.

On July 12, 1957, the registrar referred the agreement of the federation with its related recommendations to this court. By that time, as we were told, it was apparent to the main committee that, working largely in the dark, relying on abridged costings and loose estimates of changes in material elements and factors and with no precise information, it was increasingly difficult to justify their recommendations convincingly. The federation's accountant advisers were strongly in favour of a return to a more elaborate costing system and it was decided to adopt a form substantially the same as that which had operated up to the end of control. During the succeeding months the prices remained unchanged at the June, 1957, levels, in spite of increased flour and wages costs, and a formula was sought which could be used, and justified, as a reasonable basis for determining standard bread price recommendations. It was not till April 9, 1958, that a definitive memorandum entitled "Cost and Sale of Standard Bread in "England and Wales," with supporting resolutions, was adopted. This memorandum incorporated a formula to regulate price recommendations.

The essential resolutions were as follows: "It is hereby "resolved and declared on behalf of the members of the federa-"tion in England and Wales that if the said members or the

"main committee acting on their behalf, at any time or from "time to time recommend a retail selling price for standard "bread, or wrapped, or sliced and wrapped standard bread in "England and Wales or allow such recommended price to "continue, they shall not recommend or continue any such price "in a manner which conflicts with the provisions of a memo-"randum dated April 9, 1958, and entitled 'Cost and Sale of "'Standard Bread in England.'

"It is further hereby resolved and declared that the members "of the federation in England and Wales or the main committee "acting on their behalf may at any time or from time to time "discontinue the making of such recommendation but if a "specific recommendation is made each member, while free to "charge less than the maximum retail price stated in the "recommendation, should not charge more than that price.

"It is hereby resolved and declared that four copies of these "resolutions and of the memorandum entitled 'Cost and Sale "'of Standard Bread in England and Wales' shall forthwith be "delivered to the Registrar of Restrictive Trading Agreements "and two copies of the same shall forthwith be delivered to Peat, "Marwick, Mitchell & Co.,[1] and one copy to each of the said "members and that any amendment or cancellation or revival of "these resolutions or of any of them and of the said memorandum "shall forthwith on the occasion of the amendment or cancella-"tion or revival be likewise delivered."

Amendments were made to the memorandum on May 13, 1958, November 12, 1958, and May 11, 1959, and these have been incorporated in the present form of the memorandum, which will be discussed in detail later. From December 8, 1958, the recommended price for the unwrapped 14 oz. loaf was 6½d. for all areas. The current recommended prices of unwrapped standard loaves are: 28 oz. loaf—10½d.; 14 oz. loaf—6½d. Wrapped and sliced loaves are 11½d. and 7½d., respectively.

Before considering fully the memorandum and formula an explanation of some trade terms which occur in this case will be helpful. The trade in standard bread is either (a) from baker direct to public or (b) from baker to retailer, then from retailer to public. There is no intervention of a wholesaler between the baker and the retailer and "wholesale price" means the price charged by the baker to the retailer. "Retailer's margin" is the difference between the wholesale price and the retail price; this margin is that allowed to retailers who do not qualify for specially advantageous terms. The term "discount" is used in two ways. Normally it means the retailer's margin plus an additional sum allowed to quantity purchasers, to groups of multiple stores, or to "ex-bakers" (a somewhat odd term used to describe family bakers who buy part of their requirements from the plant bakers). Sometimes "discount" is used to mean the additional sum only,

[1] The federation's accountants.

R. P. Ct.
(E. & W.)

1959

Federation of Wholesale and Multiple Bakers' (Great Britain and Northern Ireland) Agreement, *In re.*

without the retailer's margin. The term is appropriate only in contexts which denote that retailers are purchasing on specially advantageous terms entitling them to a preferential wholesale discount.

During the control period the retailer's margin rose from 6d. to 9d. per dozen 2 lb. loaves. When the subsidy was withdrawn it was increased to 1s. per dozen 28 oz. loaves. Up to that time this margin was dealt with by the area groups but it was then decided that the federation should make a national recommendation, which was done on February 14, 1957, when the retailer's margin was increased to 1s. 3d. per dozen 28 oz. loaves; for the 14 oz. loaf it was fixed at 8d. in some areas and 7½d. in others.

It is necessary to examine in some detail the memorandum of April 9, 1958, with subsequent amendments. In opening the respondents' case, Sir Milner Holland said: "That memorandum "was at the heart of this case. . . . It is a memorandum "determining how costing information should be obtained, what "costing information should be obtained, and what use should "be made of it."

The first introductory paragraph states: "This memorandum "sets out the method of costing to be used on behalf of the "members of the federation in England and Wales for the "purpose of determining the cost of producing and distributing "standard bread in England and Wales and the method of "determining recommended maximum retail selling prices of "such bread in the event that the members (through the main "committee) decide to make or continue making such recom-"mendation, it being understood that the members are not under "any obligation to initiate recommendations or to continue any "recommendations already in force."

Part I defines the term "standard bread" and goes on to state the requirements as to number and types of costed members. The paragraph reads: "1. Definition of standard bread. The "term 'standard bread' in this memorandum and in any returns "of cost means all loaves of 14 ounce weight or multiples thereof "baked in tins from brown or white flour, or blends thereof, by "members of the federation in England and Wales, whether or "not subsequently wrapped or sliced, other than Vienna bread "or rolls, or fancy or proprietary or specially enriched bread. "2. Number and types of costed members. The costs of "producing and distributing standard bread and wrapped and "sliced and wrapped standard bread in England and Wales will "be determined from the like representative numbers and types "of members to those used in the preparation of costs for the "Ministry of Food during the period of price control of national "bread by that Ministry. A sufficient number of returns not "being less than forty should be submitted by members to the "appointed accountants and should continue to be representative "of the whole of the members of the federation in England and "Wales."

After stressing that confidential treatment would be given to all information submitted, it is added that members who are not subsidiaries of the same parent company should not exchange information relating to their individual returns.

Returns are made on seven schedules:

Production Costs:

Schedule I	Flour, other ingredients, and bakehouse wages and expenses.
VIa	Administration expenses, apportioned to production.

Distribution Costs:

Schedule II	Wholesale selling and depot expenses.
III	,, delivery expenses.
IV	Retail shop expenses.
V	,, delivery expenses.
VIb	Administration expenses, apportioned to distribution.

A statement, containing details of sales and production for the quarter, and a statement summarising costs and margins, with a separate summary of additional proceeds and costs of slicing and wrapping standard bread, complete the returns.

Instructions for dealing with specific items in the costings, and for methods of apportionment, are given. Amongst these it is necessary to mention two, about which comment is made later. Depreciation of plant and the like is to be taken as one-quarter of the annual allowance and initial allowance granted by the Inland Revenue for the fiscal year within which the costed quarter falls. Rent is to be taken as one-quarter of the net Schedule A annual value, or of the actual annual rent paid, whichever is higher, with an addition of one-quarter of the industrial buildings allowance and initial allowance on the buildings granted for the fiscal year in which the costed quarter falls.

Members producing or distributing other goods in addition to standard bread are to apportion costs between the standard bread and other goods. Where possible the apportionment is to be made on the basis of actual costs, failing which certain bases are given amongst which three may be noted:

Wholesale delivery expenses (schedule III), in the proportion of gross retail value of standard bread delivered wholesale to 25 per cent. of the gross retail value of other goods delivered wholesale.

Retail shop expenses (schedule IV), in the proportion of gross retail value of standard bread sold over the counter to 50 per cent. of the gross retail value of other goods sold over the counter.

Retail delivery expenses (schedule V) in the same proportion as for retail shop expenses substituting "delivered to retail "customers" for "sold over the counter."

The returns are to be completed within 21 days of the end of

R. P. Ct. (E. & W.)

1959

Federation of Wholesale and Multiple Bakers' (Great Britain and Northern Ireland) Agreement, *In re.*

the quarter and sent to the appointed accountants, Peat, Marwick, Mitchell & Co. who have the right to inspect the records of any member submitting returns and to test the accuracy of the returns submitted.

Part II of the memorandum deals with the analysis of the returns which is to be prepared by the accountants after they are satisfied (a) that the sample is of "like representative numbers "and types of members to those used in the preparation of costs "for the Ministry of Food" during the control period, and (b) "that the sum of the outputs . . . from those returns of plants "whose average weekly sackage exceeds the average weekly "sackage per member of all members of the federation in "England and Wales is not less than the sum of the outputs "from those returns of plants whose average weekly sackage is "below the said average weekly sackage per member." The accountants may exclude returns in order to satisfy (b) so long as the total number included in the sample is not less than 36. No analyses are to be prepared if insufficient returns are made. The accountants, having made the analysis, prepare statements to show basic averages as follows:

(a) Averaged production cost, that is the average, on a weighted basis, of the cost of production of standard bread per sack for the costed period (schedules I and VIa supply the data).

(b) Averaged distribution cost, that is the average, on the same basis, of the distribution costs of standard bread including the costs of slicing and wrapping.

(c) Averaged total datum cost, which is the sum of (a) and (b) less an amount equal to 7½ per cent. of that part of the cost in (a) which is attributable to costs other than flour cost.

(d) Averaged datum sales revenue, that is the average, on a weighted basis, of the revenue from the sales of all standard bread, including proceeds from any retail delivery charge, assuming that the bread had been sold during the period of the return at the recommended maximum retail selling price prevailing during the period.

(e) The returned margin, which is the difference between the datum revenue (d) and the datum cost (c) averages. This, the final product of the sample for the quarter, is then taken as the basis for determination of "the current margin."

(f) The current margin is determined, as at the date of the analysis, by "correcting the returned margin to account for "changes during the period of the costing not fully reflected in "such costings and for changes, since the period of the returns, "in charges for flour and wages and in the price of standard "bread." Authoritative sources for such changes are given and "forecast" changes of charges and "contemplated" changes in price may be taken into account also.

(g) The ceiling. This is ascertained by adding to 15s. per sack one-quarter of the sum of any shortfalls in the preceding four

quarters and deducting one-quarter of the sum of any excesses in the preceding four quarters. Shortfalls occur in any quarter when the returned margin for that quarter is less than 15s. per sack, excesses when the returned margin is greater than 15s. per sack.

Part III of the memorandum deals with the duty of the main committee as regards the specific recommendations and the notice to be given to the purchasing public. It reads as follows: "The main committee, if it decides on behalf of the members "of the federation in England and Wales to make specific "recommendation as to the maximum retail selling price of "standard bread in England and Wales or to allow any such "recommendation to continue in force, shall not make any "such recommendation the effect of which would be to cause the "current margin, after allowing for any contemplated change of "price and for any forecast change of charges, to exceed the "ceiling by more than an amount represented by one-half of the "minimum practicable price change of ½d. in the retail price "of standard bread of 28 ounces weight and shall not allow any "recommendation to remain in force after discontinuance of cost "returns or the effect of which would be to cause the current "margin to exceed the ceiling after allowing for any prospective "change of charges by more than half the said minimum "practicable price change.

"The main committee shall make any such specific recom-"mendations or withdraw the same by public announcement and "for this purpose may use the national press and radio, the "object being to ensure that the purchasing public is informed of "any such recommendation or withdrawal."

The phrase "amount represented by one-half of the minimum "practicable price change" may be simplified as "4s. 6d.," that amount being one-half of 9s., the effect, on the proceeds of sale of 216 loaves of 28 ounces, of a price change of ½d. per loaf.

Schedules were submitted in evidence, prepared in considerable detail by the appointed accountants, and summarised according to the formula, for the five consecutive quarters to March 31, 1959. They cover the first fifteen months of the existence of the formula.

Generally it may be said that the federation has adopted the Ministry's practice of using samples of costs of production and distribution. The federation's accountant said that so far no returns have been excluded from the analysis and that he considered that the sample had been fairly consistent, quarter by quarter. The numbers of members making returns were:

	1st	*2nd*	*3rd*	*4th*	*5th* quarters
Bakers of first group	15	15	15	15	15
Bakers of second group	16	16	14	15	16
Bakers of third group	14	19	19	18	18
Non-group bakeries	3	4	3	2	3
Total individual returns	48	54	51	50	52

R. P. Ct.
(E. & W.)

1959

Federation of Wholesale and Multiple Bakers' (Great Britain and Northern Ireland) Agreement, *In re.*

Basic average results computed were as follows:
Returned margins: 11s. 8d., 15s. 7d., 15s. 10d., 12s. 6d., 12s. 10d.
Current margins: 13s., 15s. 7d., 15s. 10d., 13s. 2d., 13s. 5d.

A material item in the final average computation is the 7½ per cent. deduction (a considered but arbitrary percentage) made from the ascertained average production costs, other than flour cost. In the five quarters analysed this deduction varied from 3s. 2d. to 3s. per sack. No such deduction was made in the Ministry control period. The court was informed that it was deliberately introduced into the formula in order to bias the ascertained costs down from the average towards the lower-costed bread production. It sets the weighted average costs of the sample about 3s. per sack below what the sample shows them to be and, to that extent, reduces the difference between the average sample costs and the production costs of the lower cost producers. The respondents' trade witness, T. W. H. Curtis, called this "the efficiency "factor."

As an illustration of the final calculation which determines the decision whether or not to recommend a change in price the last quarter, to March 31, 1959, may be taken. The "current "margin" was 13s. 5d. and it was estimated that an increase of ½d. in the recommended price of the 28-ounce loaf would have produced additional proceeds of 8s. 2½d. (after allowing for the estimated effect of the smaller loaf remaining at an unchanged price). Such a change would have increased the profit margin to 21s. 7½d. The ceiling, however, was then 15s. 10d. (the 10d. being one-quarter of the net deficiencies of the earlier quarters), to which was added the 4s. 6d. limitation, making 20s. 4d., above which the profit margin was not to rise. No increase could therefore be recommended.

In present conditions the operation of the formula, it was agreed by the federation's accountant, with a basic ceiling of 15s. and an "efficiency factor" of 3s., produces, in the long run, an average profit of 12s. per sack, exclusive of cash discounts. These, it was also agreed, add approximately 1s. 5d. per sack, and so we are dealing with a total average profit margin of 13s. 5d. per sack.

At this stage two considerations must be stressed. Firstly, the baking of standard bread is not the sole activity of the trade, granting the justice of the comment that it is, indeed, the standard "bread-and-butter line" of the plant baker. Other sources of profit are the baking of special breads and the production of flour confectionery. According to the costing returns of March, 1956, and March, 1958, respectively, the federation's accountant stated that the relative percentages, on a flour converted basis, were:

	1956	*1958*
National or standard bread	86·9	84·2
Other breads, etc.	13·1	15·8

If the proportion is based on proceeds, that is retail turnover, for both these years the national or standard bread percentage is 56·9.

Secondly, the sample shows a very wide range of profits both as a whole and within the groups. Taking the year 1958 (which incorporates the first four quarters of the formula's operation), the range over the whole sample was from a profit of 31s. 3d. to a loss of 22s. 11d. per sack. Ranges within the groups were:

First group	—	Profit 20s. 2d. to loss 1d.
Second ,,	—	Profit 21s. 3d. to loss 2s. 10d.
Third ,,	—	Profit 31s. 3d. to loss 22s. 11d.
(Non-group members	—	Profit 11s. 2d. to loss 6d.)

The weighted average profit margin for all returns for the year was 10s. 11d.

The participation in the sample by the third group appeared to the court scarcely to merit the description "fairly consistent" applied to the sample as a whole by the federation's accountant. Both from variations in the number of members participating quarter by quarter, and from variations in the identity of those members, it seemed that there was no settled group policy in these respects.

However that might be, it was certain that a considerable number of federation producers of standard bread within the sample were making profits in 1958 well above the average of the sample, and it is a reasonable assumption that this applied outside the sample members and, indeed, outside the federation.

The federation sought to justify all the retail price recommendations under paragraph (*b*), and the recommendation as to the fixed retailer's margin under paragraph (*g*), of section 21 (1) of the Act.

Sir Milner Holland Q.C. and *Robert Lochner* for the federation.
John Megaw Q.C. and *R. A. Barr* for the registrar.

The following case was referred to in argument: *In re Wholesale and Retail Bakers of Scotland Association's Agreement.*[2]

Cur. adv. vult.

December 16. PEARSON J. read the following judgment of the court. The present case is confined to matters arising in England and Wales. There was recently before this court in Scotland a case [1] dealing with bakers carrying on business in Scotland. Naturally there is much in the technical, industrial and historical background that is common to the two cases, both being concerned with trade associations of bakers and with the prices

[2] (1959) L.R. 1 R.P. 347; [1959] 1 W.L.R. 1094; [1959] 3 All E.R. 98.

[1] *In re Wholesale and Retail Bakers of Scotland Association Agreement* (1959) L.R. 1 R.P. 347; [1959] 1 W.L.R. 1094; [1959] 3 All E.R. 98.

R. P. Ct.
(E. & W.)
1959

Federation of Wholesale and Multiple Bakers' (Great Britain and Northern Ireland) Agreement, *In re.*

to be charged for standard bread. There are, however, differences in the facts generally, and in particular there are differences in the arrangements for price recommendations as a result of changes introduced for England and Wales in the year 1958. Shortly it can be said that the present system in England and Wales involves recommended retail prices, which are in form at any rate maximum and not fixed or minimum retail prices, and a rigid formula for determining on a costings basis what prices are to be recommended from time to time, and an ancillary recommendation of a fixed retailer's margin. There are in that system certain features which distinguish it from the system which was considered in the Scottish case. The issues to be decided in the present case, although from one point of view they cannot be basically different from those which arose in the Scottish case under the same provisions of the same Act, have arisen on different facts in relation to a different system and have been differently presented and argued. There was rightly no suggestion made on behalf of the registrar that the decision in this case should be governed by the decision in the Scottish case, and the respondents are fully entitled to have this case considered quite separately and independently on its own evidence and its own merits.

We will first state what are the main issues to be decided, and deal with a question which was raised as to the burden of proof, before proceeding to examine the facts of the case. The issues are related to section 21 of the Restrictive Trade Practices Act, 1956, and the provisions of that section which are material to the present case are as follows: "(1) For the purposes of any "proceedings before the court under the last foregoing section, a "restriction accepted in pursuance of any agreement shall be "deemed to be contrary to the public interest unless the court is "satisfied of any one or more of the following circumstances, "that is to say . . . (*b*) that the removal of the restriction would "deny to the public as purchasers, consumers or users of any "goods other specific and substantial benefits or advantages "enjoyed or likely to be enjoyed by them as such, whether by "virtue of the restriction itself or of any arrangements or "operations resulting therefrom; . . . (*g*) that the restriction is "reasonably required for purposes connected with the mainten-"ance of any other restriction accepted by the parties, whether "under the same agreement or under any other agreement "between them, being a restriction which is found by the court "not to be contrary to the public interest upon grounds other "than those specified in this paragraph, or has been so found in "previous proceedings before the court, and is further satisfied "(in any such case) that the restriction is not unreasonable "having regard to the balance between those circumstances and "any detriment to the public or to persons not parties to the "agreement (being purchasers, consumers or users of goods

"produced or sold by such parties, or persons engaged or seeking "to become engaged in the trade or business of selling such "goods or of producing or selling similar goods) resulting or likely "to result from the operation of the restriction."

Subject to the point of law which will be mentioned hereafter, the incidence of the burden of proof is quite clear. The registrar can rely on the prima facie presumption that the restrictions are contrary to the public interest, and the respondents, in order to displace the presumption, have to satisfy the court on two points, namely: (i) the existence of the "circumstances" referred to in paragraphs (*b*) and (*g*); and (ii) that the restrictions are not unreasonable having regard to the balance between those circumstances and any such detriment as is mentioned at the end of subsection (1). If the respondents fail to prove the circumstances, the "balancing provision," as it is conveniently called, does not need to be considered. If the respondents prove the circumstances, they have the further task of satisfying the court that the restriction is not unreasonable having regard to the balance when the circumstances are put in one scale and any detriments are put in the other scale. As the case developed at the hearing, battle was joined, so to speak, on the paragraph (*b*) line, and attention was mainly concentrated and most of the evidence and argument were directed to establishing or defeating the respondent federation's contention that removal of the restrictions would deny to the public as purchasers, consumers or users of any goods specific and substantial benefits or advantages such as are referred to in paragraph (*b*). The respondents' contention was summarised very briefly and clearly in two paragraphs of Sir Milner Holland's opening speech on their behalf.

On the first day, referring to "specific and substantial benefits "or advantages," he said "the simplest way of putting it is to "give them as two; one is the limitation of upward movement of "retail prices, which is inherent in the maximum price, and the "other is the limitation imposed by the moral pressure, at any "rate, of the recommended discount, which tends to keep down "one cause of upward price movement. . . . We also say that "the benefits are substantial . . . because as a fact in this "industry there is a real risk that prices would rise if this very "influential body of large plant bakers withdrew or was ordered "to withdraw its maximum price recommendation." On the second day he said: "The specific benefit which would be denied "to the public if we stopped what we are doing is the limitation "to upward movement of retail price, and the limitation on one "particular cause of upward movement, namely, the retailer's "margin." In his closing speech Sir Milner Holland gave a slightly different version of the respondents' contention, quite consistent but bringing out another aspect of it, when he said that "the broad question . . . is . . . whether the adoption of a "maximum price by a very influential part of the bread industry ". . . does not necessarily confer a substantial benefit on the

R. P. Ct. (E. & W.)

1959

Federation of Wholesale and Multiple Bakers' (Great Britain and Northern Ireland) Agreement, *In re.*

"public, not only because it will prevent members of the "federation from charging more, but because on the facts it must "tend to keep the price of bread down by its influence on others."

Mr. Megaw on behalf of the registrar disputed the respondents' contention and said that it raised two questions, namely: "First, "are these recommendations recommendations of maximum "prices, or are they in effect recommendations of fixed prices, or "are they what may be thought to be somewhere between the "two, recommendations which tend to bring prices up to or "towards the maximum recommended price? Secondly, which-"ever they are or whatever they are in these respects, is their "true effect to keep the prices in general now and hereafter, "while the formula continues, below what they would be if there "were no such recommendations?"

Undoubtedly those questions do arise. In so far as the consideration of them involves construction of paragraph (*b*) of section 21 (1), the court, having regard to the general effect and language of that paragraph and the subsection as a whole and also the provisions of sections 2, 3 and 4 of and the Schedule to the Act as to the composition and procedure of the court, takes the view and decides that it is at liberty and ought to adopt a realistic approach and to consider on the merits of the particular case whether in fact the removal of the restrictions would have the effect alleged. In particular, the court is not bound to confine its attention to the quasi-legal or formal effect of the recommended maximum prices, but can and should consider how they have been, and are, and are likely to be, effectively operating in practice, and whether as maximum or fixed or minimum prices. That question, and the question whether the recommendations are having and are likely to have the practical effect of keeping prices down, are simply questions of fact to be decided on the evidence. In addition, there are questions as to the adequacy of the federation's formula for determining the prices to be recommended. Is it apt and correct for keeping prices down and stimulating efficiency and affording an objective standard and regulator independent of the wishes of the members?

A point of law was taken on behalf of the respondents as to the burden of proof in a case such as this, where the restrictions are contained in recommendations of a trade association and not in clauses of an agreement. It was pointed out that the words in section 21 which place the burden of proof on the respondents are the words "a restriction accepted in pursuance of any "agreement shall be deemed to be contrary to the public interest "unless the court is satisfied. . . ." In the present case restrictions were not in fact accepted in pursuance of an agreement. Accordingly it is argued that section 21 does not apply to this case or can only be applied partially or by analogy or with modifications or otherwise imperfectly.

In the view of the court this point is covered and disposed of

by subsection (7) of section 6 of the Act providing as follows: "(7) Where specific recommendations (whether express or "implied) are made by or on behalf of a trade association to its "members or to any class of its members, as to the action to "be taken or not taken by them in relation to any particular "class of goods or process of manufacture in respect of any "matter described in the said subsection (1), this Part of this "Act shall apply in relation to the agreement for the constitution "of the association notwithstanding any provision to the "contrary therein, as if it contained a term by which each such "member, and any person represented on the association by any "such member, agreed to comply with those recommendations "and any subsequent recommendations made to them by or on "behalf of the association as to the action to be taken by them "in relation to the same class of goods or process of manufacture "and in respect of the same matter."

That subsection introduces a convenient statutory fiction. The obvious reason for this fiction is that compliance by the members of a trade association with its recommendations may have substantially the same effect in establishing and maintaining restrictive practices as would compliance with an agreement by the parties to it. The manifest object of the subsection is to bring the recommendations within the Act and put them on the same basis as contractual provisions for the purpose of being fully amenable to the jurisdiction of the court. The conditions which are required for bringing subsection (7) into operation are satisfied in the present case, in that (a) the respondents in these proceedings are the Federation of Wholesale & Multiple Bakers (Great Britain and Northern Ireland) representing their members; (b) they are a trade association as defined in subsection (8), being a body of persons formed for the purpose of furthering the trade interests of the members; (c) there is an agreement for the constitution of the federation; and (d) specific recommendations have been made by the federation to the members as to action to be taken by them in relation to standard bread in respect of wholesale, retail and other prices to be charged therefor in England and Wales. Accordingly by the operation of subsection (7), Part I of the Act applies in relation to the agreement for the constitution of the federation as if the agreement contained a term by which each member of the federation agreed to comply with those recommendations and to comply with any subsequent recommendations so made as to the action to be taken as to the same class of goods and in respect of the same matter. If then we turn back to section 21, we have to apply the statutory fiction in order to give effect to the obvious intention of the Act and in order to implement the express provisions of subsection (7) of section 6. We have this position. The agreement constituting the federation contains a term that the members shall comply with the federation's recommendations: the agreement does contain that term, notwithstanding

R. P. Ct. (E. & W.)

1959

Federation of Wholesale and Multiple Bakers' (Great Britain and Northern Ireland) Agreement, *In re.*

appearances to the contrary, because Parliament has said so: that is the effect of the statutory fiction. The federation makes a recommendation setting up a restriction. The members have to accept, and do accept, the restriction in pursuance of the agreement, which contains a term obliging them to accept it. Therefore the provisions of section 21 as to the burden of proof do apply fully and without modification to the present case.

Now we come to the facts [His Lordship stated the facts set out above and continued:] Much time and thought have been applied to the question of comparison of the trading results of the federation, judged from the sample, with those obtained in other reasonably similar trades. The value of such comparisons of averages, especially in cases based on a sample of returns, must always be limited because of the difficulty of ascertaining with sufficient accuracy the bases of preparation of the accounts, samples and statistical tables which may be selected for comparison purposes.

Comparison of averages resulting from the sample returns with outside statistical sources might have been usefully supplemented by the production of actual samples of representative balance sheets and trading accounts. Such examples would certainly supply a useful check, especially if the trading results were, to use a phrase which has statutory authority, "computed "on ordinary principles of accountancy recognised in the United "Kingdom."

The federation's accountant produced a comparison, based on one of the Annual Reports issued by the Commissioners of H.M. Inland Revenue, which, inter alia, give information of the net trading profit percentages, on turnover, earned by various categories of industrial companies. The report for 1957 to 1958 gives for the food category the figures:

1953–54	6·2 per cent.
1954–55	6·6 per cent.
1955–56	5·7 per cent.

He agreed, basing his calculation on the sample returns for the March, 1959, quarter, that a profit margin of 13s. 5d. represented, approximately, a percentage on turnover of 7 per cent.; that is to say, a materially higher percentage.

In the case of one particular company, a group member put forward by the respondents as a typical plant-bakery the output of which, in standard bread, would show a proportion similar to the average, it was stated that, for the post-subsidy period 1956 to 1959, the ratio of profit to turnover, for standard bread only, was 10·2 per cent.

Unresolved differences of accountancy opinion appeared in the evidence of the accountant for the respondents, as compared with that of the accountant for the registrar, W. E. Parker, not only with reference to the most appropriate standard of comparison, but also as to the methods of arriving at an estimate

of the capital employed in the industry. The accountant for the registrar suggested that comparison should be made of the average profits earned on capital employed shown by the sample with similar statistics published in "The Economist," quarterly, relating to industrial profits and capital. These, for the period from April, 1958, to March, 1959 (corresponding to the last four quarters of the formula period), gave, for Food and Confectionery Companies, capital employed, including intangible assets, £1,069 million and relevant trading profits, before taxation, £181 million. The average profit margin of such Food and Confectionery Companies expressed as a percentage on capital employed including goodwill was, therefore, 16·9 per cent.

An inquiry was made by the federation in 1958, when each member submitting costs was asked to furnish particulars of assets and liabilities according to their balance sheets ended between April, 1957, and March, 1958, 38 members sent returns, 37 from the groups and 1 independent, and a schedule was completed from which the position can be summarised as follows: (a) Capital employed with fixed assets taken, as far as possible, at estimated taxation written down values and including goodwill, 64s. 4d. per sack. Average profit margin of 13s. 5d. per sack = 20·8%. (b) Capital employed with fixed assets taken at depreciated replacement cost and including goodwill, 87s. 10d. per sack. Average profit margin of 12s. 1d. per sack = 13·8%.

(Fixed assets at replacement cost would require a higher rate of annual depreciation, and this was estimated by the federation's accountant to be about 1s. 4d., reducing the 13s. 5d. profit margin to 12s. 1d. as above.)

The accountant for the registrar challenged the inclusion of the whole of the groups' "goodwill" in the calculation, since there would certainly be included elements other than normal trade goodwill. He also argued that it was unlikely that "The "Economist" table fixed assets were all at depreciated replacement cost, as probably some would be at historical cost. He had prepared an estimate of capital employed on a basis of historical cost, 49s. 6d. per sack, without goodwill, and at depreciated replacement cost, 73s. per sack, without goodwill. Profit margins of 13s. 5d. and 12s. 1d., respectively, equalled 27 per cent. and 16½ per cent. on capital employed. He thought the reality lay between the two, and added that from "The Economist" comparison "it looks as if the industry is not doing too badly "but I cannot be more specific than that." In fact both comparisons (in respect of turnover and in respect of capital employed) show, with whatever reservations, average profits favourable to the standard bread industry.

On the memorandum and sample generally, while it should be recognised that the federation, faced with difficult problems at the end of 1956 and onwards, made a serious attempt to

R. P. Ct.
(E. & W.)
1959
Federation of Wholesale and Multiple Bakers' (Great Britain and Northern Ireland) Agreement, *In re.*

evolve a mandatory formula, nevertheless the basis of this formula is open to criticism.

This criticism is in part detailed and in part general. As to the former, it appears to us that it was not necessary, nor realistic, to take as a foundation the methods adopted by the Ministry in the control period, evolved under the stress of war and directed in their origin to the conditions then existing. The present composition of the federation, the relative importance of standard bread production in the industry and the general conditions are not comparable with the earlier period. We have already referred to the change in the composition of the federation in England and Wales as follows:

	1953	*1959*
" Group " members	43	142
Independents	120	51
	163	193

During the early period of control bakeries were producing practically nothing but " national " bread. Today, as we have stated, 56·9 per cent. in value of total output is standard bread, and 43·1 per cent. in value is made up of other breads and flour confectionery. The demand for standard bread has been steadily declining, and its relative importance to the trade is much reduced since the war period. As to general conditions, it was agreed in evidence that costing techniques had greatly improved and that much more accurate costing could and should be expected from the industry today than could have been hoped for in the control period. No evidence was given as to how far the requirement in the memorandum that apportionment of certain expenses should be on the basis of actual costs, where possible, was implemented in the sample. This would have been an almost unrealisable requirement in the difficult war years, but should be much more capable of realisation in any returns today.

In examining the sample analyses it was noticeable that the cost of flour in the case of the two miller-controlled groups was greater than for the group which had no such association. The explanation given was that the millers charged the same price to their associated members as to outsiders and that the " non-miller " group used overseas flour, with probably cheaper blends, and obtained higher rebates. Without investigating or questioning these reasons we feel that there is here a potential weakness in the formula, since the millers' policy vis-à-vis their respective groups might easily change, with distorting effects on the costs of the sample. These groups are both powerful, and could exercise a very material power in this respect, if they so decided, within the frame of the memorandum as it now stands.

Mention has already been made of the inclusion of initial allowances in the charges for depreciation and rent. It was

agreed that this method could cause considerable distortion of results when rebuilding or re-equipment was prevalent. No evidence was forthcoming of the difference which the replacement of the memorandum method by a more realistic depreciation method would make in the sample results.

Reference has been made to methods of apportionment of certain expenses where the Ministry adopted arbitrary reductions, to 25 per cent. and 50 per cent. of their retail selling values, for products other than National Bread. It is fair to comment that the accountant for the registrar said that he did not think that actual costing where available would produce a material effect within the sample, but we think that, given the great difference, to which we have already referred, between the period of control and today, in the relative production of the other sources of revenue to that of standard bread, an attempt should have been made to confirm, at least, the substantial accuracy of the fixed percentages adopted.

These are important criticisms of detail. But assuming for the moment an arrangement to fix maximum prices on these general lines to be capable of justification, the basis actually adopted is open to major criticism. The obvious need was to produce figures of costs and profits which would justify the prices recommended. The most obvious and defensible way would be to assemble the costs and profits of all the members of the federation. "Sample" figures can only be justified in certain circumstances and subject to recognised principles. In this case no attempt was made by the respondents to obtain the actual figures. The sampling method was, as has been said, merely a continuation of sampling methods adopted under abnormal conditions and (an important distinction) under the supervision of a government department. Given this approach by the respondents, careful rules were made to secure that the samples used compared not unfavourably with those in the control period in numbers and in types of members, and to see that the figures resulting from these samples were weighted to secure due representation of the figures drawn from the larger and, it was assumed, lower-cost producers. Moreover, an arbitrary reduction of 7½ per cent. in the costs of production, excluding flour, was made in order to bring the assumed average costs nearer to those of the lower-cost producers. Full credit must be given for these arrangements and for the way in which they were carried out by the federation's accountants, as well as for the arrangements for the automatic change in prices. But it was freely admitted in evidence that no one knew anything about the essential test of the samples; namely, as to whether they were, in fact, representative of costs and profits. Only the costs and profits of the units submitting samples were known; there were no means of actually testing how far, in fact, they were representative.

R. P. Ct.
(E. & W.)

1959

Federation of Wholesale and Multiple Bakers' (Great Britain and Northern Ireland) Agreement
In re.

Again, the quarterly returns were consistently referred to as "samples," as if that fact gave them validity. But the first question of the statistician must be as to how these samples are arrived at. The answer given was that all members of the federation were asked to "volunteer" to make returns; if these were the returns volunteered, obviously the varying circumstances and attitudes, and, indeed, interests, of the different members could have an unpredictable effect upon the returns actually received. They were not the "planned samples" carefully specified to a given end, nor the "chance samples" known to statisticians as acceptable for certain purposes, and within certain limits and conditions. Moreover, it appeared that in fact (as has been shown) only 3 returns were volunteered from among 51 independent members and the remaining 49 (to take the quarter ending March 1959) were supplied from the three large bakery groups. This ratio was justified by the respondents on the ground that the independents' costs would be higher. But a further factor emerged at the hearing, very important from the point of view of assessing the validity of the sampling as a method. This was that as regards all those units within the three groups (representing nearly three-quarters of the whole) the selection of which units, within each group, should be regarded as representative and should make returns was decided by the management of each group. Without wishing in any way to suggest that, in fact, those concerned were biased, or were in fact influenced by any improper motive in their selection, it is obvious that returns "volunteered" in this way would not satisfy the tests of sampling as generally understood.

It should be mentioned here that after the conclusion of the evidence at the hearing Sir Milner Holland on behalf of the federation informed the court that if only the limitations of the "sample" and the inclusion of the initial allowances in the depreciation figures stood in the way of a decision in favour of the federation's recommendations, the federation would be willing to undertake to amend the formula by providing for every member of each group to supply costings and for "straight line "depreciation" to be used in the costings.

We have now stated the facts which appear to us to be most material, with special emphasis on the memorandum or formula, which is a central feature of this case. We can now come to the issues which have to be decided, as set out at an earlier stage.

The first issue, stated very shortly, is whether the maximum prices have in practice effectively operated so far, and can reasonably be expected to operate in the future, if they are continued, as maximum or fixed or minimum prices. It should be said at the outset that a collective price control stated in terms of maximum prices, and actually so operating, seems less open to criticism in relation to the public interest than one

stated in terms of fixed or minimum prices. A maximum price might in certain circumstances safeguard the buyer against having to pay more, while giving him a chance of paying less if he could find a seller willing to take less. That chance might be a benefit, and not unreal, because a situation might arise in which a seller would be willing to take less and the description of the recommended price as "maximum" would enable him to take less without infringing the recommendation. But whether the benefit is real or notional, substantial or unsubstantial, depends upon what happens in practice, or, for the present purposes under section 21 (1) (*b*) of the Act, what is reasonably estimated as likely to happen in the future, taking into account what has been happening up to the present time. If it appears that in fact sales at prices below the recommended maximum price have been made very infrequently, that must tend to show that the benefit of having the recommended price stated as a maximum is unsubstantial or even negligible. It is clear from the evidence in this case that such sales have taken place hardly ever. There has been no specific evidence of any actual instance, and it has been admitted on behalf of the federation that such sales have been very rare. Indeed, in the market survey, which will be dealt with more fully later, there were 109 purchases of standard bread and not one of them was at a price below the recommended maximum price. That was the only specific evidence before the court on this point. It was contended that the reason for the absence of sales at prices below the recommended maximum price is that it was fixed at a low level, so that nobody could afford to sell below it. In our view, however, as will appear later, while the prices recommended may be low for certain higher-cost sections of the industry (which includes the family bakers producing the loaves by manual operation and on a small scale), they are not low prices for the members of the federation, having enabled them to make, on the average of the "sample," good profits. Some of the federation members are making high profits and could afford to make sales at reduced prices, if that were their policy.

Next, as we have to make under section 21 (1) (*b*) a forecast as to what is likely to happen in the future, it is right to bring into account indications of the federation's own attitude and expectations. When the change was made from fixed to maximum prices in April, 1958, there was no alteration of the figures and there was no announcement to the public. As appears from the resolutions, which have been set out above, copies of the resolutions and the memorandum were delivered to the Registrar of Restrictive Trading Agreements and to the federation's accountants and to each of the members of the federation. There is, however, nothing to show that the independent retailers or the purchasing public had any knowledge of the newly acquired "maximum" character of the recommended

R. P. Ct. (E. & W.)

1959

Federation of Wholesale and Multiple Bakers' (Great Britain and Northern Ireland) Agreement, *In re.*

prices in April or May, 1958, or at any time before November, 1958, when, on the occasion of a change in some of the prices, public announcements were made in the Press clearly stating that the prices were maximum and sales could be made at lower prices. The absence of any public announcement at the time when the change from fixed to maximum prices was made tends to show that at that time the federation were not expecting or intending that the new description of the prices as maximum would have far-reaching practical effects. Next, there was no softening of the federation's uncompromising attitude towards price reductions, at any rate if they could be described as "price-cutting." They had in March, 1958, before the change was made, taken a very adverse view of a retailer giving away some loaves and selling others at 1d. below the proper price. In a letter of May 2, 1958, after the change had been made, the secretary of the federation, explaining the disadvantages of high rates of wholesale discounts, said: "There is, too, the "danger that a sufficiently high discount will introduce price "cutting at retail level, a result which might have the heaviest "effect in the West Midland area. It is obvious that wholesale "discounts must be kept to a minimum, not only for the protec-"tion of retail business, but also in the public interest. . . . "I feel particularly disturbed since I have endeavoured, and "to date with a measure of success, to have all federation "members, be they independent or in groups, comply with the "arrangements and agreements made freely in open discussion. "This policy, I had hoped, would be in everybody's interests "and prevent the outbreak of price-cutting wars, which "were so ruinous 20 years ago." Also, there are striking passages in the federation's statement of case, delivered on May 19, 1958. It is right to bear in mind that the statement of case must have been drafted initially at a time when fixed prices were recommended, and that even after the change the court's approval was (as it still is) sought for the earlier fixed price recommendations as well as for the later maximum price system. Nevertheless, the passages are striking, and the following are examples:

Paragraph (21) (h) (i). "There is information as to price "available which would put any member of the public on "inquiry as to profiteering in the event of prices substantially "in excess of the recommended price being demanded without "adequate justification and on inquiry as to a lowering of "quality and service in the event of prices substantially lower "than the recommended price being demanded without adequate "justification." *Paragraph 21 (h) (vi).* "The existence of the "recommended price, though not preventing sales of bread at "lower prices when adequate justification for such lower prices "exists, will tend to mitigate such periods of price cutting."

The intervention of the fixed retailer's margin of 1s. 3d. per

dozen loaves of standard bread introduces an element of rigidity into the price structure, and would hinder sales to independent retailers at reduced prices, if any member of the federation were minded to make such sales. While the federation's trade witness was giving evidence, a problem was put to him on these lines: Take the common case of a sale by a federation member to an independent retailer in circumstances where only the fixed retailer's margin of 1s. 3d. per dozen loaves, without any additional discount, is appropriate. If the sale is made at the maximum price, the invoice will show for one dozen loaves the maximum retail price of 10s. 6d. and the retailer's margin of 1s. 3d., and the net wholesale price of 9s. 3d. The retailer will sell at 10½d. per loaf and receive 10s. 6d. But suppose that the federation member wished to sell at a reduced price, what would he do? Would he simply charge a reduced wholesale price of, say, 8s. 9d., and leave the retailer free to sell at the recommended maximum price of 10½d. per loaf, which is also the current price, and so receive a total of 10s. 6d., thereby taking a margin of 1s. 9d. instead of 1s. 3d.? Or should the federation member, before reducing his wholesale price, take some action to ensure that the retailer will make a corresponding reduction in his retail price to the public, so that the retailer will receive no more than his proper margin of 1s. 3d.? The federation's trade witness asked for time to consider the question, and on a later day he was recalled. He gave a full and careful answer. He could not say that precisely the circumstances or precisely the type of example stated in the question had been considered, but he did think that, in approaching the question of retail price and fixed margin, so far as possible the whole context of such a position had been given some thought, and he could give a generalised answer on these lines: "First, "if a producer reduced his recommended retail price and then "gave the same fixed margin, so that he was in effect putting "into the hands of the retailer bread at a lower price, it might "well be considered by the federation that he was not obeying "the fixed margin; that in effect he was giving a larger margin "than the fixed retail margin, which would be regarded as being "against the interests of the federation. The only other "alternative circumstances I can think of is that if a producer "desired his bread should be sold to the public at a lower price, "he would then have to enforce a fixed price ruling on the "retailer." He was then asked if that meant there would be an understanding between the particular plant baker and the particular retailer, that if the retailer got his 12 loaves at 8s. 9d. he must not sell them at more than 10s. He said: "Precisely. I cannot conceive that that would be likely to "arise, because I do feel so much myself that the position "we are in is that action by one producer could produce "action by other producers in the same area, so that advantage

R. P. Ct. (E. & W.)

1959

Federation of Wholesale and Multiple Bakers' (Great Britain and Northern Ireland) Agreement, *In re.*

"would be short-lived with an arrangement of this sort." In all probability his answer does show how the problem would be solved, if it arose and had to be decided. It is interesting, however, to note that there was no ready-made solution for this problem, which seems elementary if any sales below the recommended maximum price in the common type of transaction (with the plant baker selling to the independent retailer, who resells to the public) were expected or envisaged. So long as the recommended maximum price is operating as a fixed price, it can operate in conjunction with the fixed retailer's margin without raising any such problem, and, as the problem had not been raised, it is a reasonable inference that the recommended maximum price had been operating as a fixed price.

Finally, it can be said as a matter of common sense that if a large and influential federation, which has at least half the market for the commodity concerned, publishes a recommended price, even if it is described as a maximum price, the members of the federation and other traders will naturally regard it as a fair and reasonable price approved by the federation, and they will be disinclined and unlikely to sell at any lower price.

For the reasons which have been given, our conclusion is that the federation's recommended maximum price has in practice effectively operated as a fixed price, and, whether or not the recommendations have been otherwise beneficial to the public, they have not been substantially beneficial by virtue of their description of the price as "maximum."

We now come to the second main issue, which is whether the true effect of the price recommendations is to keep standard bread prices now and hereafter, while the formula continues, below what they would be if there were no such recommendations. We have to make a forecast as to the likelihood or degree of risk of price increase ensuing if the price recommendations were abolished.

The issue has two aspects. The first is financial—what level or kind of price is likely to be produced by the formula? The second is economic—what results would be likely to flow from the economic facts of the situation if the formula had not existed or were abolished?

As to the financial aspect, the formula itself, although for reasons given above it cannot be fully relied upon to present a dependable average cost, appears to show profits which are too favourable to justify a claim that the formula adequately protects the consumer. The average profits have been shown to be favourable in comparison with profits in other industries. Moreover the average profit, which results from the formula, is to continue while the formula lasts, in bad times as well as good. Deficiencies below the average are to be automatically recovered in subsequent periods whatever the state of trade or whatever the variation in consumer purchasing power.

As to the economic aspect, we will first mention a suggestion

as to method that was made by the registrar's expert witnesses. They suggested that, if there is to be collective regulation of prices on the basis of costs, it should not be on the basis of average costs reduced by an "efficiency factor" (such as the 7½ per cent. of production costs other than flour in this case) but rather on the basis of lowest costs with an addition calculated to keep in business enough higher-cost producers to provide the supplies required by the public. There was no evidence in this case as to practical applications of the suggested method, and it might not be free from difficulties, but it does seem to us to be sound in principle, and a citation from the judgment of this court in the Scottish case [2] will show what is involved: ". . . the "ascertainment of a price based on averaged costs has been shown "in the evidence in this case to be consistent with high profits "being available to the low cost producers, with no means "existing whereby they can pass any part of the benefit of these "profits, or their own probable higher efficiency, to the con-"sumer in the shape of lower prices for standard loaves. Not "unnaturally it is among the low cost producers that the "businesses controlled by the five dominating groups are to be "found. Thus the system is not designed to reflect the lowest "economically practicable cost, or to result in the lowest "economically practicable price being paid by the consumer, and "if it does not do so in the short run, we do not see why it should "do so in the long."

We now come to consider directly the question, What results would be likely to flow from the economic facts of the situation if the formula had not existed or were abolished? A very important factor to be taken into account is one which has already been mentioned briefly, namely the declining demand for bread in general and standard bread in particular. In the agreed statement of facts there is a table of bread consumption stated in ounces per head per week as follows:

Year	*Oz.*
1937–38	58·19
1954	56·28
1955	55·13
1956	51·08
1957	48·00
1958	47·21

Of course, the increase of population is a partial countervailing factor. There is in the agreed statement of facts another table showing both the declining trend of bread sales for 1948 to 1954 and also the larger establishments gaining more of the market at the expense of the small firms. The figures are in thousands of hundredweights, and are for Great Britain except that for 1954 the sales by larger establishments include also sales in

[2] L.R. 1 R.P. 347, 379.

R. P. Ct. (E. & W.)

1959

Federation of Wholesale and Multiple Bakers' (Great Britain and Northern Ireland) Agreement, *In re.*

Northern Ireland. Subject to that qualification the figures are as follows:

	1948	*1951*	*1954*
Sales by larger establishments	55,032	52,994	52,947
Sales by small firms	26,253	17,699	12,690
Total sales	81,285	70,693	65,637

It was agreed by the witnesses that there has been a considerable decline in the consumption of standard bread since 1956. The declining trends in the consumption of bread in general, and standard bread in particular, will not necessarily continue indefinitely, and the federation's trade witness had an impression, from certain figures of flour consumption which he had seen, that the declining tendency is now levelling off. It seems, however, likely that the decline will continue to some extent owing to consumer preference for more expensive foods than bread and for breads other than standard bread. Another important factor which has already been mentioned is the need for a plant baker to maintain a steady turnover, because a fall in production would cause uneconomic labour costs and idle capital equipment. Production for stock is not practicable, as bread which is not sold within a short time of baking becomes unsaleable: unlike some other articles, it cannot be stored for sale if and when demand revives. So long as there is a declining demand for standard bread, the plant baker will have to increase his share of the diminishing market merely in order to retain his existing turnover, and he would be more likely to reduce than to increase his prices. If there is or will be a levelling out of the demand, so that it ceases to decline and becomes stationary, it will still be necessary for the plant baker not to lose turnover, and there would obviously be a risk of that if he increased his prices. Thirdly, the recommended prices, while they may be low for the industry as a whole, are not low for the federation members, who are on the average making good profits from standard bread, which is their "bread and butter line," and they are probably making higher profits from other breads and flour confectionery. There are thus sound economic reasons for expecting that prices would tend to be favourable to the consumer in the absence of collective price recommendations. Moreover, the evidence of the federation's trade witness shows that there are other considerations likely to influence the federation in the direction of a low price policy, in that (i) they wish to act with a due sense of responsibility to the public and give no ground for any accusation of profiteering, (ii) they wish to avoid any situation which might lead to the reimposition of price control by the Government, (iii) high prices might give rise to wide retailers' margins, and (iv) the federation members are supplying quite a number of substantial multiple grocers or dairies or similar large customers, and if the profit margin of bread were at a high level

such customers might prefer to bake their own bread rather than buy it from federation members. The effect of competition is illustrated by the results of a market survey carried out for a rather different purpose. The federation had instructed Retail Statistics Ltd. to carry out a market survey by making purchases of standard loaves in selected areas, and Retail Statistics Ltd. accordingly purchased 109 of the 28-ounce wrapped and sliced standard tin loaves for this purpose. A summary of the results of the survey shows that in areas where the federation's influence is strong, whether the population be large (as in Liverpool, Bristol and Croydon) or sparse (as in Hucknall, Garforth and Hereford), the sales were made, with only one exception, at the federation's recommended maximum price of 11½d. per loaf; but that in areas where the federation's influence is weak, whether the population be large (as in Ipswich, Swindon and Weymouth) or sparse (as in Downham Market, Devizes and Whitchurch), a majority of the sales (15 to 12 and 12 to 8) were made at prices higher than the recommended price. Of the sales at prices higher than the recommended price none was made to the customer by a federation member through his own shop or roundsman, but some were of bread produced by federation members. These results do afford evidence of the federation influence in securing sales at the prices which they fix, but it is the local competition of the federation members rather than the existence of the recommendations which tends to keep the other prices down.

Under free competition there might well be cases of some prices in some areas being above the general level, but, as the market survey has shown, that happens also with the recommendations in operation. Moreover, a marked rise in production costs would force a rise in prices whether the recommendations were in operation or not. But, on the whole, having regard to the factors which we have mentioned and our impressions derived from all the evidence, we are not satisfied that there is a likelihood or serious risk that abolition of the recommendations would cause a rise in bread prices. On the contrary, in face of a declining, or at best stationary, demand on the one hand, and ample and increasingly efficient production capacity on the other hand, the long-term natural forces of competition would seem to favour some reduction in the level of prices.

The importance of preserving competition as the ultimate safeguard can be deduced from a consideration of the evidence of the respondent's economist, E. E. Watkins. He gave evidence to the effect that, at present, prices are largely controlled by dominant groups which have grown or developed under present arrangements; that in this situation it is in the economic interests of members of the federation not to compete in price, and they are strong enough to fix prices if they act together; and that in these circumstances the consumer would do well to accept the

R. P. Ct. (E. & W.)

1959

Federation of Wholesale and Multiple Bakers' (Great Britain and Northern Ireland) Agreement, *In re.*

existing system of recommended maximum prices. If we had reached a different view as to the net benefits derived by the consumers from the present formula, it would then have become important to bear in mind the strain to which any formula would be exposed, if at some future time the groups' strong and increasingly dominant position in the industry were carried forward to a point only just short of "monopoly" as statutorily defined, and they were fixing the prices without any external check or independent regulator, with the purchasing public, deprived of the ultimate safeguard of price competition, left to rely solely on the formula for their protection. That is not the present position, but it is a future possibility which cannot be disregarded.

Our conclusion is that the respondents have not proved their case under paragraph (*b*), not having satisfied the court that the removal of the restrictions would deny to the public any specific or substantial benefit or advantage such as is referred to in that paragraph. Therefore, no question now arises under paragraph (*g*) or under the "balancing provision." As the restrictions concerned have failed to pass the statutory tests, there must be in the terms of the Act a finding that the restrictions are contrary to the public interest. As was said in the Scottish case,[3] "It "must always be kept firmly in view that it is to be presumed "that freedom from the restrictions struck at by the statute is "in the public interest, and freedom from such restrictions "necessarily implies freedom to compete in price as well as in "other matters." There is no implied criticism of the conduct or intentions of the federation, who have not been lacking in moderation or in civic responsibility. Their formula has deserved, and we hope has received, full and careful consideration. The federation have through their counsel and witnesses put the full facts candidly and lucidly and fairly before the court.

One further point remains to be dealt with. Counsel on both sides have asked us, in exercise of the powers conferred by section 20 (5) of the Act, to make declarations not only in respect of the agreement as it now is with the set of restrictions now in force, but also in respect of the agreement as it was in, say, March, 1958, before it was varied by the resolutions of April 9, 1958, introducing the costings formula and the description of the recommended prices as maximum. The powers under that subsection are discretionary, and we are asked to make a declaration in respect of a system which has been obsolete for twenty months and was materially different from the system now in force. We have to ask ourselves, how could paragraph (*b*) be applied? Suppose that the expression "would deny" can be read, as counsel on both sides asked us to read it, as including "would have denied": it would still be necessary for us to project our minds back to March, 1958, and make a forecast in

[3] L.R. 1 R.P. 347, 382.

respect of a period then future but now past, and it would be difficult to decide how much foreknowledge we could allow ourselves to have in respect of that period. In our view it is not appropriate to make any declaration as to past history in this case. There will be a declaration as to the restrictions involved in the present system.

Declaration accordingly.

Solicitors: *McKenna & Co.; Treasury Solicitor.*

J. F. L.

[COURT OF APPEAL.]

C. A.
1960
Mar. 7.
Sellers, Ormerod and Upjohn L.JJ.

* PEASE *v.* GEORGE.

[1959 P. No. 1739.]

PRACTICE NOTE.

Practice — Jury, civil action — Right to jury — Judge's discretion— Whether Court of Appeal will interfere—Personal injuries—Very grave injuries—R.S.C., Ord. 36, *r.* 1 (1) (3).
Court of Appeal—Discretion of judge, matter within—Application for jury—Whether court will interfere with judge's decision.

Hope v. *Great Western Railway Co.* [1937] 2 K.B. 130; 53 T.L.R. 399; [1937] 1 All E.R. 625, C.A. applied.

APPLICATION.

By his writ and statement of claim, the plaintiff, Edward Pease, an infant suing by his father and next friend, Edward Frederick Pease, claimed damages for personal injuries against the defendant, Richard Thomas George. The plaintiff's claim was in respect of injuries alleged to have resulted from a collision between his solo motor-cycle and the defendant's motor-van along Thanet Way, Herne Bay, Kent, on May 10, 1959, which was alleged to have been caused by the negligence of the defendant. The defendant denied that he was negligent or in any way responsible for the accident. There was no agreed report on the plaintiff's condition. The plaintiff alleged that he had sustained very severe injuries. It was pleaded in his statement of claim, inter alia, that "the plaintiff is now a total invalid and is likely "to remain so both mentally and physically for the remainder "of his life, requiring constant nursing and medical attention."

On the summons for directions, Master Clayton ordered that the trial should be before a judge without a jury. On appeal to Hinchcliffe J. in chambers, the judge affirmed the master's order and refused the plaintiff leave to appeal. The plaintiff applied to the Court of Appeal for leave to appeal.

C. A.
1960
Pease v. George (Practice Note).

J. Drinkwater for the plaintiff.
E. W. Eveleigh for the defendant.

The following cases were cited in argument, in addition to those referred to in the judgment: *Scott* v. *Musial* *; *Bocock* v. *Enfield Rolling Mills Ltd.* †; *Dolbey* v. *Goodwin.* ‡

Sellers L.J. This is a case where the plaintiff sought to have an action for damages for personal injuries incurred through a road accident tried by a jury. The application was refused by the master, and, on appeal to Hinchcliffe J., he likewise, in his discretion, refused to order a jury. There may be much to be said for having a jury in this particular case where the injuries are very grave indeed, and there is some judicial authority to indicate that a jury is not an improper or unreasonable mode of trial in such circumstances. But, while there was ample power in the judge to have ordered trial by jury in this particular case, he took the view that it was not one in which he would do so. It seems that under R.S.C., Ord. 36, r. 1 (3),[1] it is in the discretion of the court or the judge to decide one way or the other, and that is an absolute discretion. In *Hope* v. *Great Western Railway Co.*[2]—a decision of a court of five judges of the Court of Appeal—it was held that this court would not interfere with the judge's discretion in such circumstances. No doubt if it was, in the view of this court, going to create any real injustice, the principle of *Evans* v. *Bartlam* [3] might be invoked. But I can see no injustice in this particular action being tried by a judge alone, as the judge below ordered. This application, therefore, must be refused.

Ormerod L.J. I agree.

Upjohn L.J. I agree.

Application dismissed with costs.

Solicitors: *White & Co.; L. Bingham & Co.*

N. P.

* [1959] 2 Q.B. 429; [1959] 3 W.L.R. 437; [1959] 3 All E.R. 193, C.A.

† [1954] 1 W.L.R. 1303; [1954] 3 All E.R. 94, C.A.

‡ [1955] 1 W.L.R. 553; [1955] 2 All E.R. 166, C.A.

[1] R.S.C., Ord. 36, r. 1: "(1) In "every action commenced by writ of "summons, an order made on the "summons for directions shall determine the place and mode of the trial, "and, where the trial is to be before "a Judge, shall determine whether "the trial is to be with or without a "jury; but any such order may be "varied by a subsequent order of the "Court or a Judge made at or before "the trial. . . . (3) Save as provided "by Rules 2 and 3 of this Order, the "discretion of the Court or Judge in "making or varying any order under "this Rule is an absolute one."

[2] [1937] 2 K.B. 130; 53 T.L.R. 399; [1937] 1 All E.R. 625, C.A.

[3] [1937] A.C. 473; 53 T.L.R. 689; [1937] 2 All E.R. 646, H.L.

[PROBATE, ETC., DIVISION.]

* FINCH v. FINCH.

1960
March 14, 15, 16, 17, 18.

Mr. Commissioner Latey Q.C.

PRACTICE NOTE.

Husband and Wife—Practice—Pleading—Answer—Bare denial—Provocation and other matters of the nature of confession and avoidance alleged at hearing.

The doctrine of confession and avoidance does not obtain in matrimonial causes. The Matrimonial Causes Rules, 1957, r. 17, although leaving a party free to set up more than a bare denial if so advised, places no obligation upon him to do so.

Thompson v. *Thompson* [1957] P. 19; [1957] 2 W.L.R. 138; [1957] 1 All E.R. 161 applied.

PETITION for divorce.

A wife filed a petition seeking dissolution of the marriage on the ground of the husband's cruelty and adultery. The husband filed an answer which consisted of a bare denial of the wife's charges.

At the hearing of the suit the cross-examination of the wife proceeded on the basis of certain acts of violence and ill-temper on her part which had provoked some degree of retaliation on the part of the husband. Counsel for the wife sought to exclude those matters on the ground that they should have been pleaded in the husband's answer so that he should not be taken by surprise.

In the course of the hearing leave was granted to the husband to amend his answer to make, by way of cross-petition, a charge of desertion against the wife.

S. C. Silkin and *R. D. L. Kelly* for the wife.

K. Bruce Campbell and *Elaine Jones* for the husband and the intervener.

MR. COMMISSIONER LATEY Q.C., in the course of his judgment, referred to the submission of counsel for the wife on the state of the pleadings and continued: He submitted that as the answer was a bare denial of cruelty it was not open to counsel for the husband to set up in cross-examination a case of provocation and the like. He based himself on the Rules of the Supreme Court, Ord. 19, r. 15, which states: "The defendant or plaintiff (as the case "may be) must raise by his pleading all matters which show the "action or counterclaim not to be maintainable, or that the trans-"action is either void or voidable in point of law, and all such "grounds of defence or reply, as the case may be, as if not raised "would be likely to take the opposite party by surprise, or would "raise issues of fact not arising out of the preceding pleadings, as, "for instance, fraud, Statute of Limitations, release, payment,

1960

Finch
v.
Finch.

Mr. Commissioner Latey Q.C.

"performance, facts showing illegality either by statute or common law, or Statute of Frauds" and suggested that he had been taken by surprise in this matter.

The doctrine as to pleading confession and avoidance or accord and satisfaction in common law and Chancery actions is well established, but it has never obtained in matrimonial causes as something which has to be pleaded. There are some circumstances in which, although the answer may be confined to a bare denial, some extra fact should be pleaded, as, for instance, when the wife's respondent's case, in a petition based on desertion, was that there had been a mutual agreement to separate with subsequent happenings which might negative desertion. That was really the issue in *Slater* v. *Slater*.[1] In such a case it is desirable that the fact be pleaded in the answer.

Counsel for the wife further invoked the Matrimonial Causes Rules, 1957, rule 82, as to the Rules of the Supreme Court being followed where there was no matrimonial causes rule dealing with the subject-matter; but rule 17 of the Matrimonial Causes Rules, 1957, does deal with this point. Though it imposes no obligation upon the defending party to set up more than a bare denial, it leaves him free to do so if he is so advised. An apt explanation on the point raised by counsel for the wife was actually given by Denning L.J. in the case of *Thompson* v. *Thompson*,[2] a case based on cruelty charges in which the pleadings of both parties were prolix. Denning L.J. said [3] that all that was needed from the wife, respondent, was a denial of the charge of cruelty. Speaking generally, he said [4]: "The respondent should "also remember that in his answer he need only deny that he is "guilty of cruelty. He need not go on to say what happened on "the occasion in question." Thus, both by law and practice, the objections of counsel for the wife cannot be sustained. The underlying principle in matrimonial causes is that all the relevant facts to enable the court to come to a decision should be adduced in order that the court may, if satisfied of a matrimonial offence, possibly change the status of the parties.

[His Lordship at the conclusion of his judgment, rejecting the charges of cruelty and adultery made against the husband, the intervener having already been dismissed from the suit, found that the wife had deserted the husband and dismissed the prayer of the petition and granted a decree nisi to the husband on the prayer of his cross-petition.]

Solicitors: *Barradale, Blacket Gill, Silkin & Young; Prothero & Prothero.*

E. J.

[1] [1952] W.N. 260; [1952] 1 T.L.R. 1314; [1952] 1 All E.R. 1343.

[2] [1957] P. 19; [1957] 2 W.L.R. 138; [1957] 1 All E.R. 161, C.A.

[3] [1957] P. 34.

[4] Ibid. 35.

[CHANCERY DIVISION.]

* STROUD BUILDING SOCIETY *v.* DELAMONT AND OTHERS.

1960
Jan. 22, 26, 27, 28.

Cross J.

[1959 S. No. 1407.]

Mortgage—Receiver—Receipt of rent, by—Trespasser, from—Whether tenancy created—Surrounding circumstances—Law of Property Act, 1925 (15 *&* 16 *Geo.* 5, *c.* 20), *s.* 109 (2).

On July 31, 1947, freehold premises were charged by way of legal mortgage in favour of a building society by a legal charge which provided that no lease should be made by the mortgagor without the consent of the society. In March, 1948, the mortgagor, without the consent of the society, granted an oral tenancy of the premises. On June 27, 1956, the mortgagor was adjudicated bankrupt. On January 23, 1957, the society served notice on the tenant to deliver up possession and stated that they did not regard themselves as bound by the tenancy, but the tenant did not comply with the notice to quit and the society did not enforce it, and until the end of 1957 the rent was paid to the mortgagor's trustee in bankruptcy. On January 13, 1958, the society, pursuant to section 109 of the Law of Property Act, 1925, appointed P., its secretary, to be receiver of the income of the mortgaged property; he gave the tenant notice of his appointment and requested her to pay the rent to him. In March, 1958, the society informed the tenant that the terms of the tenancy, which she held as tenant of the building society, were the same as those of the tenancy granted by the mortgagor. The tenant paid rent by cheques drawn in favour of the society, and on July 1, 1958, P., acting as secretary of the society and not as receiver, served on the tenant notice to quit and deliver up possession on January 3, 1959, but it was agreed that, if the tenant held a tenancy binding on the society, that notice was invalid. The tenant failed to comply with that notice. On a summons by the society claiming possession of the premises:—

Held that, although the receipt of rent by a receiver appointed by a mortgagee did not of itself create a tenancy between a mortgagee and the tenant, there was nothing to prevent a mortgagee who had appointed a receiver from creating the relationship of landlord and tenant between himself and the mortgagor's tenant without previously terminating the receivership, and that, on that footing and looking at the facts as a whole, the right inference was that the society had consented to accept the tenancy notwithstanding the receivership. The society, accordingly, was not entitled to possession.

Dictum of Harman J. in *Lever Finance Ltd.* v. *Trustee of the Property of L. N. and H. M. Needleman* (*Bankrupts*) [1956] Ch. 375, 382; [1956] 3 W.L.R. 72; [1956] 2 All E.R. 378 applied.

ADJOURNED SUMMONS.

By a mortgage deed, dated July 31, 1947, the first defendant, Stanley Ernest Delamont, charged by way of legal mortgage a freehold property, No. 22, East St. Helen Street, Abingdon, Berkshire, in favour of the plaintiffs, the Stroud Building Society, in consideration of an advance of £2,800 with interest. Clause 7 (iii) of the deed provided that no lease should be made by the

1960

Stroud Building Society v. Delamont.

mortgagor without the consent in writing of the society. In March, 1948, the mortgagor, without the consent of the society, orally agreed with Mrs. Mary Alice Waller, the third defendant, that she should have a tenancy of the mortgaged property at a weekly rent of five guineas. On June 27, 1956, the mortgagor was adjudicated bankrupt and the tenant then paid the rent to the second defendant, the trustee in bankruptcy. On January 23, 1957, the society served on the tenant notice to deliver up possession of the mortgaged property on February 9, 1957. Correspondence ensued between her solicitors and the solicitors acting for the society in which it was stated that the society did not recognise the tenancy as binding upon it, since it had not consented to its creation. Nevertheless, the tenant did not comply with the notice to quit, and the society took no steps to enforce it. The tenant continued to pay rent to the trustee in bankruptcy throughout 1957.

On January 13, 1958, the society, in exercise of the powers conferred on it by section 109 of the Law of Property Act, 1925, appointed its secretary, Alan Frederick Richards Payne, to be the receiver of the income of the mortgaged property, and on the next day he gave the tenant notice of his appointment and requested her to pay to him all rent then due, or thereafter becoming due, in respect of the tenancy.

On March 3, 1958, one E. W. Mann, who helped the tenant in business matters, wrote a letter to the society's solicitors which contained the following sentence: "With reference to your letter "of January 14th signed by Mr. Payne applying for the rent, will "you please send Mrs. Waller the terms and conditions of the "tenancy." On March 10, 1958, the society's solicitors replied that they understood from the society that the terms of the tenancy were the same as those between the tenant and the mortgagor, and that unless all rent due since the service of the notice was paid within seven days proceedings would be taken for its recovery and for possession. After a dispute with regard to deductions for repairs, the tenant paid the arrears of rent from January 14, 1958, to the society by a cheque drawn in favour of the society, and she continued to pay the weekly rent of five guineas by cheques drawn at intervals in favour of the society. It appeared from the account kept by the manager of the society that the total amount received from the tenant was less than the sum expended on repairs to the property.

On July 1, 1958, the society's solicitors wrote to the tenant in the following terms: "We have been instructed by the Stroud "Building Society to send you the enclosed notice to quit and "deliver up the above mentioned premises on January 3, 1959, "at which date the key should be forwarded to the secretary of "the Stroud Building Society. . . ." The enclosed notice read as follows: "I, Alan Frederick Richards Payne, secretary of the "Stroud Building Society . . . hereby give you notice to quit and "deliver up to the . . . society or to whom they may appoint on

"January 3, 1959, possession of the premises . . . which you "hold as tenant of the said Stroud Building Society."

It was agreed between the parties that in giving that notice he was acting as secretary of the society and not as receiver. In answer to a letter from E. W. Mann expressing surprise at the service of the notice to quit, the society's solicitors wrote again to the tenant on August 25, 1958, saying: "We have to inform "you that the possession of this property will be required on "January 3, 1959, as provided by the notice to quit and in the "meantime rent should be paid to the society." The tenant continued to pay the rent to the society after receipt of that letter in precisely the same manner as she had been paying it up to that date. On December 19, 1958, the tenant's solicitors wrote to the society's solicitors suggesting, among other things, that the notice to quit of July 1, 1958, was invalid as the premises were business premises and the notice did not comply with the statutory requirements. It was common ground between the parties that if the tenant held a tenancy binding on the society the notice must have been bad. The tenant did not give up possession on January 3, 1959, and, accordingly, on January 30, 1959, the society's solicitors wrote to her solicitors saying that they had been instructed by the society to institute proceedings for possession of the property, and that in view of the nature of the tenancy a fresh notice to quit was being given. No fresh notice was in fact given and by a summons dated May 6, 1959, the society claimed possession of the mortgaged premises on the footing that the tenant was a trespasser and that no particular form of notice was required.

E. G. Nugee for the plaintiffs.

A. L. Price for the tenant.

The first and second defendants did not appear and were not represented.

The following cases, in addition to those referred to in the judgment, were cited in argument: *Keech* v. *Hall*[1]; *Lows* v. *Telford*[2]; *In re O'Rourke's Estate*[3]; *Doe* d. *Hughes and Rising* v. *Bucknell*[4]; *Corbett* v. *Plowden*[5]; *Rust* v. *Goodale*[6]; *Clarke* v. *Grant*[7]; *Leicester Permanent Building Society* v. *Shearley*[8]; *Parker* v. *Braithwaite*[9]; *Towerson* v. *Jackson*[10]; *Keith* v. *R. Gancia & Co. Ltd.*[11]

[1] (1778) 1 Doug.K.B. 21.
[2] (1876) 1 App.Cas. 414, H.L.
[3] (1889) 23 L.R.Ir. 497.
[4] (1838) 8 C. & P. 566.
[5] (1884) 25 Ch.D. 678, C.A.
[6] [1957] Ch. 33; [1956] 3 W.L.R. 749; [1956] 3 All E.R. 373.
[7] [1950] 1 K.B. 104; 65 T.L.R. 241; [1949] 1 All E.R. 768, C.A.
[8] [1951] Ch. 90; 66 T.L.R. (Pt. 2) 316; [1950] 2 All E.R. 738.
[9] [1952] W.N. 504; [1952] 2 T.L.R. 731; [1952] 2 All E.R. 837.
[10] [1891] 2 Q.B. 484, C.A.
[11] [1904] 1 Ch. 774; 20 T.L.R. 330, C.A.

1960

Stroud Building Society v. Delamont.

Cross J. stated the facts substantially as set out above and continued: When a mortgagor has granted a tenancy which is not binding on the mortgagee, since he has not given his consent, the mortgagee can, instead of treating the tenant as a trespasser, consent to treat him as his tenant or, at all events, act in such a way as precludes him from saying that he has not consented to take him as his tenant. Such an acceptance by the mortgagee of the mortgagor's tenant, whether express or implied, or operating by way of estoppel, must, I think, amount to a creation of a new tenancy between the parties. The tenancy between a mortgagor and a tenant is not one which is merely voidable by the mortgagee if he chooses not to accept it, but which he can confirm by waiving his right to avoid it. It is a nullity as against the mortgagee; and so, if the mortgagee is to lose his right to treat the mortgagor's tenant as a trespasser, it must be because the tenant has become the mortgagee's tenant under a new tenancy. The law on the subject is, I think, correctly stated in Smith's Leading Cases, 13th ed. (1929), p. 575, in the notes to *Moss* v. *Gallimore*.[1]

In this case it is clear that until January 13, 1958, when the receiver was appointed, the society had done nothing which deprived it of its right to treat the tenant as a trespasser. It is equally clear that if the society had then called on her to pay her rent to it, and she had done so, a new weekly tenancy would have been created between her and the society. But, instead of calling on the tenant to pay them rent, the society appointed its secretary receiver of the mortgaged property. A receiver appointed by a mortgagee does not, of course, pay any rent received to the mortgagor. He either applies it in payment of outgoings or pays it to the mortgagee. But, though the mortgagee has the benefit of the rent, the receiver, by reason of section 109 (2) of the Law of Property Act, is the agent of the mortgagor. In *Lever Finance Ltd.* v. *Trustee of the Property of L. N. and H. M. Needleman (Bankrupts)*,[2] where, as here, the mortgagor was a bankrupt and the mortgagee had appointed a receiver, Harman J. considered the question whether the receipt of rent by such a receiver created a tenancy between the tenant and the mortgagee, and he expressed the view that it did not.[3] This was obiter dictum and not part of the ratio decidendi of the case, but I shall accept it as correct. Indeed, counsel for the tenant has not invited me to do otherwise, but bases his case entirely on what happened after the appointment of the receiver. It is, I think, a reasonable, indeed the only reasonable, inference from the correspondence, that the society did not appreciate until shortly before the issue of the summons that the fact that they had appointed a receiver might enable them to continue to treat the tenant as a trespasser if they so desired, even though they were receiving the benefit of the rent paid by her. When E. W.

[1] (1779) 1 Doug. 279.

[2] [1956] 1 Ch. 375; [1956] 3 W.L.R. 72; [1956] 2 All E.R. 378.

[3] [1956] Ch. 375, 382.

Mann wrote to the society on March 3, 1958, in answer to the receiver's demand for rent, asking what would be the terms and conditions of the tenancy, the society through its solicitors answered that the terms of the tenancy were the same as those between the tenant and the mortgagor. The question and answer indicate that both parties thought that a new tenancy between the society and the tenant would result from her payment of rent. The matter is made still plainer by the words "which you "hold as tenant of the said Stroud Building Society" in the notice served on July 1, 1958, and in the reference to the nature of the tenancy in the society's solicitors' letter of January 30, 1959. There is, after all, nothing very surprising in the society making this mistake. The idea that a mortgagee can through the medium of receivership get the benefit of a tenant's rent while remaining at liberty to treat him as a trespasser is a highly artificial one which would not readily occur to a layman or even to a good many lawyers.

Mr. Nugee, however, argued for the society that the fact that the parties may have thought they were entering into the relationship of landlord and tenant is quite irrelevant. He points out that the receivership was never terminated, and that in a new rent book which was issued in April, 1959 (by which time no doubt the society had been advised as to the effect in law of receipt of rent by a receiver), the rent is described as payable to the receiver under a tenancy between the tenant and the mortgagor. He also points out that such cases as *Doe* d. *Wilcockson* v. *Lynch*[4] and *Lowenthal* v. *Vanhoute*[5] show that, when an owner of land is entitled to treat someone in occupation of it as a trespasser, the inclusion in a notice served on him of an erroneous statement that the occupier is the tenant of the owner will not itself without more create a tenancy between the owner and occupier. On the basis of those cases he argued that the inclusion in the notice of July 1, 1958, of what he submits was an erroneous statement that the tenant was tenant of the society would not crate a tenancy. He also argues that no importance should be attached to the fact that by the letter of August 25 the society demanded payment of rent and that the tenant paid the rent demanded, since she was only continuing to do what she had in fact been doing since March. He argues that the fact that rent was paid by cheque in favour of the society is not (having regard to section 109 (3) of the Law of Property Act, 1925) inconsistent with its being paid to the receiver. Consequently, he says, the reference to the payment of rent to the society made in the letter of August 25, 1958, is capable of being construed as an intimation that the tenant must, until the notice to quit expires, go on paying rent to the receiver as agent for the mortgagor by way of cheques drawn in favour of the society.

[4] (1771) 2 Chit. 683.

[5] [1947] K.B. 342; 63 T.L.R. 54; [1947] 1 All E.R. 116.

1960

Stroud Building Society v. Delamont.

Cross J.

It may well be that if one takes each point which may be said to tell in favour of the creation of a tenancy in isolation from the rest, each can be explained away on those lines, but I must look at the picture as a whole. So far as I know, there is nothing in point of law to prevent a mortgagee who has appointed a receiver of mortgaged premises from creating, by virtue of his legal estate in the land, the relationship of landlord and tenant between himself and a tenant of the mortgagor without previously terminating his receivership. Mr. Nugee, though he did not admit that that was so, was not able to refer me to any case which suggested the contrary. On that footing I have to say whether (looking at the facts as a whole and putting myself in the position of a juryman) the society had consented to accept the tenant as tenant notwithstanding the receivership or whether they had not. In my judgment, the right inference to draw from all the facts is that the society had consented to accept her as a tenant. No doubt the society never deliberately abandoned any right which it had to treat her as a trespasser, but that was because it never appreciated that it had any such right. No doubt, if it had appreciated that, it would have acted differently. But, as I see it, that is irrelevant to the question I have to decide. In the result, therefore, I must refuse this application.

Application refused with costs.

Solicitors: *Crossman, Block & Keith for Winterbotham, Ball & Gadsden, Stroud; Gamlen, Bowerman & Forward for Morland & Son, Abingdon.*

M. G. T.

[COURT OF APPEAL.]

C. A.

1960
March 1, 2, 3, 4, 7.

Sellers, Ormerod and Upjohn L.JJ.

* PEMBERTON *v.* BRIGHT and Another.

[1957 P. No. 295.]

Nuisance—Watercourse—Interference by highway authority—Extension of ancient culvert with new entrance on adjoining occupiers' land—Entrance left unprotected by grid—Neighbouring land flooded by blocking of unprotected entrance 30 *years after completion of work—Liability of highway authority—Liability of occupier—Highways Act,* 1835 (5 *&* 6 *Will* 4, *c.* 50), *s.* 67.

Nuisance—Potential nuisance—Damage reasonably foreseeable—Entrance to culvert left unprotected.

Injunction—Form—Nuisance—Mandatory order on occupiers of land "at all times" to keep culvert clear and unobstructed—Whether too wide.

In 1926 a county council as the highway authority widened a road under which ran a stream through an ancient brick culvert. Their operations involved their extending the culvert by means of a new pipe, the entrance to which was placed on the land of adjoining occupiers to the west of the road. The new entrance so made was

left unprotected by any form of grid or grating for the succeeding 30 years. From time to time after the work was done, and at least until 1954, the county council's servants cleared the entrance to the culvert of dirt or débris which might cause a blockage.

In 1934 the first defendants B. became the occupiers of the land on which the entrance to the culvert was situated.

In December, 1956, following heavy rainfall, the land and dwelling-house of the plaintiffs P., which was situated in a dip on the east side of the highway, became flooded by reason of the entrance to the culvert becoming blocked by débris. They brought an action in nuisance, claiming damages and a mandatory injunction against the occupiers B., who in turn instituted third party proceedings against the county council; and on the trial the county council were joined as second defendants, the allegation against them being that they had in 1926 created a nuisance by the manner in which they had interfered with the stream and by their failure to protect the new entrance with a grid.

The trial judge gave judgment against both defendants, apportioning the liability as to one-fourth against the occupiers and three-fourths against the county council; and he granted a mandatory injunction ordering the occupiers "at all times" to keep the culvert clear and unobstructed. On appeal by both defendants:—

Held, (1) that the county council by what they had done in 1926 and failed to do subsequently had created a potential nuisance and were, accordingly, liable for the failure to provide a grid or grating when the potential became an actual nuisance in 1956 (post, pp. 442, 446).

(2) That the occupiers were also liable for continuing the nuisance created on their land; nor, in the absence of evidence of a contractual obligation on the county council to keep the entrance clear, were they liable to indemnify the occupiers against that liability. Although the council had previously kept the culvert clear, they had power to do so under section 67 of the Highways Act, 1835 [1] (post, p. 443).

(3) That the apportionment of liability by the trial judge should not be disturbed.

(4) That the mandatory injunction granted against the occupiers was too onerous and should be modified to restrain them from allowing the entrance to the culvert to become blocked in such a way as to cause a nuisance to the plaintiffs (post, p. 446).

Greenock Corporation v. *Caledonian Railway Co. Ltd.* [1917] A.C. 556; 33 T.L.R. 531, H.L. followed.

Dicta in *Sedleigh-Denfield* v. *O'Callaghan* [1940] A.C. 880, 895–896, 902, 912–913; 56 T.L.R. 887; [1940] 3 All E.R. 349 considered and applied.

APPEAL from Cassels J.

In 1926 the Devon County Council, as the highway authority, acquired a strip of land on the west side of the existing road from Axminster to Chard and widened the road. That involved extending a culvert which carried a stream under it from land on the same side occupied by small farmers. There had been a causeway over the stream adjacent to the pre-existing road with a

[1] Highways Act, 1835, s. 67: "The said surveyor . . . shall have "power to make, scour, cleanse, and "keep open all ditches, gutters, "drains, or watercourses, . . . as he "shall deem necessary, in and "through any lands or grounds "adjoining or lying near to any high-"way. . . ."

C. A.
1960
Pemberton
v.
Bright.

culvert underneath, and as the widened road encroached on that, the county council extended the culvert 30 ft. and made a new causeway for the occupiers' use so much further to the west. The 30 ft. extension of the culvert consisted of a concrete pipe of 2 ft. diameter or slightly less. It was of a different character from the ancient drain, with a smaller orifice and of a different shape. The old brick culvert had had a flat base of 2 ft. 8 ins. and was arched to a height of 2 ft. with the sides not quite even. The gradient over the new 30 ft. pipe was 1 in 32, and of the adjacent 32 ft. of the old culvert 1 in 24, and the next 8 ft. 1 in 11, showing a more rapid fall on to the land on the east side of the road. Although the addition in 1926 had a reduced superficial area, the circular and smooth piping facilitated the flow of water and the capacity in cubic feet per minute was somewhat greater with the pipe. When the culvert was altered in that way and extended, the entrance was left uncovered and unprotected.

In 1934 a father and son, Henry and Martin Bright, became occupiers of the land—Coaxdon Farm—on the west side of the widened road on which the new entrance to the culvert was situated.

In 1953 the plaintiffs in the present proceedings, Colonel John Boileau Pemberton and his wife, Alice Barbara Pemberton, became the owners and occupiers of a house and lands, Coaxdon Hall, Chardstock, Devon, situated on the east side of the widened road opposite the land occupied by the Brights. Their property was at a dip in the road and the house was below the road level, being about the lowest point of a catchment area of some 90 acres.

The stream, the subject of the county council's alterations in 1926, ran eastward from the Brights' fields in a steep gulley or goyle, passed under the road through the ancient brick culvert as altered, and then travelled along the northern side of Coaxdon Hall along a stretch described as "the easement" and then on through fields to join the River Axe.

Over Christmas, 1956, the rainfall had been heavy and persistent, and was followed on the night of December 27/28 by even heavier rains, which, though unusual, were not such that they could not have been reasonably anticipated. On the early morning of December 28, the plaintiffs' house was found to be flooded in the hall at the front of the house facing west, in the drawing-room on the south side, and in the garage, where the water reached a height of some 2 ft. 2 ins. The drive from the main entrance on the Chard Road had been scoured out and even cobblestones in it had been removed. The damage had been done, as the trial judge found, by water diverted from the stream from the Brights' land, owing to the fact that the stream had been unable to make its way through the culvert because the entrance was blocked with tree branches, leaves, mud and débris, which had collected at the mouth to such an extent that very little water passed through it, but the water collected and built up until it passed round the sides, over the top of the retaining wall, and

over the road and down the plaintiffs' drive, with the full force of the stream pushing it on.

The plaintiffs brought proceedings against the Brights as occupiers of the land on which the entrance to the culvert was situated. They alleged, inter alia, that by reason of the absence of a grid or grating to protect the entrance to the culvert the entrance was liable to become blocked during or after heavy rain by débris washed down by the stream and to cause flooding of surrounding land; that the Brights knew or ought to have known that that was liable to happen; and that the culvert with its unprotected entrance constituted a nuisance. They claimed (a) a mandatory injunction ordering them to prevent the pipe from becoming blocked and to keep it clear and unobstructed, and (b) damages for nuisance.

The Brights denied liability and that the unprotected entrance constituted a nuisance or that they were responsible for it. They claimed further that if a nuisance existed, it had been created by the Devon County Council which was responsible therefor; and they joined the county council in third party proceedings. The county council were later joined in the plaintiffs' action as second defendants. It was alleged that they had constructed the culvert in 1926 and had repaired and maintained it from time to time thereafter; and that the nuisance created by them had been continued by the Brights or by the county council thereafter. Both the plaintiffs and the Brights alleged against the county council that the work done in 1926 had been improperly done in that no grid had been placed to prevent blocking of the entrance.

The county council by their defence admitted that as the highway authority they had in connection with the widening of the road entered on the land later occupied by the Brights and had extended the culvert, but denied that they had any responsibility for the pipe or its entrance or for the repair, maintenance or alteration thereof. They alleged that before its extension the culvert had never been protected by a grid, and denied that the pipe and the uncovered entrance to it constituted a nuisance to the plaintiffs or that they had created or continued the alleged nuisance, or that the pipe had become blocked in December, 1956, or that by reason thereof the water had collected and burst out from the Brights' land to invade the plaintiffs' premises.

On the trial of the action before Cassels J. at the Devon Winter Assizes on February 12, 1959, the pleaded defence of both defendants that the heavy rainfall of December, 1956, was an act of God, was not pursued. Evidence was given that protecting grids were not normal in that part of the country; and one Alner, formerly a servant of the county council as a roadman or lengthman for the material area, gave evidence that until his retirement in 1954 he had often cleared the mouth of the culvert, since water would otherwise have come round over the culvert on to the main road; and he stated that he had looked at that culvert more often than at other culverts along the road because the water used to

C. A.
1960
Pemberton
v.
Bright.

come down very rapidly at that point; and that he had looked to see if any rubbish came down the gully which would stop the mouth of the culvert. There was no clear evidence as to what was done after his retirement.

The special damages suffered by the plaintiffs were agreed at £681 15s. 2d. Cassels J., having found that the reason for the flooding of the plaintiffs' premises was the build-up of water by reason of the blockage of the entrance to the culvert, held that that was a nuisance. He said: "It was a nuisance for the county "council to have created such a state of affairs; they were inter-"fering with the course of the water; they were pushing it into a "pipe. And they made no provision for keeping it clear other than "getting one roadman occasionally to go and see it was not "blocked. They never adopted the plan of having a grid. And "they made a situation—not under the highway but under the "causeway which is not part of the highway—which, when there "came this abnormal downfall of rain, it was quite incapable of "receiving." He gave judgment for the plaintiffs against both defendants; against the first defendants as the occupiers of the land on which the nuisance existed, and against the second defendants as the persons who created the nuisance. He awarded a total of £1,000 to the plaintiffs, and apportioned that as to £250 against the Brights and as to £750 against the county council. His Lordship also granted the mandatory injunction asked for against the Brights in the following terms: "That the defendants "Henry Bright and Martin John Henry Bright by themselves "their agents or servants or otherwise be restrained from allowing "or permitting the pipe which carries a stream under land "occupied by these defendants . . . from becoming blocked by "dirt and/or débris or from becoming otherwise obstructed and "that they be ordered to keep the same at all times clear and "unobstructed."

The defendants appealed against the judgment in favour of the plaintiffs, and also against the apportionment of liability as between themselves.

G. D. Squibb Q.C. and *Thomas Dewar* for the county council.

N. R. Fox-Andrews Q.C. and *J. F. E. Stephenson* for the occupiers.

J. T. Molony Q.C. and *H. E. L. McCreery* for the plaintiffs.

Thompson v. *Gibson*[2] was referred to in addition to the cases cited in the judgments.

Sellers L.J. stated the facts set out above, and continued:

When the culvert was altered and extended in 1926, the entrance was left uncovered and unprotected, and it was alleged by both the plaintiffs and the first defendants that the work was consequently incomplete and improperly done as no grid had been

[2] (1841) 7 M. & W. 456.

placed at a reasonable distance, perhaps eight yards, to prevent anything which might be washed down, particularly at times of heavy rain or storm, from blocking the entrance to the culvert and so holding up and diverting the stream. There was evidence that a grid was not usual in that part of the country, or with the culvert as large as 2 ft. in diameter and was not necessary, but the judge preferred the evidence that a grid should have been provided, and I see no reason to take a different view.

When interference with the stream took place in 1926, reasonable foresight should have foreseen that blocking of the culvert might divert the stream on to the plaintiffs' premises. They were so situated that heavy rain was always a potential danger unless properly controlled, and this at least was a place where a grid would have stopped, or would probably have stopped, débris getting past it. If it had become blocked and had created a dam there, the water would probably have found its way into the culvert some eight yards further on, and would not have been diverted across the road on to the plaintiffs' property.

Lord Finlay stated the broad principle of law in the well-known case of *Greenock Corporation* v. *Caledonian Railway Co. Ltd.*,[1] where he said: "It is the duty of anyone who interferes with the "course of a stream to see that the works which he substitutes "for the channel provided by nature are adequate to carry off the "water brought down even by extraordinary rainfall, and if "damage results from the deficiency of the substitute which he "has provided for the natural channel he will be liable." The deficiency here was, it was alleged, the unprotected entrance.

In *Sedleigh-Denfield* v. *O'Callaghan*,[2] it appears that the appropriate county council—there the Middlesex County Council—had placed a pipe or a culvert in a natural ditch which ultimately gave rise to trouble. In that case the Middlesex County Council were not before the court, and the action was against the occupiers. In the recital of the circumstances which gave rise to the case, it appears that the county council made the culvert and covered the top of it with earth.[3] "To prevent the possibility of "wood or leaves blocking the opening of the fifteen-inch pipe, it "would have been proper practice to fix a grid or grating in the "ditch a little way from the opening of the pipe, inasmuch as "there were trees in the hedge, and sticks and leaves would be "apt to fall into the ditch. The county council recognised the "necessity for a grating, and provided one, but their workmen, "instead of fixing it in the ditch a foot or two from the opening "of the pipe or culvert, where it would intercept leaves and other "refuse, placed it on the top of the culvert, where it was useless. "The mouth of the culvert was on the respondents' land." Lord Atkin said[4]: "I agree with the finding of the learned judge,

[1] [1917] A.C. 556, 572; 33 T.L.R. 531.
[2] [1940] A.C. 880; 56 T.L.R. 887; [1940] 3 All E.R. 349 (H.L.).
[3] [1940] A.C. 880, 881.
[4] Ibid. 895–896.

C. A.
1960
Pemberton v. Bright.
Sellers L.J.

"accepted by the Court of Appeal, that the laying of a 15-inch "pipe with an unprotected orifice was in the circumstances the "creation of a nuisance or of that which would be likely to result "in a nuisance. It created a state of things from which when "the ditch was flowing in full stream an obstruction might "reasonably be expected in the pipe, from which obstruction "flooding of the plaintiff's ground might reasonably by expected "to result. . . . It is probably strictly correct to say that as "long as the offending condition is confined to the defendant's "own land without causing damage it is not a nuisance, though "it may threaten to become a nuisance. But where damage has "accrued the nuisance has been caused." Lord Wright put the matter this way[5]: "The interposition of the pipe as the means "of carrying the water from the ditch in place of the former open "watercourse was not in itself objectionable. The trouble was "that no protecting grid was put in place, and there was nothing "to prevent the pipe getting choked. There was thus the risk "of a flood, which might spread, as in fact happened, to the "appellant's premises, causing damage which in the actual result "was considerable. The structure of the orifice of the pipe was "on the respondents' land. If the work had been done by or on "behalf of the respondents, the conditions requisite to constitute "a cause of action for damages for a private nuisance, would be "beyond question complete." I make one other citation from the speech of Lord Romer[6]: "When the Middlesex County "Council constructed the culvert without a proper grid to prevent "its getting blocked they created a potential nuisance; that is to "say they did something that in the future might and did in fact "seriously damage the appellant as the occupier of No. 1, Victoria "Road. The respondents"—the respondents being the occupiers "did not themselves create this potential nuisance, and cannot "therefore be held liable for its creation. But an occupier of land "upon which a nuisance has been created by another person is "liable if he 'continues' the nuisance."

I would hold, as did the judge, that in 1926 the Devon County Council created a potential nuisance which became an actual and actionable nuisance when, by reason of the entrance to the culvert being negligently left unprotected, it became blocked so that it dammed the water flowing in the stream and diverted it on to the plaintiffs' land.

Up to his retirement in 1954, a Mr. Alner, a roadman or lengthman for this area, employed by the county council, had cleared the mouth of the culvert very often, otherwise, as he said, the water would have come round over the culvert on to the main road. One question he was asked was: "Did you treat this "culvert in any different way to other culverts along the road?", to which he answered: "I used to look at it more often because "the water used to come down very fast because it is more steep

[5] [1940] A.C. 880, 902. [6] Ibid. 912-913.

"there; I looked to see if any rubbish came down the gully "which would stop on the mouth of the culvert." There is no reason to think that after Mr. Alner's retirement similar clearing was not done by his successor, although the county council seem to have been somewhat inexplicably reticent about what was in fact done.

The advantage of a grid, as I see it, is that in a sudden heavy rainstorm with consequential onset of débris towards the culvert it would prevent the culvert becoming blocked and probably would have successfully met the situation which occurred on the night of December 27/28. This blockage was not shown to have been due to a failure to inspect and clean out the culvert regularly and as a matter of routine—that may well have been done—but it came about because there was nothing to stop the débris blocking the culvert's entrance if it collected suddenly and during the night as it seems to have done here.

On the facts found by the judge, which, in my view, the evidence fully justified, the first defendants were clearly liable for the damage caused as the occupiers of the land on which the nuisance existed, and, as the Devon County Council created the trouble by their failure to complete the culvert properly with a protection, they also are liable.

The work in 1926 was necessitated by the road widening and, no doubt, was done with the agreement of the then owners who would have relied on the county council to do it properly. Mr. Squibb contended that the work was done by the county council merely as contractors for the occupiers and no more. It was probably done in lieu of compensation, but I cannot think it makes any difference to their liability.

We were asked by Mr. Fox-Andrews for the first defendants to find that there was an agreement continuing from the date of the new culvert that the county council would not only construct the culvert but would thereafter maintain it, and therefore the county council were liable to indemnify the first defendants against their liability in this case. Certainly from 1926 up to 1954 the county council did in fact do the necessary work to keep the entrance clear and, if the facts were known, it may be there was an arrangement of some kind. But the county council had powers under section 67 of the Highway Act, 1835, to do what they did, and I do not find sufficient evidence to support any contractual obligation with the first defendants or their predecessors. In any case I doubt if any ordinary or reasonable attention to the culvert entrance would have prevented this flooding in the absence of a grid. A grid would form an emergency barrier.

This is a case where the same damage has been caused by two sets of wrongdoers and it is, perhaps, not an easy case in which to decide what is a just and equitable apportionment between them having regard to the extent of their respective responsibility. The first defendants could, if they had wished, have provided a grid, but from the time they came into occupation

C. A.
1960
Pemberton
v.
Bright.
Sellers L.J.

in 1934 they had seen the county council in charge, as it were. They were small farmers accepting things as they found them. The county council, on the other hand, had failed to put the grid in at the outset or to make amends by putting one in later, which they could in fact have done by the authority of section 67, if not by negotiation with the occupiers.

The county council submitted that all the burden lay on the occupiers who should have kept the culvert clear, and that there was no room for any contribution. We were urged on behalf of the first defendants, on the other hand, to vary the order to 100 per cent. contribution against the Devon County Council. I find the relevant factors hard to assess in a case such as this, and I am not prepared to alter the judge's decision on apportionment, especially as this court does not readily interfere in such a matter.

In considering this case I have regarded the plaintiffs' complaints that the pipe laid in 1926 was not the right size, and that the defendants, or one of them, had increased the quantity of water brought on to the plaintiffs' land as no longer in issue or as unsustainable. Also I have disregarded the evidence of some flooding of the plaintiffs' premises in 1957, and of the capacity of the plaintiffs' easement, which was itself at least in part artificial, containing, as it did, some small culverts. As the damages were agreed in the event of liability, and no attempt was made at the trial to limit them, the conditions of flooding which might have arisen if the culvert had not been blocked on the night of December 27/28 do not call for consideration.

I would dismiss the appeals of both the defendants, subject to the modification of the injunction against the first defendants in the way to be indicated by Upjohn L.J.

Ormerod L.J. I agree. There is no doubt that the plaintiffs' premises were flooded on the night in question and damage was done to them. A substantial part of that damage was done to the drive, which was badly scored by reason of the volume of water which flooded down it. It was not seriously disputed that the water in the main came from the goyle in the first defendants' land. On the morning following the flood the culvert was blocked so that little or no water passed through it, and the water in the goyle was still high enough to trickle on to the road. It was common ground that when the road was widened in 1926 the culvert was extended by the county council not only to the new width of the road but for some feet on to the land now occupied by the first defendants, and a causeway was constructed over the culvert on the first defendants' land so that they and their cattle could pass from one field to the other. Mr. Squibb, on behalf of the county council, argued that in these circumstances there was no liability on the second defendants to keep the mouth of the culvert clear. His submission was that the work of extending the culvert on to the first defendants' land was "accom-"modation" work done by the county council, presumably in

pursuance of an agreement with the then owners or occupiers of the land, and they were in no different position from the position in which a firm of private builders would be who agreed to build the culvert in those circumstances. That may well be so, but it leaves the question as to whether the county council discharged their obligations sufficiently at the time when they constructed the culvert. The submission was that the culvert was properly constructed at the time in 1926 and thereby the responsibility of the county council was at an end. It was suggested in the course of the argument that as the culvert put in by the county council was circular it was of a less dimension than the original culvert, and that although the evidence was that it would take an equal or greater flow of water than the original culvert because of the reduced friction in the pipe, there was a greater danger of the orifice being blocked because of its smaller area. This argument, however, does not seem to carry the case much further, and the consensus of evidence appeared to be that, so far as the culvert itself was concerned, it was, both in its dimensions and construction, in accordance with sound engineering practice. But it was submitted as against the county council that the county council at the time of constructing the culvert should also have constructed a grid and placed it about eight yards upstream of the mouth of the orifice. There was a conflict of evidence amongst the experts as to the necessity for this provision, but the judge, who had an opportunity of seeing the witnesses and considering the value of their evidence, appears to have come to the conclusion that such a provision should have been made. I say "appears" because it has been argued that there was not a precise finding in the judge's judgment to that effect. I think, however, that it is clear that that was the conclusion to which he came. He said: "Now it was said on behalf of the plaintiffs that "one of the things that ought to have been done was to have a "grid. Mr. Patrick, who was the expert called on behalf of the "plaintiffs, said that a grid was essential; he thought it ought to "have been about five feet high. He said that was necessary "because of the danger in such country as this of large trunks of "trees getting wedged and causing something in the nature of a "dam. His view was that a grid was important and he would "put it, as I say, five feet high, and about eight yards back from "the pipe. The surveyors called on behalf of the first defendants "and the second defendants have disagreed with Mr. Patrick. "One of the reasons given was that they do not use grids in the "county of Devon; another reason was that they do not think that "a grid would have made any difference." The judge then went on: "This court cannot help coming to the conclusion that a grid "at that spot might well have served at least one useful purpose, "and that is, it would have made it easier to clean upstream, and "if any trunks of trees had been lodged against the grid they "could have been pulled out more easily, instead of letting them

C. A.
1960
Pemberton v. Bright.
Ormerod L.J.

"flow on until they come down to the mouth of the pipe." Later he said: "I hold that this was a nuisance. It was a "nuisance for the second defendants to have created such a state "of affairs; they were interfering with the course of the water— "they were pushing it into a pipe. And they made no provision "for keeping it clear other than getting one roadman occasionally "to go and see it was not blocked. They never adopted the plan "of having a grid." I see no reason for disturbing this finding of the judge.

It was argued that even if a grid had been constructed by the county council it would have to be kept clear, presumably by the occupier, and that, if it were not, there would still be as great a danger of blockage as if it were not there. I think the real value of the grid, provided, of course, that the occupier performs his task and keeps it clear, is to catch material coming downstream during the actual flood which might otherwise block the culvert. An occupier cannot, of course, be certain that the culvert will be kept clear. But if there is a grid properly sited it seems to be common sense that the likelihood of the culvert being blocked during a flood will be substantially reduced. In my judgment, on the findings of the judge the county council were at fault in not providing a grid, and the absence of the grid was to some extent at least responsible for the blockage of the culvert and the consequent flooding of that night.

It has been argued on behalf of the first defendants that they should not be held responsible for their failure as occupiers to keep the goyle clear as this work was from time to time done by the workmen of the county council, although there appeared to be no evidence that it was done by them after Mr. Alner left some two or three years before the flood. It was, however, the responsibility of the occupiers, and, although the apportioning of blame in a matter of this kind, as my Lord has said, is difficult because of the various factors that have to be taken into consideration, I would not for my part disturb the apportionment which has been made by the judge.

I agree that the appeal should be dismissed subject to the variation in the form of the injunction with which Upjohn L.J. will deal.

Upjohn L.J. I agree, and I do not think I can usefully add anything. Subject to any comments that counsel may care to make, the injunction will be in this form: "An injunction "restraining the defendants Henry Bright and Martin John Henry "Bright from allowing the entrance to the culvert mentioned in "the pleadings from becoming blocked by stones, mud, branches, "leaves or other débris so as to cause water in the goyle to flow "over the road immediately to the east thereof and thence over

"the plaintiffs' land and premises in such manner as to cause a "nuisance to the plaintiffs."

C. A.
1960
PEMBERTON v. BRIGHT.

Appeal of first defendants dismissed with costs.
Appeal of second defendants dismissed with costs.
Injunction modified as above.

Solicitors: *Sharpe, Pritchard & Co. for H. G. Godsall, Clerk to Devon County Council; Keene, Marsland & Co. for McLusky & Braddell, Exeter; Arnold Carter & Co. for Dunn & Baker, Exeter.*

M. M. H.

[COURT OF APPEAL.]

* MASCHERPA *v.* DIRECT LTD.

[1959 M. 603.]

C. A.
1960
March 18, 21.
Hodson, Willmer and Devlin L.JJ.

Practice—Discovery—Privilege—Forfeiture of lease, action for—Counterclaim for relief against forfeiture—Whether exclusion of discovery on forfeiture claim extended to counterclaim—Law of Property Act, 1925 (15 *&* 16 *Geo.* 5, *c.* 20), *s.* 146 (2).

The rule that an order for the discovery of documents will not be made in an action for the forfeiture of a lease does not extend to a counterclaim thereto under section 146 (2) [1] of the Law of Property Act, 1925, for relief against forfeiture, since a separate issue is raised by the counterclaim on which questions other than those relating to forfeiture may arise.

A defendant to an action for possession of certain premises for breach of covenant contained in the lease counterclaimed for relief under section 146 (2) of the Act of 1925. An order was made on him for discovery of documents "excluding . . . those documents relating "to the issue of forfeiture":—

Held, that the order was good in law, as the form of the order enabled the two issues—that of forfeiture and of relief against forfeiture—to be kept separate.

Earl of Mexborough v. *Whitwood Urban District Council* [1897] 2 Q.B. 111; 13 T.L.R. 443, C.A. considered.

APPEALS from an official referee.

The plaintiff, Livio Onorino Mascherpa, by this action against the defendants, Direct Ltd., sought possession of certain property

[1] Law of Property Act, 1925, s. 146 (2): "Where a lessor is proceeding, by action or otherwise, to enforce such a right of re-entry or forfeiture, the lessee may, in the lessor's action, if any, or in any action brought by himself, apply to the court for relief; and the court may grant or refuse relief, as the court, having regard to the proceedings and conduct of the parties under the foregoing provisions of this section, and to all the other circumstances, thinks fit; and in case of relief may grant it on such terms . . . as the court . . . thinks fit."

C. A.
1960
Mascherpa
v.
Direct Ltd.

on the ground of breach of covenant in the lease thereof. By an order made by consent the action was transferred to an official referee.

By an order of the Official Referee (Sir Brett Cloutman Q.C.), dated January 12, 1960, it was ordered that: "The plaintiff re-"deliver to the defendant within seven days the schedule of "dilapidations referred to in the statement of claim" and "with-"in ten days file an affidavit of documents and that the "defendant within ten days file an affidavit of documents exclud-"ing in the case of the defendant those documents relating to the "issue of forfeiture." That order was not appealed against at the time. On February 23, 1960, a second order consequential on the first was made, by which it was ordered that unless "the defen-"dant pays into court the sum of £250, and files an affidavit of "documents, both within seven days, the defendant's defence and "counterclaim herein be struck out and the defendant placed in "the same position as if he had not defended and the plaintiff to "be at liberty to sign judgment for damages to be assessed and "his costs of this action including the costs of this application "to be taxed the defendant having failed to comply with an order "of His Honour Sir Brett Cloutman . . . dated January 12, 1960, "for discovery of documents."

The defendants appealed from those orders.

David Weitzman Q.C. and *Peter Weitzman* for the defendants.
Norman Tapp for the plaintiff.

All the cases cited in argument are referred to in the judgment.

Hodson L.J. stated the facts and continued: The action being an action for the possession of land, based upon a forfeiture, and the plaintiff's case being that the defendants had failed to comply with their covenant to repair, the defendants take the point that no order for discovery can be made. So far as the first order is concerned they were out of time on appealing. They obtained the consent of the plaintiff according to a direction (*Practice Direction* [1]) given by this court and their time was thereby extended. This has a curious effect in this case, because the order of January 12, 1960, had not been appealed from, and the order of February 23, 1960, was consequential upon non-compliance with the first order: on the face of it the official referee was not wrong in law, and no appeal therefore lies to the court from the second order. But the question whether appeal can be made from that order is merely of academic importance because it depends in any event on the first order, and, in my judgment, the first order was right, as to discovery, and the defendants are wrong in seeking to say that they are not open to any order for discovery at all.

It should be stated that what has happened here (as happens in many cases where an application for possession is made, based

[1] [1958] 1 W.L.R. 761; [1958] 2 All E.R. 493.

upon forfeiture) is that the defendants have, in the same action, by way of counterclaim, asked for relief against forfeiture, relying upon the provisions which are now contained in section 146 (2) of the Law of Property Act, 1925. [His Lordship read section 146 (2) of the Law of Property Act, 1925.]

It is clear from the language of that section that many other issues may be raised on the defendants' claim for relief against forfeiture apart altogether from the issue or issues upon which the forfeiture itself depends. To complete the matter, I should say that that right to claim relief against forfeiture was first introduced by the Conveyancing Act, 1881. Before that the position appears to have been that, except in the case of non-payment of rent and certain other rare cases, no relief against forfeiture could be given until that Act came into force.

The contention of the defendants here is that this is a case where the only matter in issue is forfeiture, and they argue that if that is not precisely correct, the position is that since they are claiming relief against forfeiture, their claim for relief is so closely allied to the plaintiff's claim for possession based on forfeiture that the protection which the law gives them on the forfeiture matter should cover them as to the counterclaim. They rely on what was said by this court in *Earl of Mexborough* v. *Whitwood Urban District Council.*[2] I draw attention to the date of that case because, of course, it was after 1881, when the Conveyancing Act, 1881, came into force; and, indeed, Mr. Weitzman, on behalf of the defendants, has relied upon that matter as showing the attitude of the court towards discovery notwithstanding the enlarged right to relief which the statute has given.

In that case, the headnote reads[3]: "In an action to enforce "a forfeiture of a lease for breach of covenant the court will not "grant discovery of documents or leave to administer interroga-"tories for the purpose of establishing the forfeiture." No other issue was raised in the action but the question whether or not there had been a forfeiture for breach of covenant; and there was no claim for relief against forfeiture. The rule was stated by Lord Esher M.R. in this way[4]: " . . . there are two rules of law "which have always existed as part of the common law of "England, and have been recognised as such by all courts "whether of law or equity, and the rights conferred by them have "never been taken away by any statute. The first is that, where "a common informer sues for a penalty, the courts will not assist "him by their procedure in any way; and I think a similar rule "has been laid down, and acted upon from the earliest times, "in respect of actions brought to enforce a forfeiture of an "estate in land. These are no doubt rules of procedure, but they "are much more than that: they are rules made for the protec-"tion of people in respect of their property, and against common "informers."

[2] [1897] 2 Q.B. 111; 13 T.L.R. 443, C.A.

[3] [1897] 2 Q.B. 111.

[4] Ibid. 114, 115.

C. A.
1960
Mascherpa v. Direct Ltd.
Hodson L.J.

Lord Esher, quoting from a judgment of Alexander C.B. in *Orme* v. *Crockford*,[5] said[6]: "'We must not lose sight of the fact "'that it is a most important right of which this bill seeks to "'deprive the defendant, no less than that of protecting himself "'by refusing to answer from the consequences of answering "'questions which might tend to charge him with a crime or "'subject him to penalties, or forfeiture of estate contrary to the "'humane policy of the law.'" Later he said[7]: "I do not "think the House of Lords [*Ind, Coope & Co.* v. *Emmerson*[8]] "meant to decide that the Judicature Act had done away with "these two fundamental rules of law for the protection of people "in respect of their title to property and against common "informers. There appears to me to be ample authority for "saying that an action for forfeiture stands for the present pur-"pose on the same footing as an action for penalties. I think the "proper enunciation of the law on the subject is that, where in "any action an issue is raised solely for the purpose of obtaining "judgment for a forfeiture of land, the court will not with regard "to that issue make any order either for the discovery of docu-"ments or for the administration of interrogatories. There may "be an action where that is one of the issues and there are other "independent issues, and the court may with regard to those "other issues make an order for discovery of documents and inter-"rogatories, but on the issue relating to forfeiture I think the "court will not make such an order. When, as in the present "case, the sole issue raised is whether there has been a for-"feiture, I think no order can be made in favour of the plaintiff "either for discovery of documents or for the administration of "interrogatories."

I have read enough to show that the way in which Lord Esher, and, indeed, the other members of the court, approached the matter was that they were desirous of laying down the continued existence of the rule which protected people in respect of their title to property; and it was emphasised in the last sentence which I read that the only issue raised was whether there had been a forfeiture.

That case has been followed recently in two cases, the first of them being *Seddon* v. *Commercial Salt Co. Ltd.*,[9] and I need only read one sentence from the judgment of Warrington L.J.[10]: "There is a very well-known rule that where in any action an "issue is raised solely for the purpose of obtaining judgment for "the forfeiture of land, the court will not with regard to that "issue make any order either for the discovery of documents or "for the administration of interrogatories."

The only other case I need mention to which we have been referred is *Colne Valley Water Co.* v. *Watford and St. Albans Gas*

[5] (1824) 13 Price 376.
[6] [1897] 2 Q.B. 116.
[7] Ibid. 117.
[8] (1887) 12 App.Cas. 300, H.L.
[9] [1925] Ch. 187, C.A.
[10] Ibid. 194.

Co.,[11] which was also a decision of the Court of Appeal. That was an action for penalties; there was also a claim for damages and an injunction; and the question which is connected with this question was whether in such an action discovery could be obtained without infringing the rule which I have stated. On the facts of that case Tucker L.J. put the matter in this way[12]: "That part of the claim being one for penalties, it becomes "necessary to consider whether in this particular case, in the "exercise of his discretion, the judge should, or could, have made "an order for discovery limited to those issues in the action which "are not concerned with the claim for penalties. I agree that in "this particular action it would be impossible to frame an order "so limited, and, therefore, that this was not a case where the "judge could be called upon to exercise the discretion which he "would otherwise have had in circumstances similar to the "present." Lord Goddard C.J. had said[13]: "It is clear that, "although three different remedies are sought, there is really only "one issue, namely, whether or not the gas company have fouled "the water supply of the water company."

In this case, in my opinion, there is more than one issue, and for that reason the order of the official referee was right. The pleadings upon the question whether relief should be granted contained a number of matters, quite apart from the question raised as to the want of repair of the premises, the contention of the landlord being, broadly speaking, that the defendants are not financially sound and able to shoulder the obligations of the lease; and it is in respect of that aspect of the matter that discovery is by them primarily sought. I think that the official referee has by the form of his order enabled the two matters to be kept separate. It is conceded by the landlord, the plaintiff in the action, so far as his claim to mesne profits is concerned, that that may be subject to the same objection as the claim for damage was in the *Colne Valley* case,[14] and he does not seek discovery upon that. But so far as the other matters are concerned, the question of the breach of covenant to repair can be kept quite separate from the matters arising from the counterclaim of the defendants.

In my judgment, the order of the official referee (and I am dealing with the first order, that of January 12, 1960) was good in law; the defendants' objection to that order fails; and the appeal should be dismissed.

WILLMER L.J. I agree so fully with what my Lord has said that I should be merely wasting time if I were to repeat the reasons for dismissing the appeal.

[11] [1948] 1 K.B. 500; 64 T.L.R. 44; [1948] 1 All E.R. 104, C.A.
[12] [1948] 1 K.B. 507.
[13] Ibid. 505.
[14] [1948] 1 K.B. 500.

C. A.
1960
Mascherpa v. Direct Ltd.

Devlin L.J. I also agree.

Appeal dismissed with costs.

Solicitors: *Gale & Phelps; Gordon Dadds & Co.*

I. G. R. M.

[CHANCERY DIVISION.]

1959
Oct. 15.
Danckwerts J.

*LEWIS *v.* PACKER.

Practice and Procedure—Originating summons—Moneylender—Application by originating summons for payment of moneys secured—Whether summons should contain facts to be contained in statement of claim—R.S.C., Ords. 3, *r.* 10; 20, *r.* 10; 55, *r.* 5A.

Moneylender—Action for recovery of money—Originating summons—Form—R.S.C., Ords. 3, *r.* 10; 20, *r.* 10; 55, *r.* 5A.

By two legal charges dated respectively March 25, 1955, and April 19, 1955, the defendant charged property by way of legal mortgage with payment to the plaintiff, a licensed moneylender, of moneys due under two promissory notes. In January, 1958, the property was sold by prior mortgagees but the proceeds of sale were insufficient to pay the amount due to them. The plaintiff applied by originating summons dated February 6, 1957, under R.S.C., Ord. 55, r. 5A,[1] for payment of the moneys secured. On an objection by the defendant that the summons did not contain the statements of fact which a statement of claim should contain in order to comply with Order 20, r. 10, and Order 3, r. 10[2]:—

Held, that although proceedings commenced by originating summons were an action, neither the summons nor the affidavit in

[1] R.S.C., Ord. 55, r. 5A: "Any mortgagee or mortgagor, whether legal or equitable or any person entitled to or having property subject to a legal or equitable charge . . . may take out as of course an originating summons . . . for such relief of the nature or kind following as may by the summons be specified, and as the circumstances of the case may require; that is to say,—Payment of moneys secured by the mortgage or charge . . ."

[2] Ord. 20, r. 10: "In actions by a moneylender or an assignee for the recovery of money lent by the moneylender or the enforcement of any agreement or security relating to any such money, the statement of claim shall state, in addition to any other particulars, the particulars referred to in paragraphs (*a*) to (*j*) inclusive in rule 10 of Order 3."

Ord. 3, r. 10: "Where an action for the recovery of money lent by a moneylender or for the enforcement of any agreement or security relating to any such money is brought by the lender or an assignee, the indorsement on the writ shall state, in addition to any other particulars, the fact that at the time of making the loan or contract the plaintiff or (in an action by an assignee) the original assignor was a licensed moneylender, and if the writ be specially indorsed under rule 6 of this Order, shall also state—(*a*) the date on which the loan was made; (*b*) the amount actually lent to the borrower; (*c*) the rate per cent. per annum of interest charged; (*d*) the date when the contract for repayment was made; (*e*) the fact that a note or memorandum of the contract was made, and signed by the borrower; (*f*) the date when a copy of the note or memorandum was delivered or sent to the borrower; (*g*) the amount repaid; (*h*) the amount due but unpaid; (*i*) the date upon which such unpaid sum or sums became due; (*j*) the amount of interest accrued due and unpaid on every such sum."

support of it was a statement of claim, so that Order 20, r. 10, did not apply, and compliance with the practice under Order 55, r. 5A, was sufficient; accordingly, the defendant's objection failed.

ADJOURNED SUMMONS.

By two legal charges dated respectively March 25, 1955, and April 19, 1955, made between the plaintiff, Harry Lewis, a licensed moneylender, and the defendant, Reginald Howard Packer, each charge reciting that the plaintiff had advanced £100 to the defendant on a promissory note of even date bearing interest at 48 per cent. per annum, the defendant charged No. 18, Sandilands Road, Baguley, Manchester, by way of legal mortgage with payment to the plaintiff of all sums payable on the promissory notes. In or about January, 1958, the property was sold by prior mortgagees. The proceeds of sale were insufficient to pay the amount due to the prior mortgagees.

The plaintiff applied by originating summons dated February 6, 1957, to recover from the defendant £409 18s. 6d. (£200 principal and £209 18s. 6d. interest), and further interest at the same rate from that date until judgment.

The defendant took the preliminary objection that, since the legal charges were part of moneylending transactions, the summons should have contained the statements of fact which a statement of claim in an action by a moneylender commenced by writ should contain in order to comply with R.S.C., Ord. 20, r. 10, and Ord. 3, r. 10. The affidavit evidence in support of the summons complied with R.S.C., Ord. 55, r. 5A, and the plaintiff's affidavit in reply contained those particulars required by R.S.C., Ord. 20, r. 10, and Ord. 3, r. 10. The plaintiff abandoned the excess of his claim over £400 and did not ask for costs prior to the filing of his affidavit in reply. The application was adjourned into court from the District Registrar at Manchester.

E. W. H. Christie for the plaintiff.
The defendant appeared in person.

DANCKWERTS J. The objection taken by the defendant has common sense to recommend it, and it may be that the rules should be changed, but the objection fails because, although proceedings commenced by originating summons are an action, the originating summons is not a statement of claim, and R.S.C., Ord. 20, r. 10, does not apply to it. It has sometimes been said that the affidavit in support of an originating summons is equivalent to a statement of claim, but it is not in fact a statement of claim, and compliance with the requirements of proof under R.S.C., Ord. 55, r. 5A, is sufficient for an originating summons brought under that rule.

Judgment for the plaintiff.

Solicitors: *L. A. Lewis & Co., Manchester.*

M. G. T.

[MANCHESTER ASSIZES.]

1959
Dec. 11, 18.

Jones J.

* AKERIB *v.* BOOTH & OTHERS LTD.

[1958 A. No. 4752.]

Contract—Exceptions clause—Negligence—Tenancy agreement—Landlord not "in any circumstances" responsible for damage caused by water—Damage to tenant's goods by water escaping from cistern in water closet retained in landlord's possession—Landlord's liability for negligence.

By a written agreement dated December 1, 1954, the defendants let to the plaintiff certain offices and warerooms in their premises, retaining possession of a water closet on a higher floor. Water escaped from a cistern in this water closet by the admitted negligence of the defendants or their servants, and did damage to the plaintiff's goods. The defendants relied upon a clause in the tenancy agreement: "The landlord shall not in any circumstances "be liable for damage caused by . . . water . . . to any goods "whether in the possession of the landlord or not." Goods were defined elsewhere in the agreement as including "the tenant's "goods," which in turn were defined as including all goods bought by or belonging to the tenant, or in which the tenant may be interested, or which may come under his control in connection with the business of the tenant as carried on upon the premises:—

Held, that the words "in any circumstances" were wide enough to protect the defendants from liability for their admitted negligence.

Joseph Travers & Sons Ltd. v. *Cooper* [1915] 1 K.B. 73; *Alderslade* v. *Hendon Laundry Ltd.* [1945] K.B. 189; [1945] 1 All E.R. 244; and *A. E. Farr Ltd.* v. *Admiralty* [1953] 1 W.L.R. 965; [1953] 2 All E.R. 512 applied.

Action.

By a written agreement dated December 1, 1954, the defendants, Booth and Others Ltd., agreed to let to the plaintiff, Jack Akerib, part of their premises at 21, Chorlton Street, Manchester. The premises consisted of four offices and a wareroom on the third floor, and a further wareroom on the second floor. The defendants retained in their possession a water closet on the fourth floor. In addition to the tenancy obligations the agreement contained terms whereby the packing of all the plaintiff's goods was to be carried out exclusively by the defendants, and also certain exemption clauses. The clause relied on by the defendants was contained in the schedule to the agreement, and was in the following terms: "2. The landlord shall not in any circumstances "be responsible for damage caused by fire water (including "sprinkler leakage and damp) . . . to any goods whether in the "possession of the landlord or not." The word "goods," where used in the schedule, was expressed to include "the tenant's "goods" as defined in the agreement. By the terms of the agreement this expression was to include "all goods bought by

[Reported by Donald Hart, Esq., Barrister-at-Law.]

"or belonging to the tenant or in which the tenant may be "interested or which may come under his control in connection "with the business of the tenant." Between April 3 and 5, 1958, there was an escape of water from the cistern in the water closet, alleged by the plaintiff to be due to the defendants' negligence, which caused damage to certain of the plaintiff's goods in the part of the premises let to him. The defendants by their defence denied negligence, and relied in the alternative upon the exemption clause in the tenancy agreement. At the trial, negligence was admitted, in that the overflow pipe of the cistern was blocked, and the defendants' servants failed to turn off the water supply at the control tap in the basement on the night or nights preceding the escape, although it was their duty to do so. Damages were agreed subject to liability.

J. R. D. Crichton Q.C. and *C. N. Glidewell* for the plaintiff.
Fenton Atkinson Q.C. and *A. K. Hollings* for the defendants.

The cases cited in argument are referred to in the judgment.

Cur. adv. vult.

Dec. 18. Jones J. stated the facts and continued: The point that the defendants take is that they are protected by an exemption clause in the agreement between the parties.

Clause 1 of the agreement provides that the landlord agrees to let and the tenant agrees to take four offices and one wareroom on the third floor and one wareroom on the second floor. By sub-paragraphs (a) and (b) of clause 2 the landlord agrees to provide for the payment of rates and taxes and for the supply of water and electric current. Sub-paragraph (c) provides that the landlord agrees to make-up and/or to pack the tenant's goods at the rates from time to time agreed upon between the parties in a workmanlike and efficient manner and with all reasonable dispatch, having regard to the landlord's obligations of a similar nature to other customers, and otherwise upon and subject to the terms and conditions set out in the schedule to the agreement. That is an important provision, and it makes it clear that this agreement is not only a tenancy agreement but an agreement which provides for other matters.

Clause 4 is important and reads: "The terms of this tenancy "are based upon the undertaking of the tenant (hereby expressly "given) to employ the landlord exclusively in the making-up "and/or packing (including the supply of all materials therefor) "of all goods bought by or belonging to the tenant or in which "the tenant may be interested or which may come under his "control in connection with the business of the tenant as carried "on upon the premises all which goods are included in the expres-"sion 'the tenant's goods' as used in this agreement."

There are then two paragraphs in the schedule which are

1959

Akerib
v.
Booth &
Others Ltd.

Jones J.

important. The first one is as follows: "No liability is accepted "by the landlord for any loss or damage to any goods (which word "where used in the schedule includes 'the tenant's goods' as "hereinbefore defined) where such loss or damage occurs whilst "the goods are in transit to any premises of the landlord or at any "time after the same have left such premises."

Paragraph 2, which is the exemption clause, is the most material clause for the purposes of this case. That provides: "The landlord shall not in any circumstances be responsible for "damage caused by fire water . . . to any goods whether in the "possession of the landlord or not."

Mr. Atkinson, for the defendants, has taken the point that paragraph 2 protects the defendants against liability for negligence, because the defendants could not possibly be liable to the plaintiff for any damage caused by water unless it was caused by the negligence of the defendants or their servants, and that, consequently, no other liability could arise. Apart from that, this exemption clause is a particularly powerful one, because of the presence in it of the words "shall not in any circumstances."

As for the exemption clause, the rule as to these clauses has been laid down comparatively recently in *Alderslade* v. *Hendon Laundry Ltd.*[1] The headnote in that case is as follows: "Articles "were sent by the plaintiff to the defendants' laundry to be "washed and were lost. In an action by the plaintiff against "the defendants for damages the defendants relied on the follow-"ing condition to limit their liability: 'The maximum amount "'allowed for lost or damaged articles is twenty times the charge "'made for laundering':—*Held*, that as no liability could arise "for loss of articles except through the defendants' negligence, "the condition applied to limit their liability in cases of negli-"gence and applied, therefore, to limit the plaintiff's damages. "In a case where loss might arise from causes other than negli-"gence, such a condition would not apply to limit liability for "loss through negligence, unless it was expressly made applicable "in clear terms."

Lord Greene M.R. said[2]: "It was argued before us for the "defendants that the clause did apply and was effective to limit "liability for lost articles; and reliance was placed on a well-"known line of authority dealing with clauses of this description. "The effect of those authorities can I think be stated as follows: "where the head of damage in respect of which limitation of "liability is sought to be imposed by such a clause is one which "rests on negligence and nothing else, the clause must be con-"strued as extending to that head of damage, because it would "otherwise lack subject-matter. Where, on the other hand, the "head of damage may be based on some other ground than that "of negligence, the general principle is that the clause must be "confined in its application to loss occurring through that other

[1] [1945] K.B. 189; [1945] 1 All E.R. 244, C.A.

[2] [1945] K.B. 189, 191.

"cause, to the exclusion of loss arising through negligence. The "reason is that if a contracting party wishes in such a case to "limit his liability in respect of negligence, he must do so in "clear terms in the absence of which the clause is construed as "relating to a liability not based on negligence." He then gives some illustrations, which it is unnecessary that I should read. There is a short judgment by MacKinnon L.J., in which he refers [3] to a passage from the judgment of Scrutton L.J. in *Rutter* v. *Palmer*.[4] MacKinnon L.J. said: "The rule or principle is "very admirably stated by Scrutton L.J. in a short passage in "*Rutter* v. *Palmer*: 'In construing an exemption clause certain "'general rules may be applied: first, the defendant is not "'exempted from liability for the negligence of his servants "'unless adequate words are used; secondly, the liability of "'the defendant apart from the exempting words must be "'ascertained; then the particular clause in question must be "'considered; and if the only liability of the party pleading "'exemption is a liability for negligence, the clause will more "'readily operate to exempt him.'"

Some difficulty has been occasioned by a decision in the Privy Council made since the decision in *Alderslade* v. *Hendon Laundry Ltd.*[5] In *Canada Steamship Lines Ltd.* v. *The King*[6] these words appear in reference to the passage I have read from the judgment of Lord Greene M.R. in the *Alderslade* case[7]: "It "appears to their Lordships that none of the judges of the "Supreme Court regarded this passage as being in any way in "conflict with the law of lower Canada. . . ." The judgment goes on to deal with the approach to the consideration of such clauses: "(2) If there is no express reference to negligence, the "court must consider whether the words used are wide enough, "in their ordinary meaning, to cover negligence on the part of "the servants of the proferens. If a doubt arises at this point, "it must be resolved against the proferens in accordance with "article 1019 of the Civil Code of Lower Canada: 'In cases of "'doubt, the contract is interpreted against him who has stipu-"'lated and in favour of him who has contracted the obligation.' "(3) If the words used are wide enough for the above purpose, "the court must then consider whether 'the head of damage "'may be based on some ground other than that of negligence,' "to quote again Lord Greene in the *Alderslade* case.[8] The "'other ground' must not be so fanciful or remote that the "proferens cannot be supposed to have desired protection against "it; but subject to this qualification, which is no doubt to be "implied from Lord Greene's words, the existence of a possible "head of damage other than that of negligence is fatal to the

[3] [1945] K.B. 189, 195.
[4] [1922] 2 K.B. 87.
[5] [1945] K.B. 189.
[6] [1952] A.C. 192, 208; [1952] 1 All E.R. 305.
[7] [1945] K.B. 189, 191.
[8] Ibid.

1959

Akerib
v.
Booth &
Others Ltd.

Jones J.

"proferens even if the words used are prima facie wide enough "to cover negligence on the part of his servants."

Mr. Atkinson submitted that there was no possible ground of liability in the present case except negligence; that if water had percolated through from the cistern, that would not be liability that came within the principle of *Rylands* v. *Fletcher*,[9] because it has been so held in a number of cases which are summarised in Salmond on Torts, 12th ed., at p. 566, in these words: "The rule "in *Rylands* v. *Fletcher* is not applicable to the escape of things "brought or kept upon his premises by the defendant with the con- "sent of the plaintiff. In such cases the defendant is not liable "except for negligence. Although not so limited, this principle "finds its chief application in those cases in which the different "storeys of a building are in the occupation of different persons, "and the occupant of a lower storey complains of the damage done "by the escape of water from an upper storey. Whether this water "is rainwater collected from the roof, or water supplied ab extra "in pipes, it is settled law that there is no liability for any such "escape in the absence of proved negligence on the part of the "upper occupant. For in such cases the water has been collected "or brought there for the mutual benefit and with the express or "implied consent of both parties; there is therefore no sufficient "reason why the risk of accident should lie upon the upper rather "than upon the lower occupant, and the only duty is one of "reasonable care."

Mr. Crichton, on behalf of the plaintiff, suggested as other grounds of possible liability first of all the case of a claim by the plaintiff against the defendants if the defendants packed the plaintiff's goods badly, in breach of clause 2 (c) of the agreement, and if, in consequence of their being packed badly, they were damaged by water. I am not very clear whether that would be a claim for damage caused by water, or whether it would not really be a claim for damage caused by bad packing. But he suggested as another ground of possible liability if the defendants collected water in their upper premises, not of the character that I have just referred to, not as being for the use of all the tenants for domestic purposes, but possibly for some other purpose, and then allowed it to escape. In the case of that happening he suggested that there would be a possible liability for nuisance, or the question of liability in regard to the rule in *Rylands* v. *Fletcher*.[9] It seems to me that it is possible that some such liability might arise. I am more impressed with the second point that he took than I am with the first, but, even so, I have to consider what is the effect of these very wide words: "The land- "lord shall not in any circumstances be responsible for damage." In relation to that I was referred to *Joseph Travers & Sons Ltd.* v. *Cooper*,[10] in which the summary of the judgment appears in the headnote: "*Held*, (1) by the whole court, that the onus lay

[9] (1868) L.R. 3 H.L. 330.

[10] [1915] 1 K.B. 73.

"on the defendant, who was in possession of the goods as bailee, "of showing that the negligence of his servant in leaving the "barge unattended did not cause the loss, and that he had failed "to discharge that onus; (2) by Kennedy and Phillimore L.JJ., "Buckley L.J. dissenting, that the term in the contract exempt-"ing the defendant from liability for damage 'however caused' "relieved him from liability for damage caused by the negli-"gence of his servant, and that therefore he was entitled to "judgment."

Kennedy L.J. said [11]: "The general principle was laid down "by Lord Blackburn in *Manchester, Sheffield and Lincolnshire* "*Railway Co.* v. *Brown* [12]: 'When an exception is made, the "'question is, what is excepted? Custom and ordinary usage "'says, in bills of lading when the goods are going by sea, "'"perils of the seas excepted." Well, the carrier is free as "'regards them. No one could for a moment argue that if the "'shipowner's servants negligently ran upon a rock, or negli-"'gently had a collision with another vessel, the owner of the "'goods carried in his ship would not be entitled to say, "I will "'"bring an action against you for this negligent collision which "'"has done me harm, even though you are not to be made "'"responsible, as an insurer, for a peril of the sea, which is an "'"excepted means of damage." And so of leakage, and many "'other things of that sort. But that does not in the slightest "'degree show that when a man says he will not be responsible "'for damage however caused, that is to be cut down and made, "'contrary to the intention of the parties, not to include the "'negligence of his servants.'"

Kennedy L.J., referring to the case before the court, went on to say [13]: "In the present case, the condition which we have to "consider uses the very words of exemption referred to by Lord "Blackburn in *Manchester, Sheffield and Lincolnshire Railway* "*Co.* v. *Brown*,[14] 'damage however caused'; and I see no "sufficient reason not to treat them as sufficient to protect the "defendant from liability for the negligence of his servant in "regard to the carriage of the plaintiff's goods. On this ground, "therefore, whilst, for the reasons which I have stated, I respect-"fully differ from my brother Pickford in regard to the view "which he has taken as to the burden of proof upon the question "of negligence, I think that in the result the defendant is entitled "to retain the judgment in his favour, and that this appeal should "be dismissed."

There is then a passage from the judgment of Phillimore L.J., which has been quoted on many occasions. He puts the matter in this way [15]: "This then is the distinction. It is a fine one, "and I am sorry to think that it is so fine; but it seems to be "this. If you say 'any loss' you are directing attention to the

[11] [1915] 1 K.B. 73, 93.
[12] (1883) 8 App.Cas. 703, 709.
[13] [1915] 1 K.B. 73, 94.
[14] 8 App.Cas. 710.
[15] [1915] 1 K.B. 73, 101.

1959

Akerib
v.
Booth &
Others Ltd.

Jones J.

"kinds of losses and not to their cause or origin, and you have "not sufficiently made it plain that you mean 'any and every "'loss' irrespective of the cause, and therefore you have not "brought home to the person who is entrusting the goods to you "that you are not going to be responsible for your servants on "your behalf exercising due care for them, or possibly even for "your own personal want of care. But if you direct attention to "the causes of any loss, if you say 'any loss,' 'however caused' "or 'under any circumstances,' you give sufficient warning, and "it is unnecessary to say in express terms 'whether caused "'by my servants' negligence,' or in the bill of lading phrase, "'neglect or default or otherwise.'"

That passage has been considered comparatively lately in *A. E. Farr Ltd.* v. *Admiralty.*[16] That was a case where the plaintiffs entered into a contract for the construction of a destroyer jetty, and the contract incorporated certain conditions. The work was proceeding under a contract when an Admiralty vessel, due to admittedly negligent navigation by an Admiralty servant, collided with certain parts of the jetty. The plaintiffs were instructed, under the contract of the Admiralty officer, to repair the damage, which amounted to a certain sum. They claimed that sum from the Admiralty under the contract which provided that the contractors would recover any expenses properly incurred in complying with the superintending officer's instructions, or, alternatively, as damages for breach of contract. But the Admiralty relied on the general conditions which provided that "The contractor shall be "responsible for any loss or damage to the works arising from "any cause whatsoever." It was held by Parker J. that the words "any cause whatsoever" were as wide as they should be and should be read as including negligent navigation of a ship by an Admiralty servant, and that, once that construction was applied to the condition, there was no room for any implied term which would limit the effect of those words, and that the plaintiffs were, accordingly, not entitled to recover the sum claimed. Parker J. said[17]: "A number of cases were cited to me. "I do not propose to refer to any of them, because they all "depend on their own particular wording, except *Joseph Travers* "*& Sons Ltd.* v. *Cooper*, a decision of the Court of Appeal which "has been often quoted and approved." He then referred to the facts of that case, and to the passage from the judgment of Phillimore L.J. which I have just read, and said[18]: "It seems "to me, therefore, that the words in the present case are about "as wide as they can be, and that I must read 'any cause what-"'soever' as if it included and expressly said 'including damage "'caused by the negligent navigation of a ship by an Admiralty "'servant.'"

It seems to me that the words of this exemption clause are as wide as they could possibly be, and that they are wide enough,

[16] [1953] 1 W.L.R. 965; [1953] 2 All E.R. 512.

[17] [1953] 1 W.L.R. 965, 967.

[18] Ibid. 968.

having regard to the decisions to which I have referred, to entitle the defendants to be protected by that exemption clause, and consequently to resist the liability for the damage that was done to the plaintiff's goods.

Judgment for the defendants.

Solicitors: *Linder, Myers & Pariser, Manchester; A. W. Mawer & Co., Manchester.*

[QUEEN'S BENCH DIVISION.]

* REGINA *v.* WOODBURY LICENSING JUSTICES. *Ex parte* ROUSE.

SAME *v.* SAME. *Ex parte* OLDHAM.

1960
April 1.

Streatfeild, Ashworth and Hinchcliffe JJ.

Licensing — Justices — Jurisdiction — Meeting subsequent to general annual licensing meeting fixed beyond statutory period—Mandamus —Licensing Act, 1953 (1 *&* 2 *Eliz.* 2, *c.* 46), *Sch.* 2, *Part I, para.* 5. *Justices — Costs — Award against justices — Mandamus — Principles applicable—Mistake—Date for hearing outside statutory period—Licensing.*

By paragraph 5 of Part I of Schedule 2 to the Licensing Act, 1953: "The times and places appointed for the second or any sub-"sequent session of the general annual licensing meeting shall be "such as appear to the justices convenient for persons intending to "apply for justices' licences; and the times so appointed shall not "be earlier than the sixth day after the session of the general "annual licensing meeting at which they are appointed or later "than one month after the first day of the general annual licensing "meeting."

At a general annual licensing meeting held on February 1, 1960, the justices ordered the second meeting to take place on the first Monday in March. Owing to leap year, instead of the first Monday falling on March 1, it fell on March 7. Two applications were made on February 11 and 12 respectively, one for a justices' licence and the other for a removal. When the applicants attended the meeting on March 7 they were told that the justices could not hear their applications because it was more than five weeks since the last meeting. The applicants moved the court for an order of mandamus to the justices to hear and determine the applications:—

Held, that the court had power to make an order absolute calling on the justices to hold a meeting for the purpose of hearing and determining the two applications.

Reg. v. *Farquhar* (1874) L. R. 9 Q.B. 258 applied.

APPLICATION for order of mandamus.

Applications were made by Ernest George Rouse and Bertram Oldham on February 11 and 12, 1960, respectively, for a justices' licence and for a removal. At the general annual licensing meeting for the area, which had been held on February 1, 1960, the

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[Reported by Miss E. CARYL-THOMAS, Barrister-at-Law.]

1960

Regina v. Woodbury Licensing Justices. *Ex parte* Rouse.

licensing justices for the Petty Sessional Division of Woodbury had ordered the second meeting to take place on the first Monday in March which, owing to leap year, was March 7. When the applicants attended in order to make their applications they were told that the justices could not hear them because it was more than five weeks since the last meeting, which was contrary to paragraph 5 of Part I of Schedule 2 to the Licensing Act, 1953.

The applicants moved the court for an order of mandamus to the justices to hear and determine the applications.

Francis Irwin for the applicants.

The justices were not represented.

The cases cited in argument are referred to in the judgment.

Streatfeild J. In these two cases application was made on February 11 and 12 respectively by two applicants, one for a justices' licence and the other for a removal. The general annual licensing meeting in this particular area had been held on February 1. Under Schedule 2 of the Licensing Act, 1953, Part I, para. 5, the second meeting of the justices should have been held not less than six days and not more than one month after the first. The justices, forgetting that it is leap year this year, ordered the second meeting to take place on the first Monday in March, believing that that was within one month of their first meeting. Unfortunately, March 1, which no doubt was the date they really believed they were fixing, although they did not say so, was a Tuesday. They sit on Mondays, and the first Monday in March was March 7. That was more than five weeks after the first meeting, and therefore, prima facie, a date which they could not fix under paragraph 5 of the Second Schedule. In the meanwhile, after the first meeting these two applications were made and the applicants attended in order to make their applications. They were then told by the justices' clerk, apparently with apologies, that the justices could not hear them because it was more than five weeks since the last meeting, with the result that the applicant in each case, through no fault of his own, will miss the granting of the licence or the removal, as the case may be, for another year. Accordingly, they move this court for an order of mandamus to the justices to hear and determine their applications.

There is mentioned in Paterson's Licensing Acts, 68th ed., p. 1025, a case in 1932 which is on all fours with the present one, *Rex* v. *Kingston Justices*,[1] which is only reported in the Brewing Trade Review. It seems to us that the principle upon which we can act in order to set this matter right is contained in *Reg.* v. *Farquhar*,[2] in which Blackburn J. said[3]: "All we can do is to "grant a mandamus to the justices to hold a licensing meeting

[1] (1932) Br.Tr.Rev. 154.

[2] (1870) L.R. 9 Q.B. 258; 39 J.P. 166.

[3] Ibid. 262.

"to hear and consider the objection to the renewal on notice to "the applicant, and to decide, after hearing him, according to "law and fact. We have power to order the justices to do this "now, though the proper time has gone by, on the authority of "the decision of the Exchequer Chamber in *Rochester Corporation* v. *The Queen*.[4] The rule, therefore, will be absolute for a "mandamus commanding the licensing justices, or some of them, "to hold a meeting, with notice to the applicant, and then to "hear and determine the question of the renewal of his licence." Quain J. said[5]: "The intention of section 42 is that there should "be a due hearing, and it is only on the objection failing in "point of law or on the facts that he is entitled to the renewal. "But to say that merely because he has not been required to "attend at the adjourned meeting, he is now to have a licence "granted as of course, is a proposition quite unmaintainable. The "mandamus must be to the justices to assemble a meeting for "the purpose of hearing Gardner's application, they having given "him notice to attend, and hearing the case just as they would "had they proceeded regularly in the first instance under section "42 (2)," and Archibald J. concurred, saying: "I am of the "same opinion, it being understood that the mandamus is to be "in the limited form to hear and determine only." It seems to me that those words cover the present situation, and that this court has power to make an order absolute calling upon the justices to hold a meeting for the purpose of hearing and determining these two applications.

ASHWORTH J. I agree.

HINCHCLIFFE J. I also agree.

[The court heard argument on whether notices which had been given in respect of these applications before the justices, and which would have been in time if the applications had been heard on March 7, were effective notices for the hearing which was now to be fixed. The court held that the notices already given were effective.]

Irwin. Would your Lordships say that this was a proper case for the applicants to have costs? It is unusual, I appreciate, for the justices to be ordered to pay costs. Griffits Guide to Crown Office Practice, p. 164, reads: "Justices may be allowed their costs "of opposing by affidavit. Costs are not usually given against "justices unless they have acted oppressively or improperly or not "bona fide." A distinction is drawn between acting in bad faith and acting improperly. In *Reg.* v. *Bell*[6] the justices had made an adjudication under the Licensing Acts and an aggrieved person wanted them to state a case. They refused to state a case, and

[4] (1858) E.B. & E. 1024; 27 L.J. Q.B. 434.

[5] (1874) L.R. 9 Q.B. 258, 262.

[6] (1899) 15 T.L.R. 487, D.C.

1960

Regina v. Woodbury Licensing Justices. *Ex parte* Rouse.

at the same time they refused to certify that the application to them to state a case was frivolous. Ridley and Darling JJ. both held that that was a proper case where costs should be awarded.

[Streatfeild J. That is a little different. In this case they have acted by inadvertence. The difficulty I feel is that this was not oppressive. It certainly was not improper, nor was it mala fide; it was just a pure mistake.]

It was. The only description I would attempt to give it is that it might come under the description of being an improper act in that there is a duty on the justices or their clerk to see that they obey the statute and do not deprive any applicant of his rights. They have deprived him of his rights. He incurs expense in coming to this court, and this court sets the matter right.

Streatfeild J. I know, but I think we can acquit the clerk; he was ordered by the justices to fix the sessions on the first Monday in March. They themselves thought that was all right, but unfortunately they made a slip. I do not think that under those circumstances we can make an order for costs against a body like justices.

Order of mandamus.
No order as to costs.

Solicitors: *Field, Roscoe & Co. for Ford, Simey & Ford, Exmouth.*

[RESTRICTIVE PRACTICES COURT.]

R. P. Ct.† (E. & W.)

1960 *Feb.* 15, 16, 17, 18, 19, 22, 23, 24, 25, 26, 29; *Mar.* 1; *Apr.* 7.

* *In re* PHENOL PRODUCERS' AGREEMENT.

[1957 No. 27 (E. & W.).]

Restrictive Practice—Restriction—Price restriction—Whether contrary to public interest—Phenol industry—Fixed prices for phenol—No formula or costings system—Natural phenol produced from distillation of tar—Current fixed price higher than free market price—Whether tar producers would divert tar to burning if phenol price fell—Whether benefits or advantages conferred on public by restrictions—Restrictive Trade Practices Act, 1956 (4 *&* 5 *Eliz.* 2, *c.* 68), *s.* 21 (1) (*b*).

Phenol, commonly known as carbolic acid, was an important raw material in the chemical industry, used principally in the manufacture of plastics, pharmaceutical preparations, paints and synthetic dyestuffs. It could be produced by synthesis from benzene, when it was known as synthetic phenol, or by refining crude tar acids, when it was known as natural phenol. Phenol, together with

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† Pearson J., Diplock J., Russell J., Sir Stanford Cooper, Mr. W. L. Heywood, Mr. W. Wallace and Mr. W. G. Campbell.

other hydroxyls, occurred naturally in coal tar, and these were generally known as "tar acids." The tar acids could be extracted from the coal tar by chemical action followed by fractional distillation. Synthetic phenol accounted for about three-quarters of current production, and natural phenol for about a quarter.

The main trends in the industry were rapid and consistently rising production (production in 1960 being expected to be four times what it was in 1949), the cessation of imports, which in 1952 and 1957 were an important supplement to home production when supplies were scarce, a remarkable rise in home trade deliveries from United Kingdom producers, though not as large a rise as that of production, and the growth of exports as a large and increasing outlet for the industry's output.

By an agreement made between all its members, the Phenol Producers' Association fixed the price at which they could sell phenol, the current basic price being 1s. 4d. per lb.

The association sought to justify the restrictions under paragraph (*b*) of section 21 (1) of the Restrictive Trade Practices Act, 1956,[1] on the ground that there was a present surplus of supply over demand which would persist for five years; that without the scheme the surplus would cause a fall in the price of phenol and related products by 25 per cent.; that thereby there would be such a loss of revenue to tar producers that tar would be diverted from distillation to use as a fuel, for which profitable sales could be obtained; and that, in consequence, many valuable chemicals derived from tar distillation would be lost to the nation, and phenol kept in short supply.

The association, also, contended that the scheme kept the price of phenol stable and held it down when demand exceeded supply, and that it increased the supply of phenol to meet an erratically increasing demand.

The court found that the fixed price scheme had the following four main detriments: (1) the price was being maintained at the present time at a higher level than that obtaining in the free market; (2) it was unrelated to cost of production or any costings formula so that there was no fetter on the amount of the price fixed by the association; (3) the policy of the association had been to charge what the trade could stand; and (4) the scheme permitted no concessions for those engaged in exports or buying phenol under long term or large scale contracts: the fixed price was a uniform delivered price, so that there were no reductions for those who collected their phenol in their own transport or whose premises were near the seller's:—

Held, (1) that even if the price of phenol and related products fell by 25 per cent. in a free market (which contentions were not accepted), it did not follow that the loss of revenue would cause diversion of tar from distillation to use as fuel because (post, pp. 483, 484):

[1] Restrictive Trade Practices Act, 1956, s. 21: "(1) For the purposes of "any proceedings before the court . . . "a restriction accepted in pursuance "of any agreement shall be deemed "to be contrary to the public interest "unless the court is satisfied of any "one or more of the following cir-"cumstances, that is to say . . . "(*b*) that the removal of the restric-"tion would deny to the public as "purchasers, consumers or users of "any goods other specific and sub-"stantial benefits or advantages "enjoyed or likely to be enjoyed by "them as such, whether by virtue "of the restriction itself or of any "arrangements or operations result-"ing therefrom: . . . (2) In this "section 'purchasers,' 'consumers' "and 'users' include persons pur-"chasing, consuming, or using for "the purpose or in course of trade or "business or for public purposes. . . ."

R. P. Ct.
(E. & W.)

1960

Phenol Producers' Agreement, *In re.*

(a) there were conflicting expert opinions as to its suitability for use as fuel;

(b) the market for tar as fuel was uncertain, whereas there was an assured market for the products of tar distillation;

(c) it was uncertain what price tar would fetch as fuel, and whether it could compete with oil or coal;

(d) the evidence of the only tar producer called as a witness did not support the association's contention.

(2) That there was unlikely to be a shortage of supplies in future because synthetic production could be expanded, but, in any event, stability of price at an excessive level could not be a benefit to the public (post, pp. 484, 485).

In re Wholesale and Retail Bakers of Scotland Association's Agreement (1959) L.R. 1 R.P. 347, 376; [1959] 1 W.L.R. 1094; [1959] 3 All E.R. 98 applied.

(3) That the scheme did not increase supplies of phenol, which were due mainly to increasing demand from the plastics industry (post, p. 485).

The association, therefore, had failed to establish its case under paragraph (*b*) of section 21 (1) and the restrictions must be declared contrary to the public interest.

Reference.

The following statement of facts is taken from the judgment of the court: On November 22, 1957, the Registrar of Restrictive Trading Agreements, pursuant to section 20 (2) (*a*) of the Restrictive Trade Practices Act, 1956, referred to the court an agreement subsisting between the members of the Phenol Producers' Association and numbered 219 on the register of agreements. There were then 15 members, but one had since resigned, so that there were at the date of the hearing 14 members. The agreement was not intended to be legally enforceable and did not provide any penalty for non-compliance, but each member signed an undertaking to adopt the schedule of prices, terms and conditions for sales of phenol fixed by the association at the date of the member's entry into the association, and any alteration thereto subsequently agreed upon by them. The price schedule, at present in force, provided a fixed basic price of 1s. 4d. a lb. for contracts for 10 tons and over for delivery at the buyer's premises in the seller's road tanks or rail tanks. There was a scale of additions to be made to the basic price for deliveries in smaller quantities or in drums or other packages, and certain terms and conditions were prescribed, but there was not, at the hearing, any separate question to be considered as to the suitability of the scale of additions and the terms and conditions, because it was agreed between counsel, and it was clear to the court that the scale of additions and the terms and conditions were merely ancillary to the fixed basic price and must in the proceedings stand or fall with it.

Phenol or benzene hydroxyl is an important raw material in the chemical industry. It is used in the manufacture, among other products, of plastics, plasticisers, pharmaceutical preparations, paints and synthetic dyestuffs. It can be produced

industrially by synthesis from benzene. It occurs naturally in coal-tar together with other hydroxyls of similar chemical characteristics of which the most important are cresols and xylenols. These are sometimes called generically "tar acids." Phenol and the other tar acids can be extracted from coal-tar by chemical action followed by fractional distillation. The phenol produced in this way is known as "natural phenol."

Synthetic phenol is manufactured as pure phenol without admixture with other tar acids. Three different processes are used in this country. In each of these, benzene, itself obtained as a by-product from the distillation of coal, is the principal raw material. The oldest process is the sulphonation process. It is used by a company, which is a member of the association, and produces as a by-product sodium sulphite, which is used in the paper industry. It is the only synthetic process for which any costings are available. The annual output of phenol manufactured by this process is 14,000 tons. The second process, the chlorbenzene process, has been used in this country for nearly 10 years by a company which was, until 1956, but is no longer, a member of the association. There was no evidence as to its costings and little information as to its by-products. The annual output of phenol manufactured by this process is 15,000 tons. The most modern process is the "Cumene" process for which a plant has recently been constructed by a company, which is not a member of the association. Acetone is the main by-product. This process has been operated in the United States of America for some years. Its profitability is dependent to a greater extent than the other two processes upon the market for the by-product. There were no costings and no information upon which the court could safely rely as to its profitability relative to the other two synthetic processes. The annual output from this process is expected to be 10,000 tons in 1960 and to rise to 13,000 tons thereafter.

The total productive capacity of the synthetic phenol industry in the United Kingdom is thus expected to be 39,000 tons in 1960, rising to 42,000 tons in 1961 and after, of which two-thirds, viz., 28,000 tons per annum, will be produced by non-members of the association.

To operate economically, a synthetic plant must be large, i.e., its capacity should be not less than 10,000 tons per annum, and it should be operated at maximum throughput. The association, however, called no evidence in relation to any of these processes as to the practicability or effect upon costs of production of reducing annual output by closing down the plant as a whole or some units of the plant for temporary periods, although the assumption that this cannot be done economically would appear to be an important part of their case.

The current output of natural phenol is between 14,000 and 15,000 tons per annum, or about one-quarter of the total output of natural and synthetic phenol. In view of the important part which natural phenol plays in the association's submissions,

R. P. Ct.
(E. & W.)

1960

Phenol Producers' Agreement, *In re.*

however, it is necessary to consider its production in some detail. It occurs in the natural state in coal-tar together with other tar acids. Coal-tar itself is a by-product of the distillation of coal. When coal is subjected to dry distillation, i.e., heated in retorts in the absence of air, five primary products are produced, viz., gas, coke, ammonia liquor, benzene and coal-tar. The dry distillation of coal it undertaken by two main industries, the gas industry, in which the object is to obtain the largest quantity of gas, and coke ranks as a by-product, though the most important by-product, and the steel industry, in which the object is to obtain the largest quantity of coke suitable for use in blast furnaces, and the gas is a by-product. The technical processes differ in the two industries and as a result, not only the quantity of coal-tar produced but also its chemical composition varies according to whether it is a by-product of the gas industry or the steel industry. One member of the association uses a third process, namely, low-temperature carbonisation, of which the main product is a smokeless fuel. The chemical composition of the coal-tar produced in this process resembles that produced by the gas industry.

Coal-tar in its crude form is thus an inevitable by-product of the manufacture of gas for domestic and industrial consumption, and of the manufacture of blast furnace coke for use in the steel industry. It will continue to be produced in the future so long as those two industries continue. The quantity produced is strictly related to and dictated by the amount of coal used in those industries, although it is anticipated by the association that, as a result of changing techniques in the gas industry, the production of coal-tar by that industry will diminish.

The current annual production of crude coal-tar in the United Kingdom is of the order of 3,000,000 tons per annum. It is combustible and capable of use in its crude form as a fuel. About 250,000 tons per annum are so used, almost exclusively by steel companies burning in their own works the crude tar produced in the coking plants at those works. The presence of carbon particles which provide radiant heat makes it suitable for use in open hearth furnaces. Conflicting views were expressed by experts as to the suitability of crude tar as a liquid fuel for steam raising and other industrial purposes. It is, however, clear that, whatever its theoretical utility may be, there has hitherto been no market for crude tar as an industrial fuel and, save for trivial quantities, its use as a fuel is restricted to the use of tar produced at their own works by some eight steel companies.

More than 90 per cent. of crude tar produced is distilled. Crude tar is a mixture of a large number of organic chemicals which vaporise at different temperatures—a physical characteristic which make it possible to separate its constituents into various groups or fractions by distillation. The normal fractions produced upon distillation in descending order of volatility are: crude naphtha, carbolic oil, naphthalene oil, creosote oil, and anthracene oil, leaving a residue of pitch which in bulk and weight is the

largest product. Each of the five fractions is itself a mixture of many different organic chemicals. Tar acids occur in the first four of them from which they can be abstracted by a chemical process. Phenol, which has the lowest boiling-point of the tar acids, is present in greater quantities in the lower boiling-point fractions, viz., crude naphtha and carbolic oil, but is to be found to some extent in naphthalene oil, while cresols and xylenols are more abundant in naphthalene oil but are present with phenol in carbolic oil and even crude naphtha, and with the higher boiling-point tar acids in anthracene oil. The product of the chemical extraction of phenol, cresols, xylenols and high boiling-point tar acids from these various fractions is known as crude tar acids, and constitutes the raw material for the final stage in the preparation of natural phenol, namely, the refining of the crude tar acids.

In addition to tar acids, the five fractions contain other valuable chemicals such as pyridine bases and naphtha in the crude naphtha fraction, Coumarone resins in the crude naphtha and carbolic oil fractions, and naphthalene in the naphthalene oil, and anthracene in the anthracene oil fractions. Creosote oil is used by itself as a wood preservative, but in the main is mixed with the residual pitch to make either road tar or creosote-pitch mixture, which is widely used as an industrial fuel in competition with heavy petroleum oil. All these products play an important part in the economics of tar distillation. The pitch-creosote mixtures, both road tar and fuel, account for about two-thirds of the total value of the products, the balance being split between the tar acids and the other products of distillation in the ratio of about three to two. Phenol itself accounts for about 5 per cent.–6 per cent. of the total value of the products of distillation, and the other tar acids for about 13½ per cent. to 15½ per cent.

The crude tar acids chemically extracted from the coal-tar fraction have little or no commercial use in their crude form and have to be subjected to a fresh process of refining by further fractional distillation. Phenol, the lowest boiling-point tar acid, can, in this way, be obtained either commercially pure, viz., 99 per cent. pure, or mixed with other tar acids, mainly cresols, to a purity of 90 per cent. phenol (a mixture which has large commercial uses), or even less, the less pure mixtures being cheaper to produce. Ortho-cresol, which has the next lowest boiling-point, is generally prepared for commercial use in a purity of about 90 per cent. Meta- and para-cresols boil at the same temperature and thus cannot be separated by fractional distillation. Their value is dependent on the proportion of meta- and para-cresols in the mixture which, in turn, depends upon the natural chemical composition of the tar. The various xylenols, of which there are several isomers, are not normally separated one from another but are sold in various mixtures classified by their boiling-point range. It is, however, not possible to generalise as to the various mixtures of refined tar acids which can be and are in

R. P. Ct.
(E. & W.)

1960

Phenol Producers' Agreement, *In re.*

practice produced, since the nature of the process of fractional distillation enables a great variety of mixtures of varying degrees of purity to be made to meet varying commercial demands.

As already indicated, the refined tar acids represent at current prices about 20 per cent. of the total value of the products of distillation of crude coal-tar. Even if they were valueless, however, it would be necessary to extract them in whole or in part in order to obtain some of the other commercially valuable products from coal-tar. In particular, the yield of naphthalene (the raw material from which phthallic anhydride used in the plastic and plasticising industries is synthesised), of which there is at present a national and world-wide shortage, would be substantially reduced if the crude tar acids were not extracted from the naphthalene oil fraction, and the yield of pyridine and Coumarone resins would be reduced if the tar acids were not extracted from the carbolic oil and naphtha fractions. Road tar could not comply with current specifications unless the greater part of the tar acids were removed from the creosote oil which goes into road tar.

The relative values of the various products of the distillation of coal-tar which have been mentioned above represent an average for the whole of the tar distillation industry. They vary, however, very substantially between different types of tar according to the nature of the coking process by which they are produced. Thus, coal-tar coming from the gas industry contains about 7 per cent. by weight of tar acids of which only one-tenth or 0·7 per cent. is phenol, while coal-tar obtained in making blast furnace coke for the steel industry contains only 1½ per cent. of tar acids, of which one-third or 0·5 per cent. is phenol. Conversely, gas industry coal-tar contains only a negligible quantity of naphthalene while coking industry coal-tars contain about 5 per cent. The value of the tar acids is only about 9 per cent. of the total value of the products of distillation of coal-tar produced in making blast furnace coke, and the value of the phenol itself is only 5 per cent.; whereas the value of the tar acids in coal-tar produced at gas works is about 30 per cent. of the total value of the products of distillation of which phenol accounts for a little more than 7 per cent. Price movements in the various products of tar distillation and refining, particularly in tar acids and naphthalene, may thus have very different effects upon the profits of tar distillation according to whether the tar is produced by the gas industry or by the blast furnace coke industry. Whether it is profitable to distill tar instead of selling it for burning if a market can be found depends upon the total value of all the products of tar distillation and not merely upon one of those products.

The chemical characteristics of all the tar acids are to some extent similar, and in some industrial processes some of the others can be used as a substitute for phenol. The characteristics of ortho-cresol, however, are different from those of the other tar acids. Its main use is for selective weed-killers and the supply

of this product, at present, exceeds the home demand. The meta- and para-cresol mixtures can in some processes in the plastic industry be used as a substitute for, or mixed with, phenol, but have other uses of their own for which phenol is not suitable. The same applies to the xylenols which are at present in short supply. Even in those processes where substitution of one tar acid for another is chemically possible, however, there would be a natural reluctance on the part of the user to make alterations in his manufacturing process necessitated by the substitution unless there was a substantial economic incentive to do so.

In addition to the possibility of substitution in manufacturing processes of the tar acids inter se, the plastic industry, particularly in the manufacture of synthetic resins, offers some possibilities of substitution of entirely different products such as urea resins which are not made from coal-tar for phenol resins, and phenol plasticisers for phthallic anhydride plasticisers, which are made from naphthalene, a product of coal-tar; but there would be a similar reluctance on the part of the manufacturer to make consequential changes in his manufacturing processes.

The association can be said to have begun in the year 1927. In that year, the three main British phenol-producing companies received from a group of German and other continental phenol-producing companies an invitation to discuss the market situation, as over-production was feared. Meetings ensued, and, on November 7, 1927, an agreement was made between the three British companies, and, on January 25, 1928, an agreement was made between the British group comprising the three companies and the German group. These agreements provided for the fixing of minimum prices for phenol, and, up to about September, 1939, prices were fixed from time to time and were observed by the companies in the British group and by the companies in the German group. There were three other arrangements initiated in 1927 or 1928. The agreement of November 7, 1927, established a quota system for the British companies inter se, and this seems to have continued with modifications up to about September, 1939. Secondly, the agreement of January 25, 1928, established a quota system as between the British group and the German group, and it was operated for some years but then lapsed owing to exchange and other difficulties. The third arrangement arose in 1927 or 1928 in this way: a German company, which was a large consumer of phenol, was proposing to start production of synthetic phenol; the producers of natural phenol, both German and British, wished to prevent this; accordingly, an arrangement was made whereby the German consumer company, in consideration of its refraining from production of synthetic phenol, would receive supplies on preferential terms from the producers of natural phenol, both German and British. This arrangement was in operation up to about 1933. In 1935, a somewhat similar situation arose in the United Kingdom; a company which consumed phenol and itself produced some natural phenol, proposed

R. P. Ct. (E. & W.)

1960

Phenol Producers' Agreement, *In re.*

to commence production of synthetic phenol. The other British producers of natural phenol wished to restrict this; accordingly, an arrangement was made, of which the effect, summarised very shortly, was that for each prospective six-monthly period it would be decided in advance either (i) that the producers of natural phenol could supply all the requirements of the consumer company and would do so on preferential terms, or (ii) that the producers of natural phenol could not supply all such requirements and therefore the consumer company should produce synthetic phenol. This arrangement operated until July, 1939, with the result that during some six-monthly periods the synthetic plant was closed and during others it was operating.

The association sought to justify the restrictions under paragraph (*b*) of section 21 (1) of the Act, it being contended, inter alia, that the public as purchasers, consumers or users of other products of crude tar and of tar acids, and goods produced from such products, enjoyed the following three benefits and advantages by virtue of its agreement: (i) the quantity of such products produced and available to the public; (ii) the stability of the price of such products to the public; (iii) the reasonableness of the price of such products.

Further facts are stated in the judgment.

B. J. M. MacKenna Q.C. and *P. J. Grant* for the association.
T. G. Roche Q.C. and *Robin Dunn* for the registrar.

No cases were cited in argument other than the case referred to in the judgment.

Cur. adv. vult.

April 7. Pearson J. read the following judgment of the court, in which he stated the facts set out above, and continued: The basic price of phenol was raised from 6⅝d. per lb. to 7⅝d. per lb. on October 1, 1939, and in January, 1940, to 8⅛d., and in July, 1940, to 9¼d. The chairman of the association, when giving evidence, was asked what led to the increases up to 9¼d., and he said it would be the supply and demand situation at that time, and, on being asked whether that had always been the guiding influence on the association in fixing prices, he said it had been one of the factors which were taken into consideration.

In the war period there was a shortage of phenol and all the producers, including the one producer of synthetic phenol, produced up to the full capacity of their plants. From about 1940 onwards the supplies of tar acids and the distribution of phenol were regulated by the Coal Tar Controller. The price was not controlled under government order, but arrangements were made by which the two producers of phenol who were not yet members of the association should become members, and the association's price should be a fixed (not merely a minimum) price to be

approved by the controller, and not afterwards to be altered without his consent.

Under these arrangements the price of 9¼d. was approved and remained in force for 18 months until January 1, 1942, when it was raised to 9½d. It remained at 9½d. for five years. In 1946 the association applied to the controller for his approval to be given for an increase in the price, and at his request figures showing the increased cost of production were collected and presented. The figures, however, showed only the increases in particular items of costs such as steam, wages, carriage, etc., in 1946 as compared with 1941. The actual cost of producing phenol at any time was not ascertained. The price was raised to 10½d. per lb. on January 1, 1947, and it remained at that figure until the end of 1949, when the control was abolished. In that year, 1949, there was a proposal to reintroduce quotas, but it was not adopted. After discussions in the early part of 1950, the price was raised to 11½d. per lb. as from July 1, 1950. Later in the year 1950 the price was raised again to 1s. 1d. as from January 1, 1951. Then at a meeting, on May 9, 1951, the price was raised again to 1s. 6d. a lb. as from July 1, 1951. Thus, in a period of just over a year the price was raised from 10½d. to 1s. 6d. a lb., an increase of over 70 per cent. The price remained at 1s. 6d. a lb. for two years up to July 1, 1953, when it was reduced to 1s. 4d. a lb. Numerous questions were put to the associations' witnesses about the policy of price-fixing in the period 1950–53. There was a changing market situation: in the early part of the period there was a scarcity of phenol, especially in the year 1951, when the world price was very high and imported phenol fetched as much as 5s. a lb. in the United Kingdom: then supplies in the United Kingdom increased, largely by reason of new synthetic production, and, by about April or at latest June, 1952, it was realised in the trade that the scarcity was ending and a surplus was to be anticipated. It is clear from the evidence that the price-fixing was not based on costs of production. The chairman said: "I should make it quite clear that, although the "members of the association undoubtedly have in mind the "variation in their costings of refining tar acids . . . the fixing of "the price of phenol is not based on any costing data." He was then asked whether the price was based on what the traffic would bear or on some other basis, and he said: "It is based on "that. We acknowledge that we must give a fair return to the "producer of our raw material. We have in mind, and must have "in mind the domestic prices in the main producing countries, "and there I mention Germany and America." It should be explained that the chairman's words "a fair return to the pro-"ducer of our raw material" impliedly referred to the industry's numerous co-operation schemes under which for supplies of raw material—tar to the distilleries or crude tar acids to the refineries—the suppliers receive a share of the net proceeds realised on the disposal of the refined products. At a later stage, the

R. P. Ct. (E. & W.)

1960

Phenol Producers' Agreement, *In re.*

chairman was asked: "Would it be fair to say that your system "was opportunism tempered by a collective sense of caution?" and his answer was: "That puts it very nicely." The association's principal trade witness, who has been a prominent member of the association for many years, had been recorded in the minutes of the meeting of May 9, 1951, as making "a point that "the tar distillers were, in effect, the custodians of the "nationalised industries which produced the crude tar, and as "such they had a responsibility to the nationalised bodies to "give them a reasonable return for the crude tar." In the course of his evidence, he was asked what were the considerations which the association had applied in trying to fix prices, and his answer was: "The main consideration is, first of all, the state "of the world market, and bearing in mind the fact that we "cannot put our customers into a situation whereby they cannot "compete with their like industries and so on. That has been "our first major consideration. Having taken into account that, "our next consideration has been the fact that we are obligated "under our schemes for distilling tar to do the best we can for our "tar producers. Within the bounds of the first consideration, "we adjust the price of phenol accordingly." The secretary of the association, who is also a chartered accountant, said that his impression of the discussions at meetings held to fix prices was that members had in mind their own increases of costs since the price was last fixed, the demand for the product, whether it would be wise to fix the price at a certain figure in order to encourage a new use, and many other factors. He agreed, when asked by Mr. Roche, that the real factor was the question of trying to gauge what price the trade would stand.

Another matter to be considered in respect of the period 1950–53 is whether the prices fixed by the association from time to time were reasonable or unreasonable. If for this purpose the costs of production have to be taken into account, the evidence is defective because there were not at any time any adequate costing data. If the costs of production are left out of account, regard must be had to the market situation. The sharp increase of the price from 1s. 1d. to 1s. 6d. by the decision at the meeting of May 9, 1951, though it was agreed unanimously, was afterwards felt by some members to have been perhaps immoderate, and a second meeting was held at which different opinions were expressed, and the decision was confirmed only by a majority vote with some members dissenting. Whether or not there was lack of moderation, we find that there was lack of flexibility in the price-fixing. There was some indication in the evidence of the rise in price being too long delayed, because phenol and its raw material (tar acids) were being exported to obtain the high world price, and there was some deficiency in the supplies of phenol for the home consumer. When the price was raised to 1s. 6d. as from July 1, 1951, by a decision at the meeting in May, possibly that price was for the time being not excessive in

relation to the prevailing scarcity of phenol and the high world price. But then the price was artificially held at 1s. 6d. from July 1, 1951, to July 1, 1953, although in the meantime, from quite early in 1952, the market situation was changing from a scarcity to a surplus of phenol. This ought to have brought about a reduction in the price. The home consumer then had the more usual complaint of the price being too high. There were vigorous complaints by consumers that, having bought their phenol at the high United Kingdom price, they could not compete in export markets with foreign makers of plastics who had bought their phenol at the lower foreign prices.

As from July 1, 1953, the price was reduced to 1s. 4d. a lb. and has remained at this figure ever since. We do not know whether this price at that time was an economic one, but, if so, the association can claim credit for not having raised the price of phenol in the long period of six-and-a-half years, when prices of many other materials and rates of wages have been raised. On the other hand, there were from time to time complaints from consumers that the home trade price was higher than the export price. Also it is admitted that at the present time the association's price of 1s. 4d. is much higher than the free market price would be if there were no price restriction. That is a further illustration of the inflexibility of the fixed price in the sense that it does not respond at all readily to changes in market conditions. In another sense there are elements of inflexibility in the terms and conditions of sale. For instance, there is the uniform delivered price, which is no doubt administratively convenient for a fixed price system but does mean that a buyer whose premises are within one mile of the seller's works must pay the same price for deliveries as a buyer whose premises are two hundred miles away, and that no price concession can be given to a buyer who is willing to fetch the goods in his own vehicles. Moreover, since the abolition in 1955 of a "Large Consumers' Schedule," no price concession can be made for a long-term or large-scale contract.

Some of the main factors in the market situation can be shown in a table. The figures are in tons.

PHENOL, NATURAL AND SYNTHETIC

Year	U.K. Production	Imports	Home Trade Deliveries from U.K. Producers	Exports
1949	13,000	918	11,393	—
1950	16,601	1,485	15,786	760
1951	19,615	2,223	19,683	180
1952	21,776	2,720	18,189	1,900
1953	23,374	55	16,401	7,800
1954	27,565	681	25,221	2,600
1955	29,341	5	26,246	3,100
1956	34,732	—	28,487	5,111
1957	36,733	—	29,927	7,454
1958	40,879	—	31,116	8,757
1959	45,591	—	36,550	10,373

R. P. Ct.
(E. & W.)

1960

Phenol Producers' Agreement, *In re.*

The estimated production in 1960 is 54,000 tons, the increase being due to the opening of a large new plant for the production of synthetic phenol. The figures in this table are not reliable for measuring fluctuations in trade, because the movements of stocks (whether of pure phenol or of intermediates containing 40 per cent., 60 per cent. or 80 per cent. of phenol) are not shown and may have been important. Nevertheless, the main trends are unmistakeable. First, there is the rapidly and consistently rising production: the production in 1960 is expected to be more than four times the production in 1949. Secondly, imports were an important supplement to the home production when phenol was scarce in 1951 and early 1952, but have since died away. Thirdly, home trade deliveries from United Kingdom producers have risen remarkably, though not quite so much as the production. Lastly, exports have become a large and increasing outlet for the industry's output.

Figures have been given of the domestic prices in the United States of America and West Germany, but they cannot readily be used for purposes of comparison with the association's price because adjustments may be required for differences in the terms and conditions of sale or in the quantities supplied. For instance, a price "delivered" may have to be compared with a price "ex "works," and it is necessary to know whether a foreign price or price range is for a large quantity or a small quantity or a range of quantities. It seems clear that, from late 1952 onwards, American and West German domestic prices have been lower than the association's price, but we cannot say how much lower. It also appears that American and West German prices have been lower in 1959 and 1960 than they were up to the middle of 1958, whereas the association's price has remained fixed.

Again, export prices received by association members are not directly comparable with the association's price, as they are shown in appendices to the agreed statement of facts at "f.o.b. "equivalent in free packages." The weighted average prices per lb. are given as 14·269d. in 1954, 13·218d. in 1955, 13·821d. in 1956, 14·522d. in 1957, 13·680d. in 1958 and 12·618d. in the first nine months of 1959. The association's price, which is the United Kingdom domestic price, is 16d. Owing to the difficulties of comparison, we cannot express a firm opinion as to the position in earlier years, but it seems clear that at any rate after the fall in the average export price in 1958–59 the association price has been substantially above the world price.

Large purchases of synthetic phenol have been made and are being made from producers outside the association at prices below the association price. Such purchases in very large quantities by an oil company's chemical subsidiary were made in the years 1956–59 from one producer outside the association, and are now being made from another. The association's chairman, in his evidence, said that he knew of three other cases of such purchases being made, involving, according to his guess, about 2,000 tons

in a year, and that in two of the cases the price was at a 5 per cent. discount from the association price; he did not know what the price was in the third case. Some of the customers concerned were called as witnesses; they were understandably reticent as to the actual prices which they were paying, but their evidence tended to confirm what the association's chairman had said.

The prices of the related products are fixed by associations, which have been described as off-shoots of the Tar Distillers' Association. The prices are for pure ortho-cresol 1s. 2d. a lb., for high ortho-cresol mixture 8½d. to 9½d. a lb., for meta-para-cresol 10½d. to 1s. 2d. a lb., for cresylic acid 7d. to 8d. a lb., for xylenols 6d. to 8½d. a lb., and for high-boiling-point tar acids 5d. to 5½d. a lb. There is no synthetic production of the related products except a very small amount of pure para-cresol. Ortho-cresol has special uses of its own, and its price is independent of the price of phenol except in so far as the customers might expect some reduction in the price of ortho-cresol to be associated with or to follow a reduction in the price of phenol and their expectations might have some influence. There is a surplus rather than a shortage of ortho-cresol. Meta-cresol is partly used as a substitute for phenol, where it is suitable, and also has some special uses of its own. The supply and demand for meta-cresol are in balance. Cresylic acid, which is a mixture of the related products and may have some phenol content, is used in the plastics industry, and can be exported as "American duty-free" to the United States of America, where there is always a market for it. Xylenols are cheap materials, the use of which in the plasticiser industry has been developing; they are in good demand and a shortage can be foreseen. There was not much evidence as to high-boiling-point tar acids, and no special uses for them were mentioned.

Several of the customers, who gave evidence, expressed a preference for a free market for phenol on the ground that with their substantial requirements they would be able to negotiate more favourable prices. One buyer spoke in favour of a stable price, but from further explanation it appeared that he had in mind, as an example of instability, a commodity the price of which fluctuated between £50 and £150 a ton, and that, if the price of phenol were free from restriction and fluctuated between 1s. 1d. and 1s. 3d. a lb., he would regard that as a stable price.

Although the costs of production had never been ascertained for the purpose of fixing the price, determined efforts had been made by the parties' respective accountants, assisted by the chairman of the association, to obtain some figures of costs for the purposes of this case. The attempt to obtain costs of production for natural phenol met great difficulties. No producer had costs relating solely to natural phenol, because that is only one of several products arising from the refining of crude tar acids. Costs have to be apportioned between the products. Moreover, there was a special difficulty in attributing a cost to the crude tar

R. P. Ct. (E. & W.)

1960

Phenol Producers' Agreement, *In re.*

acids, which are the raw material concerned, in that no member pays or receives a real market price for them. Although there are several different arrangements, under each of them the supplier of the tar or crude tar acids receives in one way or another a share of what is realised by the disposal of the refined products. To obtain a notional cost for the crude tar acids use was made of a price formula by means of which the price of tar acids purchased by some of the members is calculated. This formula establishes a price for the raw material by reference to the realised prices of refined products, and it includes an element for the phenol content as well as elements for the "cresol A" and "cresol B" contents. The element included in the formula for the phenol content was taken, for the purposes of the costing in the present case, to represent the cost of crude tar acids attributable to the production of phenol. That may well have been the best that could be done in the circumstances, but the results were inevitably artificial. The members were requested to furnish returns of their costs of production and receipts in respect of natural phenol, and instructions were given as to the use of the price formula for determining the raw material cost and as to the apportionment of costs. Members duly furnished returns, and from them a summary was made by the accountants for the information of the court. The returns, however, had not been checked, and so it was not known what degree of uniformity had been achieved in the interpretation and application of the instructions. It was clear from the evidence of the accountants and other witnesses that the costing figures so obtained for the production of natural phenol were not a reliable foundation for estimating the profits earned. The costs were notional, and, consequently, the apparent profits must be notional. The figures might be useful for comparisons between members, but not for any other purpose. Indeed, Mr. MacKenna, for the association, contended that the figures were valueless. At a later stage of the hearing, the association produced a revised summary showing costs and receipts for the whole process of extracting products from crude tar acids. That avoided some of the difficulties of apportionment, but there was still no market price for the crude tar acids and the formula still had to be used. The figures appear to show a satisfactory, or even a high, rate of profit on turnover for the leaders of the industry, but, having regard to the difficulties that have been mentioned, we consider that no firm conclusion can be reached as to the degree of profitability of the production of natural phenol, and we cannot assess the extent of the return on capital employed.

The returns and the summary relating to the costs and receipts in respect of the production of phenol included figures for the production of synthetic phenol by one of the member companies. In contrast to the generally shared misgivings about the figures for natural phenol, it was contended on behalf of the association that the figures for this company's production of synthetic phenol

were reliable, and were indeed the only figures showing real costs of production. Certainly these figures were inherently more realistic, as the actual cost of the raw materials used could be given, and there was a separate plant producing only phenol and one by-product, so that no elaborate or difficult apportionment would be required. There was, however, not enough information to enable firm conclusions to be reached with regard to the costs and profits of this company producing synthetic phenol. No representative of this company gave evidence, and we had no evidence as to whether the year 1957, for which the figures were given, was a normal year in respect of production and costs, or whether it could be adopted as indicative of present conditions in synthetic production, or as to the proportion of working capacity employed in that year. Moreover, the figures were prepared in accordance with the special instructions given for the purposes of this case with a view to comparison with the figures for natural phenol production, and most probably differed from the company's normal costings.

In our view, there are four main features of the association's price-fixing scheme:

(1) The fixed price is substantially above the level at which the price would tend to settle, or round which it would tend to fluctuate, if it were freed from restrictions and left to be determined by the interplay of supply and demand in competitive conditions.

(2) The price fixed by the association from time to time is not and never has been based upon or related to or limited by any figures of costs of production, and the fixing of the price is left entirely to the unfettered discretion and decision of the members of the association without regard to any formula.

(3) The policy of the association in their price fixing has been and still is to "charge what the traffic will bear." As sellers they have to pay some regard to the interests of their customers, because they would spoil their own market if their prices were so high as to damage the customers' businesses. Their dominant object, however, is to obtain a good return for themselves and for their suppliers associated with them in co-operative schemes. This is a producers' price scheme, operated with some degree of caution, but, predominantly, in the interests of the producers.

(4) There is the usual rigidity of a price-fixing scheme. The customer cannot negotiate for any preferential terms or concessions to assist him in his export trade, or in recognition of the proximity of his premises to the sellers' works, or to reward him for fetching the goods in his own vehicles, or even in consideration of a long-term or large-scale purchase contract. The price with its concomitant terms and conditions is as fixed by the association, and the customer must agree to pay it or do without the goods. Moreover, the fixed price tends to remain unchanged at times when the price in a free market would be changing in response to changes in the relation between supply and demand.

R. P. Ct.
(E. & W.)

1960

Phenol Producers' Agreement, *In re.*

Rigidity is quite usual and perhaps unavoidable in a price-fixing scheme, but it must nevertheless be reckoned as one of the prominent features of this scheme.

Prima facie all those four main features of the scheme are not benefits or advantages but detriments to the public as purchasers, consumers or users of any goods (including phenol and goods partly made from phenol and any other relevant goods), and the removal of the restrictions by which the scheme having those features would be brought to an end would not deny to that public any benefit or advantage but would relieve them of detriments.

Thus the association, in the present case, in addition to bearing the ordinary burden of proof which rests upon respondents under section 21 of the Act of 1956, start with the handicap imposed by the obvious and prominent features of the scheme. In order to bring the scheme within paragraph (*b*) of subsection (1) of section 21 of the Act (which is the first step and must be accomplished before the balancing provision at the end of the subsection is reached) they must present and prove some special aspects or features of the scheme or of its results and effects, by virtue of which it could be said that the removal of the restrictions inherent in the fixed price scheme would deny specific and substantial benefits or advantages to the public as purchasers, consumers or users of any goods.

The association have responded to the challenge by presenting an elaborate and carefully prepared case in support of a number of contentions. The first of these contentions, as outlined by Mr. MacKenna in his opening speech and developed in the evidence, is by far the most important and received the most attention throughout the hearing and needs to be considered in some detail. For convenience, the argument for this contention will be divided into separate steps, so that each step may be considered in turn.

(*a*) It is alleged that there is now for the time being an excess of supply over demand and the probability is that this excess will increase in the near future and persist for a period of about five years, while demand is gradually overtaking supply, but after that there will be a shortage of supply in relation to demand.

(*b*) It is alleged that the removal of the fixed-price restrictions would cause (i) a fall in the price of phenol of about 25 per cent., from 1s. 4d. a lb. to about 1s. a lb., and (ii) a fall of about the same magnitude, about 25 per cent., in the price of each of the related products.

(*c*) It is alleged that those falls in the prices of phenol and the related products would so reduce the revenue accruing to the coal tar producers from the distillation of tar and the refining of the tar acids that they would be able to obtain greater financial advantages by using the tar as fuel or selling it for use as fuel; and, consequently, within three or four years a large proportion, estimated at 50 per cent., of the tar would be diverted from the distilleries to the more profitable use or sale of it as fuel (shortly

stated, from distillation to burning); and the result would be that some of the distilleries and refineries would have to be closed down; and it would not be feasible to reopen them on a subsequent rise in the prices of phenol and the related products.

(*d*) It is alleged that, in consequence of such diversion of the tar and closing down of distilleries and refineries, the products of tar distillation and tar acid refining, for which there are no alternative sources or none so cheap, would to a large extent be permanently lost; and so there would be denied to the public as purchasers, consumers or users the benefit of having those products and goods made from those products.

These allegations will now be considered in the same order.

(*a*) It may well be that there is, at present, an excess of supply over the demand for phenol in the home market at present prices, and that such excess recently has been, and perhaps for a time will continue to be, increased by the development of the production of synthetic phenol by the Cumene process, which will more than offset some fall in the production of natural phenol. In our view, however, it is wrong to leave out of account, in this connection, the fixed price; lower prices can generate new uses and new demand. Equally it is wrong to leave out of account the export market, which is an important outlet for the products of the British phenol industry. No evidence, or no sufficient evidence, has been given of any worldwide over-supply of phenol, nor of any difficulty in disposing of British-made phenol in the export market at the prices prevailing abroad. There has been a remarkable expansion both in the deliveries to the home trade and in exports: deliveries to the home trade rose steadily from 25,221 tons in 1954 to 31,116 tons in 1958 and then jumped to 36,550 tons in 1959, exports rose steadily from 2,600 tons in 1954 to 10,373 tons in 1959—at least one company was running down its stocks in 1958 and 1959. There is no evidence of excess of supply over total demand, when the demand for exports as well as the home demand is taken into account. Even if the export demand is excluded, the rapid expansion of the British plastics industry, in particular, precludes any reliable estimate of the period which must elapse before the home trade demand overtakes, or reaches the amount of, the present supply. Moreover, it cannot be assumed that the supply will remain stationary throughout that period: it may be expanded by an enlargement of the synthetic production in reasonable anticipation of the still further demand and, if so, the anticipated shortage of supply in relation to demand some years hence will not occur.

(*b*) (i) It is common ground between the parties, and accepted by the court, that after the supposed removal of the association's price restrictions there will be a substantial fall in the price of phenol. The extent of the expected fall of the price, and the extent to which this should be attributed to the supposed removal of the restrictions, are not agreed and cannot be determined with certainty, but there are some points which seem fairly clear. In

view of the market situation, which has been described above, we think that, if the price restriction scheme remained in force, the association would not be able to hold the price indefinitely at 1s. 4d. a lb. and would have to make some reduction, though not necessarily a large one. Accordingly, that amount of reduction, as it would have occurred in any case, is not attributable to the supposed removal of the restrictions. Next, we think that the lower limit—the "floor" as it is sometimes called—for the new home trade price level is likely to be somewhat higher than the level of export prices, because, on the one hand, the home trade price has tariff protection, and, on the other hand, the export price f.o.b. at the British port has to be low enough to compete with the foreign domestic price after bearing the cost of freight, insurance, additional land transport, agents' charges and perhaps an import duty. Thirdly, the home trade price is likely to be influenced to a considerable extent by important factors on which there is hardly any evidence before the court, namely, the costs of production and price policies of the large producers of synthetic phenol who are outside the association. It seems unlikely that the fall in the price of phenol, at any rate in so far as it would be caused by the removal of the price restrictions, would be as much as 4d. a lb., but we cannot make any definite forecast on this point.

(*b*) (ii) Be it supposed, however, that the removal of the restrictions on the price of phenol would cause it to fall by 25 per cent. Would it also cause a 25 per cent. fall in the prices of the related products? In our view, there is only a speculative possibility, and not a probability, that this would happen. It is possible that the association or associations controlling the prices would simply make an all-round reduction of 25 per cent. It is more likely, however, that in relation to each particular product they would have regard to the market factors affecting that product. Reference has already been made to the relevant market factors, including the scarcity and low price range of xylenols, the special export demand for cresylic acid under the guise of "American duty free," the special uses of ortho-cresol, some use of meta-cresol otherwise than as a substitute for phenol, the absence of any substantial synthetic production of any of these related products, and the prospect of some diminution of the supply. It cannot be found from the evidence that removal of restrictions on the price of phenol would bring about an all-round or average reduction of or in the region of 25 per cent. in the prices of the related products.

(*c*) Consideration of the next step in the argument requires assumptions to be made (although in our view they are improbable) that removal of the association's restrictions on the price of phenol would cause a 25 per cent. fall in the price of phenol and an all-round or average 25 per cent. fall in the prices of the related products. Would these assumed price falls cause the tar producers to divert a large proportion of the tar from distillation

to burning? There are important differences between the two main classes of tar producers, namely, the steel companies operating coke ovens in or in connection with their steel works and the gas boards operating their gas works. The steel companies are for general reasons more likely to make the diversion, because tar is a good fuel for giving radiant heat in open hearth furnaces and in many cases the coke ovens are situated near the furnaces, and some of the steel companies are already burning tar. These companies, eight in number, already burn nearly the whole of their crude tar production and are responsible for nearly the whole of the amount of the crude tar now burnt. On the other hand, phenol and its related products form only a small proportion of the products of coke oven tar, so that the supposed fall in their prices would have only a small effect on the revenue resulting from the distillation of coke oven tar. Moreover, any fall in the revenue from phenol and its related products would be offset, to some extent at any rate, by improved revenue from naphthalene, which is an important product of coke oven tar, is scarce throughout the world, is in general demand and has a rising price trend. In the absence of direct evidence on the point, it cannot be found that the supposed fall in the prices of phenol and its related products would have any significant effect on the policies of the steel companies as to the use or disposal of their coke oven tar. No witness was called from any of the steel companies to give evidence on this point. The position of the gas boards is different. The carbonisation process in their continuous vertical retorts produces tar containing a comparatively large proportion of phenol and its related products and a comparatively small proportion of naphthalene. The revenue derived from the tar is in one way or another directly dependent on the revenue realised from the products obtained by distilling the tar and refining the tar acids. At least one gas board carries on its own distilling and refining operations for a proportion of its tar; others have long-term co-operative schemes, under which the preponderant share of the net realisation comes to them, and there are cases in which the tar acids are sold to refineries at a price ascertained by the use of a formula based on realisation. The revenues of the gas boards from this source would be reduced by the supposed falls in the prices of phenol and its related products. Would they be induced to divert their tar from distillation to burning? It might not be easy to find a market. So far the sales of tar as fuel have been on a very small scale, and the market for it on a large scale is untested. There were conflicting expert opinions as to the suitability of tar (not dehydrated) for use as fuel, and as to the price which tar as fuel would be likely to fetch now or in the future in competition with heavy fuel oil. It is uncertain whether the return from tar as fuel would be greater than the return from tar as a raw material for production of chemicals. If it were, the distilling and refining companies might be willing to accept a reduced share of the realisation and thereby increase to some

R. P. Ct. (E. & W.)

1960

Phenol Producers' Agreement, *In re.*

extent the returns to the gas boards. The gas boards have a considerable stake or vested interest in the tar distilleries and tar acid refineries, partly by direct ownership, partly through the long-term co-operative schemes and partly by shareholdings. So long as the distilleries and refineries remain in existence and in operation the gas boards have a sure outlet for their tar. But suppose that a large part of the tar were diverted to the fuel market, and consequently some of the distilleries and refineries were closed down; then the gas boards would have to depend on the fuel market for disposal of much of their tar and would be in competition with the suppliers of oil and coal and any other fuel that may be developed. A cautious attitude on the part of the gas boards would not be surprising. We have the evidence of the chairman of the Eastern Area Gas Board which is exactly on the point. He estimated the loss of revenue to his gas board from the supposed fall in the prices of phenol and the related products, and he said that this loss of revenue would not be sufficient to induce his gas board to divert their tar from distillation to burning. There was no evidence to show how any other gas board would be affected. We accept his evidence, and, in our view, his evidence, taken in conjunction with the other matters which have been mentioned, makes it impossible for the association to establish the third step in their argument, even if they had successfully accomplished the first two steps.

(*d*) Consideration of the fourth step would have raised complex and far-reaching questions, on which it is not now necessary to express opinions.

The association have a second main contention, which was stated by Mr. MacKenna in his opening speech for the association in these terms: "Secondly, we say that our system of price "control when demand exceeds supply operates to keep prices "down, and that the result of the stability of price at that lower "level is for the benefit of the public. We say that if, as a "result of our arrangement being determined, the production of "natural phenol is reduced, sooner or later the increasing demand "for phenol will overtake the diminished supply, and the price "of phenol, uncontrolled, is likely to be higher than would other-"wise be the case."

To a large extent the points involved in this contention have already been dealt with. The present effect of the association's price fixing is admittedly to keep the price of phenol at an artificially high level—higher than the price would be in free market conditions. It is not clear that the association's price fixing has normally had a different effect in the past, and there is no guarantee that it would normally have a different effect in the future. In *In re Wholesale and Retail Bakers of Scotland Association's Agreement* [1] this court said: "It is not stabilisation of "price by itself alone which is a benefit or advantage; it can only

[1] (1959 L.R. 1 R.P. 347, 376; [1959] 1 W.L.R. 1094; [1959] 3 All E.R. 98.

"be stabilisation at the right level; it is difficult to envisage "circumstances in which stabilisation at an excessive price level "could be held to confer benefit on the consumer. We reaffirm "the view already expressed by this court in *In re Yarn Spinners'* "*Agreement*[2] that, as a general rule, price stabilisation as an "alternative to a free market is not a benefit to the consuming "public. Stabilisation does not appear to us to be necessarily a "virtue." In our view, as stated above, the rigidity of the fixed price and its ancillary terms and conditions is a disadvantage to the purchasers. The estimate of an increasing demand overtaking the diminished supply and causing a scarcity is not accepted, because the synthetic production of phenol can be expanded to meet or anticipate further increase in the demand.

The association have a third main contention, which was stated in these terms: "Thirdly, we say that our system of price "control has ensured the increase of the supply of phenol to meet "an erratically increasing demand, and that the continuance of "our system gives the best security that the future supply of "phenol will be in line with the future demand."

In our view, that is claiming too much for the effect of the price-fixing scheme. The effective reason for the increase in supply has been the rapid and on the whole steady increase in the demand for phenol, especially from the growing plastics industry. Two of the large synthetic producers are outside the association and making at any rate some sales below the fixed price. Their decisions as to expanding their production of synthetic phenol are likely to be governed by their forecasts of the future demand rather than by the continuance or cessation of the association's price-fixing scheme.

Other contentions were set out in the association's statement of case and were referred to and relied upon in Mr. MacKenna's opening speech. These have been taken into account.

We have come to the conclusion that the association have failed to prove their case under section 21 (1) (*b*) of the Act of 1956. Accordingly, there will be a declaration under section 20 that the restrictions are contrary to the public interest. The parties will no doubt wish to discuss and if possible to agree the exact form of the declaration and any further order that may be required, and there is liberty to apply.

Declaration accordingly.

Solicitors: *March, Pearson & Green, Manchester; Treasury Solicitor.*

N. P.

[2] (1959) L.R. 1 R.P. 118, 188, 189; [1959] 1 W.L.R. 154; [1959] 1 All E.R. 299.

[PROBATE, ETC., DIVISION.]

1959
Nov. 27.

Marshall J.

* PACHNER *v.* PARKER (FORMERLY PACHNER).

Husband and Wife—Maintenance—Divorce—Time bar—Application several years after decree—No prayer for maintenance in petition—Effect of new rules and legislation between decree and application—Matrimonial Causes Act, 1950 (14 *Geo.* 6, *c.* 25), *ss.* 19 (3), 29 —*Matrimonial Causes* (*Property and Maintenance*) *Act,* 1958 (6 *&* 7 *Eliz.* 2, *c.* 35), s. 1—*Matrimonial Causes Rules,* 1957 (*S.I.* 1957, *No.* 619), *rr.* 3 (3) *proviso* (ii), 44 (1) (*as amended by Matrimonial Causes* (*Amendment*) *Rules,* 1958 (*S.I.* 1958, *No.* 208), *r.* 12).

A wife presented a petition for divorce in June, 1949, in which no prayer for ancillary relief was included. She was granted a decree nisi in October, 1949, which was made absolute in November, 1949, in an undefended suit. She made no application for maintenance until February, 1959, when she filed and served the appropriate notice. At the time when her decree was made absolute it was provided by rule 44 (1) of the Matrimonial Causes Rules, 1947, that "no application for maintenance shall be made later than two "months after final decree except by leave." That proviso, which was repeated in rule 44 of the rules of 1950 and 1957, was omitted by the amendment rules of 1958 as from January 1, 1959, following upon the Matrimonial Causes (Property and Maintenance) Act, 1958, s. 1.[1]

[1] Matrimonial Causes (Property and Maintenance) Act, 1958, s. 1: "(1) Any power of the court, under "the enactments mentioned in the "next following subsection, to make "an order on a decree for divorce, "nullity of marriage or judicial "separation shall (subject as mentioned in subsection (3) of this "section) be exercisable either on pronouncing such a decree or at any "time thereafter. (2) The said enactments are the following provisions "of the Matrimonial Causes Act, "1950 (in this Act referred to as 'the "'Act of 1950') that is to say,—(*a*) "subsections (2) and (3) of section 19 ". . . and those subsections as "extended by subsection (4) of that "section . . . (*b*) subsection (3) of "section 26 . . . and (*c*) subsection "(2) of section 20 . . . and that subsection as extended by subsection "(3) of that section . . . (3) In relation "to the provisions of the Act of 1950 "specified in paragraphs (*a*) and (*b*) "of the last preceding subsection,— "(*a*) any reference in subsection (1) "of this section to a decree shall be "construed as a reference to a decree "nisi, and the reference to any time "after a decree shall be construed as "a reference to any such time whether "before or after the decree has been "made absolute; but (*b*) nothing in "subsection (1) of this section shall "be construed as affecting the provisions of section 29 of the Act of "1950 as to the commencement of "proceedings for an order under the "provisions specified in those paragraphs or as to the making or effect "of such an order. (4) In accordance "with the preceding provisions of "this section, the provisions of the "Act of 1950 specified in the Schedule "to this Act shall have effect subject "to the amendments specified in that "Schedule. (5) Nothing in this section, or in any amendment made by "this section in any of the enactments referred to therein, shall be "construed as requiring the court, in "determining any application for an "order under any of those enactments, to disregard any delay in "making or proceeding with the "application."

"In section 19 (2) [which relates "to a secured provision], for the words "'On any decree for divorce or nullity "'of marriage' there shall be substituted the words 'Subject to the pro-"'visions of section 29 of this Act, "'[which relates to the commence-"'ment of proceedings under sections "'19, 24, 25 or 26 (3) of the Act], "'on pronouncing a decree nisi for "'divorce or nullity of marriage or at "'any time thereafter, whether before

Under rule 3 (3) of the Matrimonial Causes, Rules, 1957,[2] however, it became necessary for a claim for maintenance to be made in the petition (or in an answer where relief was claimed), although it was provided that a judge might give leave for an application for ancillary relief, which should have been made in the petition or answer, to be made later.

The registrar held that in view of section 1 of the Act of 1958 the wife was under no obligation to obtain leave to file her application for maintenance, notwithstanding the time which had elapsed since decree absolute. The husband appealed:—

Held, that the rules to be applied were those of 1957, they being the only rules in operation at the time that the wife made her application; and although the long delay did not of necessity debar her from proceeding, the wife could only do so with the leave of a judge in accordance with the proviso to rule 3 (3) of the rules of 1957.

SUMMONS adjourned into court.

The following statement of facts is taken from the judgment: The parties were married at the Town Hall, Prague, on July 10, 1935. At the time both were nationals of and domiciled in Czechoslovakia. They were both educated people. The wife was 25 and single, and was an actress and a member of the Svando Theatre. The husband was 28, a widower, and a partner in a chemical firm in Prague. The court was satisfied upon the evidence that on September 2, 1937, after living together for a little over two years, the wife filed in the Civil District Court of Prague a petition for a decree of separation of bed and board in respect of the marriage of July 10, 1935, based on the guilt of both parties. Her petition set out her case, inter alia, in the following terms: "We are both Czechoslovak citizens. Our "marriage was at first happy, later on, however, a deep disrup- "tion of matrimonial relations arose, for which reason we cannot "in fairness be expected to continue married life together. The "disruption is not due to predominant guilt of either party. "The respondent has rudely insulted my honour on several "occasions and used terms of abuse against me, the mildest of "which were 'silly goose,' 'you immoral, dissolute woman' and "the like. He did not have any friendly word for me in the "course of our past life together and in the course of time

"'or after the decree has been made "'absolute'; and in subsection (3) "[which relates to monthly or weekly "sums for maintenance], for the "words 'On any decree for divorce or "'nullity of marriage,' there shall be "substituted the words 'Subject to "'the provisions of the said section 29, "'on pronouncing a decree nisi for "'divorce or nullity of marriage or at "'any time thereafter, whether before "'or after the decree has been made "'absolute.'" [The Schedule also amends sections 20 (2) and 26 (3).]

[2] Matrimonial Causes Rules, 1957, r. 3: "(3) Every application for an- "cillary relief, being an application ". . . (c) for the payment, on a "decree for divorce or nullity of mar- "riage, of monthly or weekly sums by "the husband for the maintenance and "support of his wife . . . shall be "made in the petition or, where an "answer claiming relief is filed, in "the answer: Provided that . . . (ii) a "judge may give leave for ancillary "relief which should have been made "in the petition or answer to be made "subsequently . . ."

1959

PACHNER
v.
PARKER.

"complete mutual estrangement and coldness has arisen, for "which reason there is no solution other than a separation. Our "mutual property position also contributes to the disagreement, "and I have reached the conviction that with so deep a disrup-"tion no improvement can be expected."

After hearing the parties, the Civil District Court of Prague by a final judgment granted a separation from bed and board in respect of the marriage by reason of the guilt of both parties. In accordance with the law of Czechoslovakia, the husband applied to the Civil District Court of Prague for a decree of divorce; and on January 19, 1938, the same court pronounced a final decree of divorce in respect of the marriage of July 10, 1935, which became absolute on March 2, 1938. Such final decree of divorce would not have become absolute on March 2, 1938, unless and until the court had been satisfied that a copy of a decree of divorce had been served upon the wife.

At the time of these proceedings the husband was living in Prague, Czechoslovakia, which was then his permanent home; and both he and the wife had retained their Czech nationality. Both were Jews, and as a result of political developments in Czechoslovakia, and later the outbreak of war, the wife came to England some time in 1939. The husband, who was then in the Czechoslovak Forces in England, joined the wife in 1940. They resumed cohabitation; and by representing to the Czechoslovak Army authorities that no final decree of divorce had been obtained, but only a separation order, the husband obtained a marriage allowance in respect of the wife during his period of service in the forces. They continued to live together until April, 1948, when the husband left the matrimonial home in London.

On June 15, 1949, the wife filed a petition for the dissolution of her marriage of July 10, 1935, in Prague on the ground of the husband's adultery; her petition contained no claim for maintenance. The husband signed an acknowledgment of service, but entered no appearance and filed no answer. When interviewed in July, 1949, by an inquiry agent, he made a written confession as to his adultery and added the words: "I have no intention of "returning to live with my wife." On October 10, 1949, Mr. Commissioner Grazebrook, K.C., after hearing evidence from a Czechoslovakian lawyer, the petitioner wife and an inquiry agent, pronounced a decree nisi. During her evidence the wife swore that the marriage was happy down to 1945. She made no reference to any proceedings in Prague whether for a separation or for a decree of divorce.[3] The decree was made absolute on November 24, 1949.

On February 26, 1959, the wife filed a notice of application for ancillary relief seeking "such weekly or monthly sum as may

[3] *Reporter's Note*: In *Tursi* v. *Tursi* [1958] P. 54, 70, Sachs J. supported the suggestion of the Queen's Proctor that the disclosure of proceedings before a foreign court should be made obligatory under rule. 4.

"be just by way of maintenance." On May 20, 1959, she filed an affidavit praying for "leave to file an application for maintenance notwithstanding the fact that the time for so doing has expired." Mr. Registrar Forbes in his report stated that: "At the time when the decree absolute was pronounced the Matrimonial Causes Rules, 1947, were in operation, and rule 44 (1) thereof, which was then applicable, provided that 'no application for maintenance shall be made later than two months after final decree except by leave.' Having regard, however, to section 1 of the Matrimonial Causes (Property and Maintenance) Act, 1958, I did not consider that the wife was now under any obligation to obtain leave to file her present application for maintenance out of time."

[The registrar also dealt with a submission on behalf of the husband that the decree pronounced by the English court was a nullity, in view of the proceedings in Prague, and that the court, accordingly, had no jurisdiction to make any order for maintenance; and held that while it would be exceeding the powers exercisable by a registrar on an application for ancillary relief to hold that an English decree absolute was a nullity, whatever the husband's evidence might be, he was in fact estopped from asserting that the English decree was a nullity.]

The husband appealed.

For reasons appearing at the end of the judgment, the case is reported only upon the question of obtaining leave to make the application for maintenance.

S. Goldblatt for the husband.

A. B. Ewbank for the wife.

No cases were cited in argument relevant to the subject-matter of the report.

Cur. adv. vult.

MARSHALL J., after stating that he was in considerable sympathy with the view of the registrar that a registrar would be exceeding his powers were he to hold an English decree absolute a nullity, stated the facts and continued: The delay of between nine and ten years between November 24, 1949, the date of the decree absolute, and February 26, 1959, when the first claim for ancillary relief by way of maintenance was made, has given rise to a difficult legal problem.

The decree was made absolute when the Matrimonial Causes Act, 1937, was in operation and the Matrimonial Causes Rules, 1947, were in force. The Act of 1937 was repealed by the Matrimonial Causes Act, 1950, which came into operation on January 1, 1951. The Matrimonial Causes Rules, 1947, were replaced by other Matrimonial Causes Rules, and at the time that the claim for ancillary relief by way of maintenance was first made

1959

PACHNER
v.
PARKER.

Marshall J.

the Matrimonial Causes Rules, 1957 (as amended), were in operation.

Under rule 3 (2) of the 1947 Rules every application in a matrimonial cause for ancillary relief had to be made by notice in accordance with Form 2 issued out of the divorce registry; and although by rule 4 (2) a wife petitioner could include in her petition a claim for maintenance, she was under no obligation to do so. By rule 44 (1) of those rules, if no prayer for maintenance had been included in the petition, no application for maintenance could be made later than two months after the final decree except by leave.

Under the 1957 Rules, which came into operation on April 30, 1957, and which have been amended by the Matrimonial Causes (Amendment) Rules, 1958, the position with regard to claims for maintenance changed materially. (The Matrimonial Causes Rules, 1947, had been repealed by the Matrimonial Causes Rules, 1950, which came into operation on January 1, 1951.[1])

By rule 3 (3) of the 1957 Rules every application for ancillary relief being an application for the payment, on a decree for divorce, of maintenance has to be made in the petition, subject to the proviso that a judge may give leave for an application for ancillary relief, which should have been made in the petition, to be made subsequently, either by notice in accordance with Form 2 issued out of the divorce registry, or at the trial.

It will be seen that under both the 1947 and the 1957 Rules, whichever applied, leave whether by a registrar under the 1947 Rules, or by a judge under the 1957 Rules, would be required before this application for maintenance could proceed.

Mr. Registrar Forbes has, however, held, that by reason of section 1 of the Matrimonial Causes (Property and Maintenance) Act, 1958, the wife was not now under any obligation to obtain leave to file her present application for maintenance out of time.

[His Lordship read the section and continued:] As amended by section 1 of the Act of 1958, and by the Schedule to that Act, section 19 (3) of the Matrimonial Causes Act, 1950, in its relevant parts now reads as follows: "Subject to the provisions of section "29 [of this Act], on pronouncing a decree nisi for divorce or "nullity of marriage, or at any time thereafter, whether before "or after the decree has been made absolute, the court may, if it "thinks fit, by order direct the husband to pay to the wife, during "their joint lives, such monthly or weekly sum for the main-"tenance and support of the wife as the court may think "reasonable . . ."

Finally, the relevant part of section 29 of the Matrimonial Causes Act, 1950, is in the following terms: "When a petition "for divorce or nullity of marriage has been presented, proceed-"ings under section 19 . . . may, subject to and in accordance

[1] The material parts of rules 3 (2) and 4 (2) were not altered by the 1950 Rules.

"with rules of court, be commenced at any time after the pre-
"sentation of the petition."

Having considered the circumstances of the present application for maintenance of the petitioner wife I have come to the following conclusions:

(1) Having delayed making her application until February 26, 1959, the relevant provisions under which it must now be decided are sections 19 and 29 of the Matrimonial Causes Act, 1950, as amended by section 1 of the Matrimonial Causes (Property and Maintenance) Act, 1958.

(2) The rules to be applied are the Matrimonial Causes Rules, 1957, as amended, they being the only rules in operation at the time of making her application.

(3) Although the long delay in making her application does not of necessity debar her from proceeding, she can only do so with the leave of a judge sought by way of summons in accordance with rule 3 (3) proviso (ii) of the Matrimonial Causes Rules, 1957. I have not overlooked rule 83 of the 1957 Rules,[2] for, in my judgment, apart from the fact that that rule does not assist and apply in this case, as the proceedings were started after these rules came into operation, they also cannot override the provisions of the section of the Act of Parliament to which I have referred.

Having regard to this conclusion it would not be appropriate for me in these proceedings to deal with the other two points raised on this appeal. They may well have to be considered if and when leave of a judge to proceed is sought hereafter.

The husband's appeal from the decision of Mr. Registrar Forbes, dated October 12, 1959, is accordingly allowed.

Appeal allowed.

Solicitors: *A. Oldschool & Co.; R. H. Marcus, the Law Society, Divorce Department.*

J. B. G.

[2] Matrimonial Causes Rules, 1957, r. 83: "Rules 55 and 56 [which "relate to injunctions restraining "removal of children and to separate "representation of children] shall "apply to proceedings commenced "before these rules come into opera-"tion but, save as aforesaid, these "rules shall not apply to any such "proceedings, to which the rules in "force immediately before the com-"mencement of these rules shall con-"tinue to apply."

[PROBATE, ETC., DIVISION.]

* *In the Estate of* COCKE, DECD.

1960
Feb. 10.

Lloyd-Jones J.

Will—Dependent relative revocation—Two wills—First will followed by subsequent will containing revocation clause and inchoate clause referring to residue—Both wills treated as composite document.

[Reported by D. R. ELLISON, Esq., Barrister-a-Law.]

1960

COCKE, DECD., *In the Estate of.*

The testatrix duly executed a will appointing C. to be her executor and, after certain bequests and legacies, leaving the residue of her estate to C. absolutely. Later, the testatrix duly executed a second will, revoking all previous wills, again appointing C. to be her executor and, after certain bequests and legacies, which were different from those in the first will, containing a clause which was left inchoate in such a way as to leave the residue undisposed of:—

Held, that the second will, omitting the revocation clause, and the first will, omitting those clauses which were inconsistent with the provisions of the second will, should both be admitted to probate as together constituting the true last will of the testatrix.

MOTION.

The testatrix executed a will on November 28, 1956, by which she appointed the applicant to be her executor (clause 1), made certain bequests to the applicant (clause 3), left certain legacies to other persons (clause 4), and left the residue of her estate to the applicant absolutely (clause 5). The will contained a solicitors' charging clause (clause 6) and was deposited at the testatrix's bank, where it remained until after her death. In June, 1958, the testatrix was supplied with a completed copy of that will. This copy will was found amongst the testatrix's papers after her death. It had been altered in the handwriting of the testatrix.

On September 22, 1958, the testatrix duly executed a second will. It was apparent that the completed copy of the first will had been used by the testatrix as a draft for the will of September 22, 1958, which was wholly in the testatrix's handwriting. By this second will, the testatrix revoked all previous wills (clause 1), appointed the applicant to be her executor and trustee (clause 2), made certain specific bequests to him (clause 3) and gave certain legacies (clause 4). The legacies contained in this will differed, both in amount and in the identity of the legatees, from the previous will. The testatrix dealt with the residue of her estate in a clause which ran thus: "(5) I devise and bequest the whole "of the residue of my estate both real and personal unto my "trustee upon trust to sell call in and convert the same into "money with power to postpone the sale calling in and conversion "thereof for so long as my trustee shall in his or her absolute "discretion, and after payment of my debts and funeral "expenses." The charging clause in the previous will was omitted. The testatrix died on February 9, 1959, leaving no known next-of-kin and an estate of the approximate value of £8,000. The applicant moved the court for a grant of probate of both wills, with the omission of clauses 3, 4 and 6 of the will of November 28, 1956, and of clause 1 of the will of September 22, 1958.

R. J. A. Temple Q.C. and *A. J. Balcombe* for the applicant. This is a case of dependent relative revocation. The revocation clause in the second will was inserted because the testatrix thought she had completed the disposition of her estate. Since she was mistaken in this, the revocation clause is of no effect,

and should be omitted from the last will: *In the Goods of Hope Brown.*[1] From this it follows that the first will (not revoked) and the second will (excluding the revocation clause) together constituted the true last will, both documents having been validly executed. The next step is to consider whether any part of the first will ought to be omitted, in order that effect might be given to the undoubted testamentary intentions of the testatrix. On the facts, it is plain that the testatrix herself copied from a completed draft of the first will, when writing out the second will. Clauses 3 and 4 of the first will were reproduced, with variations, in the second will; clause 6 of the first will was omitted from the second will; clause 5 of the second will was left incomplete, in a way which left the beneficial interest in the residue of the estate undisposed of. Clause 5 of the first will ought to stand, because it was in the belief that this clause was wholly reproduced in the second will, and that the residue was thereby disposed of, that the testatrix purported to revoke the first will. Clauses 3, 4 and 6 of the first will ought to be omitted; clauses 3 and 4 of the second will were complete in form but different in content from clauses 3 and 4 of the first will, and clause 6 of the first will was not to be found in the second will. Reliance is placed on *Garnett-Botfield* v. *Garnett-Botfield*[2] and *In the Goods of Irvine.*[3] The present case was envisaged by Sir F. H. Jeune P. in *Garnett-Botfield* v. *Garnett-Botfield* when he said[4]: "I can conceive that, in "the future, the court may be called upon to consider very care-"fully whether in certain circumstances a revocation clause may be "so dealt with as to make of an earlier and later will a composite "document; and although this may appear very like a suggestion "that a new will might be made for a testator, the true state of "facts may possibly be that you cannot get at and give effect to "the real wishes of a testator without putting two documents "together."

C. Trevor Reeve, for the Treasury Solicitor, did not oppose the motion. He referred to an article in the Law Quarterly Review, vol. 71, p. 374, by Prof. F. H. Newark entitled "Dependent "Relative Revocation," and to an unreported Northern Ireland case in 1952, *In the Goods of Agnes Evans*, in which the testatrix, by her first will, left small pecuniary legacies and the residue to an institution for the blind. By a second will executed two days later she varied the pecuniary legacies and left the residue to her solicitor for his own use. There being no independent advice, the gift of the residue failed, and the court held that the provisions of the later will relating to revocation could not be admitted to probate, these provisions being conditional upon the validity of the provision for the disposition of the residue of the estate.

[1] [1942] P. 136.
[2] [1901] P. 335.
[3] [1919] 2 Ir.R. 485.
[4] [1901] P. 335, 344.

1960

COCKE, DECD., *In the Estate of.*

LLOYD-JONES J. ordered that the will dated September 22, 1958, with the omission of clause 1, be admitted to probate, and that the will dated November 28, 1956, with the omission of clauses 3, 4 and 6, be also admitted to probate, both wills together constituting the true testamentary dispositions of the testatrix. The Treasury Solicitor's costs were ordered to be paid out of the estate.

Order accordingly.

Solicitors: *Oldschool, Cutner & Co.; Treasury Solicitor.*

[QUEEN'S BENCH DIVISION.]

1960 *April* 14.

* PRACTICE DIRECTION (APPEARANCE).

Practice — Appearance — Post, by — Modified form of writ — R.S.C., Ord. 12, r. 8 (*as amended by R.S.C.* (*No.* 1) 1960, (*S.I.* 1960, *No.* 545), *r.* 1).

As from May 2, 1960, when R.S.C. (No. 1) 1960 comes into force, defendants' solicitors as well as defendants personally will be able to enter appearance by post.

In consequence of this new rule the masters of the Queen's Bench Division have prescribed modified forms of writs for use in London and also in district registries. These modifications refer to appearances by defendants mentioned in the footnotes on the writs and, in substance, are as follows:

"MEMORANDUM ON LONDON WRITS.

"The defendant may enter appearance personally or by solicitor either by handing in the appropriate forms, duly completed, at the Central Office, Royal Courts of Justice, London, or by sending them to that office by post. The appropriate forms may be obtained by sending a postal order for 10d. with an addressed envelope, foolscap size, to the Controller of Stamps, Royal Courts of Justice, London.

"MEMORANDUM ON DISTRICT REGISTRY WRIT.

"A defendant who resides or carries on business within the above-named district must enter appearance either personally or by solicitor by handing in the appropriate forms, duly completed, at the office of the district registrar, or by sending them to that office by post.

"A defendant who neither resides nor carries on business within the above-named district may enter appearance personally or by solicitor either

"(1) by handing in the appropriate forms, duly completed, at

"the office of the district registrar or by sending them to "that office by post, or

"(2) by handing in the said forms, duly completed, at the "Central Office, Royal Courts of Justice, London, or by "sending them to that office by post.

"If a defendant enters an appearance in London personally "or by solicitor there must be endorsed on the memorandum of "appearance and on the copy thereof (1) the name of the district "registry, (2) a statement that the defendant neither resides nor "carries on business within the district of the district registry, and "(3) the name of the plaintiff or his solicitor and his address for "service."

There will be no fixed date for bringing these new forms into use—the existing forms may still be used until the supply is exhausted. It is for this reason in particular that the attention of solicitors is drawn to this new method of appearance so that they may insure that the appropriate forms are filled up properly; as failure to do so may cause the memorandum of appearance to be rejected, and before any corrections can be made in it the plaintiff may have signed judgment in default.

WILLIAM H. REDMAN,
Secretary to the Masters of the Queen's Bench Division.

April 14, 1960.

[PROBATE, ETC., DIVISION.]

* *In the Estate of* LITTLE, DECD.

1959
Dec. 16.

Sachs J.

Will—Execution—Will consisting of several sheets—Duly executed while pressed together by hand of deceased—Subsequent holograph additions inserted above signature—Testamentary intention—Wills Act, 1837 (7 *Will.* 4 *&* 1 *Vict. c.* 26), *s.* 9—*Wills Act Amendment Act,* 1852 (15 *&* 16 *Vict. c.* 24), *s.* 1.

A draft will consisting of four sheets of paper and a back sheet, all stapled together, were sent to the deceased by his solicitor. The evidence as to attestation was that on November 21, 1957, the deceased placed a number of apparently unattached sheets of paper on a table with the reverse of the back sheet on the top, wrote his own name some eight inches down the page and caused the attesting witnesses to sign beneath. On the death of the deceased the will was retrieved from deposit in a bank stapled together in the order in which it had been dispatched from the solicitor but containing on the upper half of the back sheet above the signatures a disposition of certain specific chattels to the daughter of the deceased. The word "Draft" on the face of the back sheet preceding the word "Will" had been struck out. On an action by the executor praying that the will be admitted to probate which was defended on the ground of lack of due execution:—

Held, that, even if there were no mechanical attachment of the separate sheets of the will at the time of execution the pressing of

1959

Little, decd., *In the Estate of.*

the sheets together by the deceased constituted a sufficient nexus to produce a single testamentary document.

Lewis v. *Lewis* [1908] P. 1; 24 T.L.R. 45 applied.

The fact that, at the time of execution, a blank space intervened between the body of the will and the signature of the deceased did not, in itself, render the will invalid and, in all the circumstances of the case, the intention of the deceased at that time was to give effect to the document as a testamentary disposition immediately and not after the adding of the provision disposing of the specific chattels; that disposition was, therefore, of no effect and the will in the form in which it was on November 21, 1957, was duly executed and must be admitted to probate.

Gregory v. *Queen's Proctor* (1846) 4 Notes of Cases 620 applied.

Probate action.

On September 17, 1956, the deceased went to his solicitor and gave him instructions to the effect that he had made, in his view, ample provision for his daughter and his sons during his lifetime, and that he wished his estate on his death to be held in trust for his grandchildren, three in number. At the end of that same month there were sent to him by his solicitor the five foolscap sheets which constituted the will sought to be propounded. There was at the same time made out on the typewriter in the solicitor's office a carbon copy of those five sheets as sent out. The sheets as sent out were fastened together by a staple. On sheet 1 was the stock form commencement of a will, leaving blank the names of the executors and trustees and leaving blanks for names and amounts which could be inserted to show who were to be beneficiaries of specific legacies. Sheet 2, after certain common form instructions, contained the directions for the residue to be accumulated during the lives of the three grandchildren. Sheet 3 contained the bulk of the disposing provisions. Sheet 4 contained stock matters relating to the functions of the trustees, it was fully filled by those instructions, and ended up at the very foot with the words, "In Witness," etc. The unnumbered sheet 5 was, in fact, a back sheet, and the inside of that back sheet as sent out was blank.

Towards the end of November, 1957, those five sheets were deposited with the Westminster Bank in a sealed envelope numbered 1835. The condition in which they were deposited was that which was revealed upon the envelope being opened shortly after the death of the testator in 1958, and, largely due to the exemplary care shown by the solicitors, that condition remained in essence the same up to the moment the will was deposited in the Probate Registry. From certain photographs which were taken after that deposit it could be seen that the holes in the five sheets through which the staple was placed were no different (and were, when placed in the Probate Registry no different) to the state in which they must have been when they left the solicitor's office. A fold or crease mark, close to the holes, was to be found on each of the five sheets, and it appeared that, as regards sheet 5, the critical sheet, such a fold mark or crease existed at the earliest

moment when attention was drawn to the questions in issue in the action. Further, as regards sheet 5, no such fold mark would necessarily have been made when typing copies of the will as a whole. That was the physical condition of the five sheets as they emerged from the Westminster Bank.

Since the five sheets had left the solicitor's hands as a draft the following matters had been added in writing. On sheet 1 the executors' names were filled in, and also the names and amounts in the blanks which had been kept for the insertion of pecuniary legacies. On sheet 2 there was an alteration, initialled in ink, of the provision relating to the period of accumulation. Sheets 3 and 4 showed no alterations. Upon sheet 5 a considerable amount of writing had been placed, consisting of some eight lines which provided for the daughter, Mrs. Cooper, to take certain chattels as specific legacies (chattels which formed only a minor portion of the estate of the deceased) a full attestation clause and the signatures of the deceased and two attesting witnesses. On the back sheet the word "Draft" had been struck out before the word "Will."

Between November 21, 1957, and the date the document was deposited with the bank the deceased had a conversation with one of the executors, Mr. Foster; and Mr. Foster also had a further conversation with the deceased apparently on January 10, 1958, after the deposit of the will at the bank. In January, 1958, Mr. Foster made a note that the deceased's testamentary intentions was that the whole residue was to go to the daughter's daughter, when she was 21.

The action was brought by the executors praying that the court pronounce for the will of November 21, 1957. It was defended by the daughter of the deceased who alleged that the will had not been duly executed and should, therefore, not be admitted to probate.

Mr. Newton, a neighbour of the deceased and one of the attesting witnesses, said, in evidence at the hearing of the action, that after a telephone conversation the deceased came round to Mr. Newton's house about 2.30 or 3 p.m. on November 21, 1957; the deceased pulled out of his pocket a number of foolscap sheets, of the order, so far as he could see, of six or so, and those sheets were placed on a table with a blank sheet uppermost. Mr. Newton saw nothing of any of the other sheets. At the moment of placing on the table and thereafter the deceased, according to Mr. Newton, made what might be called a trimming movement, rather of the style that is made when one has shuffled a pack of cards; the objective of that movement was clearly to get the papers straight. Then the deceased placed his left hand on those sheets of paper, the top one of which was entirely blank. The blank sheet was the inside of the back sheet. On that back blank sheet the deceased first of all wrote his own name some 8 inches or a little more from the top. He then, according to Mr. Newton, wrote on succeeding lines the words,

1959

LITTLE, DECD., *In the Estate of.*

"Witness: Address: Occupation:" and did so twice, the topmost of those six lines being some 2½ inches from the bottom of the sheet. Then Mr. Newton and his wife, with the deceased still holding the various sheets down with his left hand, were asked to, and did, subscribe their signatures, addresses and occupations. Then the sheets were again folded up, put inside the testator's pocket and he went away. It was Mr. Newton's firm evidence that when the deceased was in the act of taking the folded sheets from his pocket to place upon the table he turned over one of the sheets, which then appeared blank, on top of the others when on the table. He was firm that it was an independent sheet which was being turned over and not one which was attached by the staple.

R. J. A. Temple Q.C. and *K. Elphinstone* for the plaintiff.

Alan Garfitt for the first defendant, who contested the will.

H. S. Law and *J. Hazel* for the second, third and fourth defendants, the grandchildren of the deceased, by their guardian ad litem.

The cases referred to in argument are cited in the judgment.

SACHS J. The issues which have been so well argued before me centre round the last sheet of the will, sheet 5. The arguments of mixed fact and law revolve around questions as to what is the effect if sheet 5 was, at the moment of execution, not attached to sheets 1–4 of the will and what is the effect of that large space on sheet 5 which now has a considerable amount of holograph writing on it, having been substantially blank at the moment when the deceased and the witnesses put their signatures upon it—with particular regard to the deceased's signature having been so placed as to leave that large space above it. [His Lordship referred to the facts and to the evidence of Mr. Foster, the executor, and Mr. Newton and continued:] If the recollection of Mr. Foster is right the deceased had altered his intention since November 21, 1957, and intended that one of his grandchildren should have all the residue and not that it should be shared between the three grandchildren. Whatever change there may have been in his intentions it seems clear that in no circumstances was he minded to leave his residue to his daughter whom he considered fully provided for.

The first inference, and perhaps the most important one which I draw, is to my mind quite clear. Indeed, Mr. Garfitt was not, in the end, prepared to argue to the contrary—and I may add that Mr. Garfitt in his closing address presented his case with praiseworthy moderation. The inference I draw is that under the blank sheet were the four other sheets of this will. (I may add that it is both obvious and common ground that the present case is one of those in which there is no possibility, no suggestion, not the faintest idea, of fraud of any sort or kind.)

Then I turn to the question of fastening. I am disposed to apply the presumption referred to in *Rees* v. *Rees*,[1] "that the "sheets bound together and constituting the will, as found . . . "were so bound together at the time of the execution and "attestation." I am disposed to the view that, honest witness though Mr. Newton clearly was, this is one of those not infrequent cases where the court takes account of the frailties of human recollection and does not necessarily give effect to that recollection on quesions which, in essence, depend on a balance of probabilities. Be that as it may, whilst disposed to take the above views on matters which are largely ones of inference, I need not and do not rest the decision in this case on those views.

I will turn to the position that arises on the footing that for some reason or other sheet 5 was not attached by the staple to the other sheets. First of all, I should mention that no point has been argued, and indeed to my mind no point could be argued, that merely because the last sheet was on top of the others, that could in any way impugn the validity of a will, for it is clear that whatever place a sheet of paper may have in a given bundle at a given time, if it is intended to be in effect the last sheet, then the law so regards it.

Next I mention that there was clear evidence, wholly undisputed, that, during the period of signing, the five sheets were pressed together on the table by the deceased. In my view, even though there was no mechanical attachment between those sheets, such a pressing provides a sufficient nexus between all five of them for the purpose of establishing that there was a single testamentary document. In that behalf I follow the lead given in *Lewis* v. *Lewis*,[2] where it was stated that two pieces of paper being held together for the moment by the testator's finger and thumb was a sufficient nexus.

I should also mention, of course, that Mr. Elphinstone in his helpful argument referred to the careful judgment of Hanna J. in *In the Goods of Tiernan, decd.*[3] There, at the end of a close consideration of the English authorities, Hanna J. stated[4] that, in his opinion, they established "that if a will be written on "several separate and disconnected sheets of paper and the last "only be attested, although no part of the will may have been "seen by the witnesses, it should be admitted to probate on the "presumption that the whole will was in the room and under "the control of the testator at the time of execution." All I need say is that on the facts of the case before me there is no need for the plaintiff to rely on the wider presumption stated by Hanna J. and I do not need to have to consider it here.

Accordingly, subject to the resolution of the further point of whether this document was intended to operate forthwith as a

[1] (1873) L.R. 3 P. & D. 84; 29 L.T. 375.

[2] [1908] P. 1; 24 T.L.R. 45; 98 L.T. 58.

[3] [1942] Ir.R. 572.

[4] Ibid. 580.

1959

LITTLE, DECD., *In the Estate of.*

Sachs J.

testamentary disposition, I hold that it was properly executed and conforms with the provisions of the Wills Act, 1837.

The further point arises thus: what inferences ought to be drawn from the fact that the testator's signature was placed, and to my mind was deliberately so placed, as to leave a blank of half a foolscap sheet above it? The first inference is that it can hardly have been left otherwise than with an intention to add something above it in addition to the words of the attestation clause. That inference is to my mind supported by the fact that within the very few days before the deposit of the will at the bank the eight lines to which I have already referred were in fact added—eight lines making minor dispositions of chattels to the daughter of the deceased.

I think, moreover, that this inference is, if anything, supported by the words which the testator wrote when addressing Mr. Foster in a letter of January 1, 1958. There he refers to his last visit to Mr. Foster and says, "Incidentally, following my "last visit to you I completed the necessary documents which "were duly witnessed and deposited with my bankers in "Banstead." That passage is equivocal in some respects and should not be too much relied upon, but it does tend at least to support something of what I have inferred. To my mind it seems to show that these eight lines, the intent of which may well have been forming or have already been formed in the mind of the testator on November 21, 1957, were probably added not on November 21 itself, but a few days later.

The point that then arises is this: which of two inferences as regards the mind of the testator should be adopted—those two inferences having opposite effects on the question of the validity of the will?

Each inference assumes some degree of ignorance of the law applicable to wills on the part of the testator. The first possible inference is that at the moment of signing he was minded that the document should have immediate testamantary effect but was also then minded later to add some words rather in the nature of a codicil. The second inference could be that he intended that the document should have no such effect until he added to and thus completed the will.

I pause only to note that the mere fact that there is a blank immediately above the signature is of itself no bar to the validity of a will. The Wills Act Amendment Act, 1852, section 1, in so far as relevant reads, "Every will shall, so far only as "regards the position of the signature of the testator . . . be "deemed to be valid . . . if the signature shall be so placed at "or after . . . the end of the will, that it shall be apparent on the "face of the will that the testator intended to give effect by such "his signature to the writing signed as his will"; and provides that no such will shall be affected by the circumstance that a blank

space shall intervene between the concluding words of the will and the signature.

Rees v. *Rees*,[5] which I have already quoted, contains a passage which represents a well-known principle of the law of probate,[6] "If any theory consistent with the validity of the will "can be suggested, which appears to the Court to be as probable "as the theory on which the argument for its validity is based, the "will as found must be maintained." Moreover, my attention has also been called to *Gregory* v. *Queen's Proctor*.[7] That was a case in which the solicitor for the deceased found him in his usual sitting-room; the deceased thereupon pointed to the table and said, "There, Amos, see what I have done. I have made "a new Will and the servants have witnessed it in pencil so that "we can alter it." The documents to which the deceased in that case pointed were admitted to probate without there having been upon it any further signature of the deceased or any further attesting signature.

I take account also of the fact that at the time this document was executed in the present case nothing was said by the deceased as to any intention that it should not take immediate effect: and Mr. Temple has pointed out that as produced there is a deletion of the word "Draft" before the word "Will."

No case has been cited to me in which blanks in a will have precluded its admission to probate, and it is well known that there are a number of cases when it has fallen to the Chancery Court to construe wills which have indeed had blanks of no inconsiderable order.

In those circumstances, my view is that the correct inference to be drawn is as follows: that the testator did intend that this document should have effect immediately as a testamentary disposition, but, being ignorant of the law, he intended before long to add something to it in the nature of a codicil. That brings the matter four-square within the old authority of *Gregory* v. *Queen's Proctor*,[8] to which I have just referred, and the result is that the subsequent insertion of the provisions with regard to specific chattels has no more effect than it did in the case of *In the Goods of Arthur, decd.*,[9] where such a disposition was attempted to be made by inserting, after the execution of the document, a clause in a space very much narrower than the present. The result is that I pronounce for the will as prayed.

The question next arises as to whether I pronounce for it with or without certain passages which have been inserted in holograph. The authorities on the matter are clear, and I do not think there was any argument about this point. I need only, accordingly, say that I propose to include in the pronouncement those parts which are holographed on sheet 1; omit the small holograph alteration

[5] (1873) L.R. 3 P. & D. 84.
[6] Ibid. 86–87.
[7] (1846) 4 Notes of Cases 620.
[8] Ibid.
[9] (1871) L.R. 2 P. & D. 273; 25 L.T. 274.

1959

LITTLE, DECD., *In the Estate of.*

on sheet 2; and exclude the whole of the disposing provisions as regards to chattels on sheet 5.

Order accordingly.

Solicitors: *Enever, Strong, Freeman & Co. for Robert H. Kerrison, Coulsdon; Kinch & Richardson.*

E. J.

[SHEFFIELD ASSIZES.]

1960 *March* 1, 2.

Salmon J.

* BURNETT & HALLAMSHIRE FUEL LTD. *v.* SHEFFIELD TELEGRAPH & STAR LTD.

Libel and Slander — Newspaper — Absolute privilege — Statement by solicitor at criminal trial—Whether newspaper bound to verify accuracy.

In an action for an alleged libel contained in a newspaper report of judicial proceedings the defence of a fair and accurate report applies to a report of counsel's or a solicitor's address in court, and there is no rule of law that a newspaper, before publishing the report, is bound to verify whether what the counsel or solicitor has said is accurate.

Dictum in *Flint* v. *Pike* (1825) 4 B. & C. 473; 6 Dow. & Ry. K.B. 528 not followed.

ACTION for libel tried with a jury.

On October 22, 1958, a man named Albert Darwent pleaded guilty at the Sheffield Magistrates' Court to stealing a quantity of coal of the value of 6s., the property of Burnett & Hallamshire Fuel Ltd., the plaintiffs. He consented to be dealt with summarily. Mr. Pitt, the solicitor who was prosecuting for the Sheffield Corporation, made a speech to the magistrates telling them what the case was all about in his view. Evidence was called of the accused's character which included previous convictions, and he was fined £10.

A reporter from the defendants' newspaper was present in court and took a shorthand note, though not a verbatim account of the proceedings. Within ten minutes of having made that note he wrote out a report which was edited by one or more sub-editors, and finally the article or report found its way into the defendants' newspaper, "The Star," on the same evening as the conviction. It read:

"COAL FIRM 'CONNIVES AT DISHONESTY'—SOLICITOR.

"A large firm of city coal merchants had 'connived at dis-
"'honesty' by employees, said Mr. George Pitt, prosecuting in
"Sheffield today. They knew that employees were stealing but
"turned a blind eye to the thefts, Mr. Pitt said, adding that the
"firm were reluctant to bring prosecutions, and even when a

[Reported by G. M. SMAILES, Esq., Barrister-at-Law.]

" policeman caught a man in the act of stealing coal, said they " did not wish a case to be brought.

" Albert Darwent, 36-year-old lorry driver, of Ironside Road, " Sheffield, was fined £10 after pleading ' guilty ' to stealing coal " worth six shillings the property of Burnett & Hallamshire Fuel " Ltd.

" Previous Thefts.

" Mr. Pitt said that Darwent, who had three children, had " previous convictions for stealing coal and had been sent to prison " for six months last year for such an offence.

" Darwent, Mr. Pitt continued, was employed as a lorry driver, " taking coal from an opencast site to Neepsend Power Station.

" A police constable who stopped Darwent's lorry found two " hundredweights of coal in bags in the cab. Darwent admitted " that he had stolen it and intended taking it home.

" The constable had done a public service in uncovering this " type of offence, Mr. Pitt added."

The plaintiffs claimed that by those words the defendants meant, and were understood to mean, that the plaintiffs connived at thefts by employees, including Darwent, which they knew to be taking place, and tried to protect their employees when caught in the act, and preferred to deliver short weight to their customers rather than do their duty by prosecuting such employees.

By their defence, the defendants admitted that they printed and published the above words but did not admit that they printed or published them of or concerning the plaintiffs. They denied that the words meant or were understood to mean or were capable of the alleged or any meaning defamatory of the plaintiffs. The defendants also claimed that the words were a fair and accurate report of proceedings publicly heard before the court on the hearing of the charge. It was conceded by counsel for the defendants that to say of the plaintiffs, or of anyone, that they had connived at dishonesty was defamatory.

Albert Darwent happened to be employed by a man who was a coal merchant and contractor, and who was under sub-contract to carry coal for the plaintiffs, and it was contended on behalf of the plaintiffs that, on the facts, it was not proved that Mr. Pitt was criticising the plaintiffs at all, and that he might well have been criticising the sub-contractor, and that the report could not therefore have been a fair and accurate one.

The case is only reported on that part of the summing-up to the jury which dealt with the question whether the defence of a fair and accurate report of judicial proceedings applied to the solicitor's address in court.

Colin Duncan and *D. T. Lloyd* for the plaintiffs.

Helenus Milmo and *G. F. Leslie* for the defendants.

1960

BURNETT & HALLAMSHIRE FUEL LTD. v. SHEFFIELD TELEGRAPH & STAR LTD.

The following cases were cited in argument: *Flint* v. *Pike* [1]; *Saunders* v. *Mills* [2]; *Lewis* v. *Walter* [3]; *Roberts* v. *Brown* [4]; *Kimber* v. *Press Association* [5]; *Farmer* v. *Hyde* [6]; also Gatley on Libel and Slander, 4th ed., at pp. 300–303.

SALMON J. Members of the jury, when a case is heard in court, any advocate—that is to say, any barrister or solicitor—or any witness or any judge, is absolutely privileged in what he says. It may be—and sometimes is—the duty of an advocate or a witness or a judge to say something which is highly defamatory about some person, but that person can have no redress in law, and it is a matter of the most urgent public policy that that should be so. It is of supreme importance that justice shall be done, and justice could never be done if an advocate or a witness or a judge was constantly looking over his shoulder and saying: "If I say so-and-so, "someone may sue me for damages." For many, many years now it has been clearly established that anything said in open court is absolutely privileged so far as the law of libel is concerned.

There is another principle which is of equal importance. Not only should justice be done, but it must manifestly be seen to be done. Justice is not a cloistered and secluded virtue. Behind closed doors, justice withers and dies, that is why in this country the doors of our courts are open to every member of the public so that the public may walk into court and see justice being done. But, members of the jury, the vast majority of the public have other occupations than attending court, and a principle has grown up which is merely an extension of the principle which I have indicated to you, that the press has the freedom to report any proceedings in open court, providing that the report is fair and accurate, so that justice is seen to be done not only by the few members of the public who can spare the time to come to court, but by the whole, vast public which is reached by our press. One of the reasons, at any rate, why the standard of the administration of justice in this country is as high as it is today is because justice is done so publicly, and it would be a very sad day if the principle that a case may be reported—if the report is fair and accurate—should ever be doubted or departed from, because it is one of the principles upon which our whole system of administering justice is based.

Members of the jury, from the point of view of the individual concerned, it is equally important that the press, in reporting any proceedings in open court, should not report the proceedings in a way which is unfair and inaccurate. Let me give you an illustration of what I mean: supposing a case has gone on for a whole

[1] (1825) 4 B. & C. 473; 6 Dow. & Ry.K.B. 528.

[2] (1829) 6 Bing. 213; 3 Moo. & P. 520.

[3] (1821) 4 B. & Ald. 605.

[4] (1834) 10 Bing. 519; 4 Moo. & S. 407.

[5] [1893] 1 Q.B. 65; 9 T.L.R. 6, C.A.

[6] [1937] 1 K.B. 728; [1937] 1 All E.R. 773; 53 T.L.R. 445, C.A.

day, and during part of the day counsel on one side or the other has said something, upon instructions, highly defamatory about one of the parties to the case but the evidence given later in the day entirely fails to support what counsel has said. The newspaper, in reporting the case next day, is entitled to report the opening and the evidence, but not the opening alone, for to leave out the evidence would give an entirely unfair slant to the whole report.

An even stronger case—and there have been such—is where a judge or a jury has found that there is nothing in the allegations made against one of the parties, and yet a newspaper in reporting the case has reported the allegations but not the finding. In such a case you would have no difficulty—and no jury would have any difficulty—in saying that that report was unfair and inaccurate.

But in considering whether a report is fair and accurate, you have got to use your common sense. You do not go through a report with a toothcomb and say: "If I can find that little inaccuracy, "that is the end of the defence." Minor and irrelevant inaccuracies are of no consequence. This principle that you are free to report anything provided it is fair and accurate would not be worth much—human nature being what it is—if, through some slight, inconsequential slip, you were to be deprived of that defence; the law takes a broad and sensible view that a minor and immaterial inaccuracy is of no importance. If there is an omission or inaccuracy, it is for you the jury to consider whether it really is significant, and the only help I can give you is this: if you say to yourselves: "It would not have mattered whether that was in "or not," then it is of no consequence. But if you say: "This "makes a real difference to what was being said about the "plaintiffs, and if this had not been added, anyone reading the "newspaper would not have taken an adverse view, or such an "adverse view of the plaintiffs as they would on the report as it "is published," then the defence fails. [His Lordship referred to the facts and continued:]

Members of the jury, I reminded you that a judge, a witness and an advocate are completely protected in respect of what they say in court, but there is a corresponding rule of practice that no advocate ought to make a charge of dishonesty unless he is satisfied that there is material to support the charge. There is another rule of practice that you do not attack the integrity of someone who is not before the court and therefore unable to defend himself, save in the most exceptional circumstances. In this case, however, you are not deciding whether Mr. Pitt was fair to the plaintiffs in what he said. What you have to decide is whether the report of those proceedings against Darwent on October 22 was a fair and accurate report. Was the report of the judicial proceedings fair and accurate? That is the point for you to consider.

It has been submitted to you by counsel on behalf of the plaintiffs that there is a rule of law that this defence of a fair and accurate report of judicial proceedings does not apply to

1960

BURNETT & HALLAMSHIRE FUEL LTD. v. SHEFFIELD TELEGRAPH & STAR LTD.

Salmon J.

a report of a counsel's address in court or a solicitor's address in court unless what the solicitor says is warranted by the facts, and in support of that contention counsel has cited to you *Flint* v. *Pike*,[1] a case which was decided in 1825. Members of the jury, I tell you—and you must take the law from me—that that case, in my judgment, decides nothing of the kind. There are certain observations made by one of the judges in that case which were not essential for the decision of the case and which do appear to support the argument on behalf of the plaintiffs; but I am bound to direct you that, in my judgment—I will not bore you with the reasons because you are not concerned with the reasons—that argument is wrong. You were also referred by counsel to Gatley on Libel and Slander, and so far as the passage in Gatley appears to support the argument, that, members of the jury, is equally wrong.

What was said by the judge in 1825 does not correctly state the law of England today in 1960, and I profoundly doubt if it stated it correctly in 1825. There is no rule of law that a newspaper, before publishing a report of proceedings in court, is bound to verify whether what counsel, a solicitor or a witness has said is accurate. The function of a newspaper is to give a fair and accurate account of what happens in court. The public is entitled to be in court and listen, and the public is entitled to know what is going on in the court through their newspapers. That is a fundamental right of the public, and it depends to no little extent upon what is called the freedom of the press. It is really the freedom of us all. So you can consider whether this is a fair and accurate report untrammelled by any rule of law. It is entirely a matter of fact for you to say, "Is that a fair and accurate report of those "judicial proceedings?"

Judgment for the defendants with costs.

Solicitors: *Kershaw, Tudor & Co., Sheffield; Neal, Scorah, Siddons & Co., Sheffield.*

[1] (1825) 4 B. & C. 473, 478.

[QUEEN'S BENCH DIVISION.]

* BRYAN v. ROBINSON

1960
April 8.

Lord Parker C.J., Ashworth and Salmon JJ.

Metropolis—Insulting behaviour occasioning breach of peace—Touting—Hostess standing in door of restaurant beckoning to passers-by—Metropolitan Police Act, 1839 (2 & 3 *Vict. c.* 47), *s.* 54 (13).

The defendant, who was employed as a hostess at a non-alcoholic refreshment house, stood in the doorway, leaned out, smiled, beckoned and spoke to three men who were walking in the street past the front door of the premises. The men, being annoyed by the defendant's conduct, walked across the street away from the

premises. The defendant was charged with using insulting behaviour whereby a breach of the peace might have been occasioned, contrary to section 54 (13) of the Metropolitan Police Act, 1839 [1]:—

Held, that in order to constitute an offence under section 54 (13) there must be not only insulting behaviour but the behaviour must be of such a character that a breach of the peace might be occasioned and, in the circumstances, even if the defendant's gestures were insulting, they were not such as might occasion a breach of the peace, accordingly, she was not guilty of an offence under the subsection.

CASE STATED by the chief metropolitan magistrate.

On May 6, 1959, an information was preferred by the prosecutor (a metropolitan police officer) against the defendant, Lorraine Bryan, that she on May 1, 1959, at Dean Street W.1, did use insulting behaviour whereby a breach of the peace might have been occasioned, contrary to section 54 (13) of the Metropolitan Police Act, 1839. The chief magistrate found the following facts:

At 10.55 p.m. on May 1, 1959, the defendant was present in Dean Street and standing in the doorway of premises at No. 48 thereof, which premises contain a non-alcoholic refreshment house licensed under the Refreshment Houses Act, 1860 (colloquially known as a "near-beer" establishment). The defendant, from her position in the doorway, leaned out, smiled, beckoned and spoke to three men who were walking in the street past the front door of the premises. The three men were annoyed by the defendant's conduct and immediately walked across the street and away from the premises. On that evening, the defendant was working at the refreshment house as a hostess. Hostesses took it in 15 minutes turns each to stand in the doorway of the refreshment house for the purpose of attracting customers. Each hostess (including the defendant) was given commission by the proprietors of the refreshment house on drinks bought by customers introduced by her and in her company. The defendant, during her 15 minutes turn at the doorway, was touting for customers on behalf of the proprietors of the refreshment house. It would be impossible for anyone so touted or solicited without inquiry to appreciate the purpose of the solicitation. That a solicitation for this purpose in the circumstances of the time and locality was of a nature to affront persons so solicited and might provoke a breach of the peace.

It was contended by the defendant that the offence had not been committed either in a public place or in a thoroughfare as required in section 54 of the Metropolitan Police Act, 1839; and that the facts as adduced in evidence by the informant (and

[1] Metropolitan Police Act, 1839, s. 54: "Every person shall be liable "to a penalty not more than 40s., "who, within the limits of the metro-"politan police district, shall, in any "thoroughfare or public place, commit "any of the following offences: (that "is to say,) . . . (13) Every person "who shall use any threatening, "abusive, or insulting words or be-"haviour, with intent to provoke a "breach of the peace, or whereby "a breach of the peace may be "occasioned."

1960

BRYAN
v.
ROBINSON.

accepted by the magistrate) were insufficient to constitute the offence as contained in section 54 (13).

It was contended by the prosecutor that the offence had been committed in a public place or thoroughfare, and that the evidence adduced was sufficient to support a finding that an offence under section 54 (13) had been committed.

The chief magistrate found that the offence had been committed in a public place or thoroughfare, and that the above-mentioned facts were sufficient to constitute the offence under section 54 (13) and, accordingly, he convicted the defendant and fined her 40s. The defendant appealed.

Michael Beckman for the defendant.
Paul Wrightson for the prosecutor.

The following case was cited in argument: *Wilson* v. *Skeock*.[2]

LORD PARKER C.J. This is an appeal by way of case stated by the chief magistrate sitting at Bow Street, before whom the defendant was charged for that "she on May 1, 1959, at Dean "Street, W.1 in the County of London, did use insulting "behaviour whereby a breach of the peace may have been "occasioned, contrary to section 54 (13) of the Metropolitan Police "Act, 1839." The chief magistrate found the offence proved and fined her 40s.

The short facts, as found by the chief magistrate, are these: The defendant was employed as a hostess at a non-alcoholic refreshment house in Dean Street. The establishment had a number of hostesses who took turns for 15 minutes to stand in the doorway of the refreshment house in order to attract customers. Each hostess was given a commission by the proprietors of the establishment on drinks bought by customers introduced by her and in her company. At 10.55 p.m. on May 1 the defendant was so employed and from her position in the doorday leaned out, smiled, beckoned and spoke to three men who were walking in the street past the front door of the premises. The three men were annoyed by the defendant's conduct and immediately walked across the street and away from the premises.

Two points were taken on the case stated. The first, which has been quite rightly, in my judgment, abandoned by Mr. Beckman, was that in any event this did not take place, to use the words of the Act, "in any thoroughfare or public place."

The second point is that the primary facts found by the chief magistrate, to which I have already referred, could not in law support a finding that an offence under the section had been committed. Section 54 of the Metropolitan Police Act, 1839, provides: "Every person shall be liable to a penalty of not more "than 40s., who, within the limits of the metropolitan police

[2] [1949] W.N. 203; 65 T.L.R. 418; 113 J.P. 294, D.C.

"district, shall, in any thoroughfare or public place, commit any "of the following offences, that is to say"; there are then set out 17 subsections of offences. Subsection (13) provides: "Every "person who shall use any threating, abusive, or insulting words "or behaviour with intent to provoke a breach of the peace, or "whereby a breach of the peace may be occasioned." The relevant words for the purposes of this case are: "Every person "who shall use any . . . insulting . . . behaviour whereby a breach "of the peace may be occasioned." It is said that the mere finding that this woman leaned out from the doorway, smiled and beckoned, coupled with the finding that three men were annoyed, is sufficient to justify the inference or the finding that she used insulting behaviour whereby a breach of the peace may have been occasioned. It is clear from the case stated that this woman was merely touting for this refreshment house. There is no suggestion here that it was a disreputable establishment or brothel, or that her solicitation was for the purposes of prostitution. In my judgment, the words of subsection (13), to which I have referred, must be read as one; there must be insulting behaviour of such a character that a breach of the peace may be occasioned. Looked at in that way, I find it very difficult to see how a mere leaning out, smiling and beckoning without more could amount to such insulting behaviour of a character whereby a breach of the peace may be occasioned. It is true that three men were annoyed, but quite clearly somebody can be annoyed by behaviour which is not insulting behaviour. The mere fact that they were annoyed really carries the matter no further. Even if it can be said that a reasonable person would be likely to treat the gestures as insulting, they were certainly not, in my judgment, of such a character whereby a breach of the peace may be occasioned. Accordingly, in my judgment this appeal will have to be allowed.

There is little doubt that this practice in London may be highly objectionable, and it may be that steps will have to be taken to prevent this sort of thing occurring; but what this court is concerned with is whether the actions in question could be brought within the Metropolitan Police Act, 1839, and in particular section 54 (13). In my judgment they cannot. Accordingly, I would allow this appeal, with costs here, and costs below to be taxed out of court.

ASHWORTH J. I agree.

SALMON J. I agree.

Appeal allowed with costs.

Solicitors: *Joelson & Co.; Solicitor for Metropolitan Police.*

J. D. P.

[COURT OF APPEAL.]

C. A.

1960
March 15, 16, 17, 18.

Lord Evershed M.R., Pearce and Harman L.JJ.

* DUPLE MOTOR BODIES LTD. *v.* INLAND REVENUE COMMISSIONERS.

SAME *v.* OSTIME (INSPECTOR OF TAXES).

Revenue — Income tax — Work in progress — Method of valuation — Whether "on cost" or "direct cost" method to be applied— Whether any principle involved.

Fact or Law—Income tax—Profits of trade—Work in progress—Method of valuation.

The taxpayers, a company, carried on the business of building to order bodies for road vehicles, mostly motor-coaches, and at the end of each accounting period the taxpayers had in hand a number of unfinished bodies. The taxpayers had for a number of years for the purpose of computing the value of work in progress for income tax purposes used the direct cost method; on that basis only the direct cost of materials and labour expended on such work was taken into account. For the three tax years in question the Crown sought to value the work in progress on an "on-cost" basis by adding to the direct cost a proportion of indirect expenditure incurred, such as overheads. It appeared, on the facts, that in the year when the taxpayers were not working to full capacity the direct cost method showed that the work in progress was £2,000 less in value at the end of the year than at the beginning, with the result that taxable profits would be reduced by £2,000. The application of the on-cost method in the same year showed the value of the work in progress as £14,000 more than at the beginning of the year, so that the taxable profits or gains were increased by £14,000. The Crown sought to have decided as a matter of broad principle that the "on-cost" method was the right principle to apply in valuing work in progress for income tax purposes. The special commissioners found that the accountancy profession as a whole was satisfied that either method would produce a true figure of profit. The commissioners, however, found in favour of the "on-cost" method of valuation. Vaisey J. reversed their decision:—

Held, that it would be wrong for the court to lay down as a matter of broad general principle that the "direct cost" method or the "on-cost" method was the right method of valuation of work in progress. The court should only deal as a question of facts and figures with the circumstances of particular cases and decide on those facts and figures what was fair as between the Crown and the taxpayer (post, pp. 520, 525), and that, on the facts and figures of this particular case, the on-cost method had been shown to produce an unfair result, and the direct cost method was the right one to employ for the assessment of the taxpayer's real profit for the years in question.

Whimster & Co. v. *Inland Revenue Commissioners*, 1926 S.C. 20; 12 T.C. 813, and *Patrick* v. *Broadstone Mills Ltd.* (1954) 35 T.C. 44; [1954] 1 All E.R. 163, C.A. considered.

Decision of Vaisey J. affirmed.

APPEALS from Vaisey J.

These two appeals were heard together, both were concerned with the same facts, the one related to the assessment of the

taxpayers' income tax, the other with the assessment of their profits tax. The appeal in regard to income tax was alone argued.

Duple Motor Bodies Ltd., the taxpayers, appealed to the Commissioners for the Special Purposes of the Income Tax Acts against assessments to income tax under Case I of Schedule D for the years 1951–52, 1952–53 and 1953–54 in the sums of £250,000, £200,000 and £1,000 respectively.

The commissioners summarised the questions for their determination as follows: (1) Whether, in arriving at the cost of work in progress for the purpose of computing the profits of the company for income tax purposes, the cost of direct materials and labour only ("direct cost") should be taken into account, or whether there should be added to the direct cost a proportion of indirect expenditure ("on-cost"); and (2) if on-cost was to be taken into account what items of indirect expenditure fell to be included.

It was common ground that there was no question of market value of work in progress as it could not be regarded as saleable in its unfinished state.

It appeared from the case stated that the taxpayers were incorporated in July, 1946, and took over the business of a company which had been incorporated in 1919. Their business was that of building to order bodies for different types of road vehicles, mostly motor-coaches, and the turnover in the period 1948 to 1954 had been in excess of £1,000,000 per annum. Since the business was almost entirely that of building bodies to order, very few finished bodies were included in work in progress at the end of an accounting period.

Since 1924 the taxpayers or their predecessors had used the direct cost method in ascertaining the cost of work in progress in their annual accounts.

The commissioners were asked in the first instance to decide as a broad matter of principle whether the direct cost method or the on-cost method was to be applied in ascertaining the cost of work in progress for the purposes of computing the Case I profits; and on this basis to consider the accounts for the year to March, 1951, as an example.

In the balance-sheet for the year to March 31, 1951, there was an item "work in progress and finished stock £136,109." This figure represented only the cost of labour and materials. From the nature of the business—i.e., almost entirely building bodies to order—and from the method of keeping records, it was possible to identify the cost of materials used and labour employed in the making of each body. The figure of £136,109 was the actual cost of the materials used in each separate job and the actual cost of the labour of individual men working on each job. The balance-sheet showed debits for unproductive labour and works costs amounting to £93,750 and for sundry charges amounting to £91,078.

C. A.

1960

Duple Motor Bodies Ltd. v. Inland Revenue Comrs.

The commissioners, after considering the figures in the accounts, stated:

"7. As regards these two methods of ascertaining the cost of "work in progress (the direct cost method and the on-cost method) "we find that the position is as follows:

"(a) Both methods are recognised by the accountancy pro- "fession as correct accountancy. There is no cleavage of "opinion in the profession as a whole in the sense that the "advocates of one method consider the other method wrong or "unsound. We think it right to say, however, that [the tax- "payers' accountant] himself considered the on-cost method "definitely unsound, but he thought—and we so find—that he is "in a minority in holding this opinion.

"Professional accountancy opinion is rarely static on questions "of this kind: we find that up to fairly recently the weight of "accountancy opinion was in favour of the on-cost method, but "that now the trend in the profession is slightly away from this "method.

"(b) On the evidence adduced before us we find—and this "naturally has caused us difficulty—that the accountancy pro- "fession as a whole is satisfied that either method will produce a "true figure of profit for income tax purposes.

"In this state of affairs we find that it is very much a matter "of policy for the decision of the directors of a company which "method should be used.

"(c) In dealing with the Inland Revenue the majority of tax- "payers either submit accounts in which the on-cost method has "been applied in the accounts, or, if this method has not been "applied in the accounts, computations of the Case I profits in "which the on-cost method is applied are submitted together with "the accounts.

"(d) There are several different ways of applying the on-cost "method. Indirect expenditure is quite commonly divided by "cost accountants into headings of:—(a) factory expenses; "(b) office expenses; (c) selling expenses; (d) dispatch and "financial expenses.

"It is a common, but not universal, method of applying the "on-cost method to include in the cost of work in progress a "proportion of either all the factory expenses or of some only of "them, and to exclude the other headings of indirect expenditure.

"(e) If the on-cost method is applied, different accountants "may apply different recognised variations of this method; and, "whatever recognised variation of this method is applied, the "accountancy profession as a whole would not condemn any "particular recognised variation as being unsound. Furthermore, "we find that there is considerable scope for difference of opinion "as to how a recognised variation of the on-cost method should be "applied to the facts of each particular case.

"(f) In the application of the direct cost method there is room

" for difference of opinion in the accountancy profession, and also " for an element of estimation. [The taxpayers' accountant] had " earlier considered certain items of expenditure to be items of " indirect expenditure; but before us he stated that he had come " to the conclusion that some of these items were items of direct " expenditure, and that as to others he had a doubt, but they " could, not unreasonably, be considered direct expenditure.

" Some items which [he] considered were items of direct " expenditure were, in this particular case, for practical reasons " estimated. For example, it would be possible by various meter- " ing devices to ascertain precisely what proportion of the cost " of power and of gas was appropriate to a particular body; it was " not reasonably practical to do this, and an estimate would be " made; but this estimate would be regarded as direct expenditure.

" (g) One result of the on-cost method is that the cost of work " in progress varies with the rate of production. If a factory is " not working at full capacity, the cost of work in progress com- " puted by this method is higher than if the factory is working at " full capacity. On the direct cost method the cost of work in " progress is not affected by the rate of production. . . .

" 9. It was contended on behalf of the appellant company: " (1) that in computing profits for income tax purposes the " amount to be taken into account in respect of work in progress " is the amount of expenditure actually incurred directly and " proximately in producing it, that is to say, the cost of materials " used, labour expended and other direct expenses; (2) that all " other expenses are properly deductible in arriving at the profits " of the year in which they are incurred; (3) that the level of " overhead expenses of a business depends upon the general " extent and organisation of that business, does not vary directly " with the volume of production and so is not directly connected " with that production; (4) that on the evidence it could not be " said either that the direct cost method of valuation was incon- " sistent with the principles of commercial accounting, or that it " did not produce a true figure of profit for income tax purposes; " (5) that the method (direct cost) adopted by the company in " computing its profits could not be displaced by the Revenue " unless (which was not the case) it was shown to be inconsistent " with the principles either of commercial accounting or of income " tax; (6) that the direct cost method contained no element of " arbitrary estimation, whereas the on-cost method did contain " such an element; (7) that, for the purposes of ascertaining the " true income tax profits for a year of assessment, a method which " contained no element of arbitrary estimation was preferable to a " method which did contain such an element; (8) that for these " reasons the direct cost method should be applied in this case.

" 10. It was contended on behalf of the respondent (H.M. " Inspector of Taxes): (1) that, where there is more than one " method for arriving at the profits for a relevant period, that

C. A.
1960
Duple Motor Bodies Ltd.
v.
Inland Revenue Comrs.

"one which shows most accurately the position between the "Revenue on the one hand and the taxpayer on the other so as "to give the true profit of a particular accounting period ought "to be adopted; (2) that accordingly, in arriving at the company's "true profits for income tax purposes, the value of work in "progress and finished goods at the end of an accounting period "must be credited in the accounts at full cost, that is to say, the "direct cost with the addition of the proportion of overhead "expenses referable to such work in progress and finished goods; "(3) that to exclude all overhead expenditure from the cost of "work in progress is in effect to allocate the whole of such "expenditure to the sales which had been effected during the "accounting period; (4) that at least some part of indirect "expenditure has been expended on work in progress, and that "it cannot be correct in arriving at the Case I profits of an "accounting period to allocate (as the "direct cost" method "does) the whole of this indirect expenditure to sales which have "been effected during that accounting period; (5) that the on-cost "method produces the true view of the Case I profit for a year of "assessment and that the direct cost method does not, and that "therefore the on-cost method should be applied in this case.

"11. We, the commissioners, who heard the appeal gave our "decision in principle as follows:

"We have been asked to decide this appeal on a broad ques-"tion of principle, and we are going to do that, fully aware that "in doing so we shall be leaving open a wide field for discussion "between the parties; but we feel that, having to decide this as a "broad question of principle, that is really inevitable and cannot "be helped.

"We think that on the broad general question the appeal fails. "The position here is that we have a company manufacturing "vehicle bodies, and at the end of every year this company has "on hand a number of finished but unsold bodies, and also a "number of unfinished bodies; and it is agreed between the "parties that these finished and unsold bodies and unfinished "bodies—that is to say, work in progress and stock—have to "come into the profit and loss account at the end of the year. It "is further agreed that those things must come in at cost; it is "agreed that there is no question before us of market value.

"The problem is one very easy indeed to state, however "difficult it is to answer. We have found the problem very "difficult. The simple question is: How do you get at the cost "of this work in progress? In the accountancy world there are "two views. The view of the appellants (which we will call the "'direct cost' view) is that the cost is to be ascertained by taking "only the cost of labour and material involved in any particular "body, and that cost only. The method adopted by the Crown is "the 'on-cost' method. They say that to ascertain the cost of "work in progress you have to add some proportion of overheads.

"The appellants say that indirect costs, such as overheads, are "incurred whether production is continuing or not, and that to "apply the 'on-cost' method will in certain circumstances "produce a distortion of the figure of profits. The appellants also "say: 'We work on known or perfectly accurate ascertainable "'figures, and on this kind of basis you arrive at a truer view of "'cost than you do on the "on-cost" method.'

"The Crown contend that some part of these overheads must "go into the cost of work in progress. When the factory is not "running at full capacity, the Crown say it is obvious that pro-"duction costs more—that is, it costs more if the factory is not "running at full capacity to make a particular vehicle. That is a "fact, the Crown contend, and that kind of fact ought to be "reflected in the accounts, and the 'on-cost' method does reflect "that kind of fact. . . .

"In that position on the evidence, and guided by the authori-"ties, we can state our opinion very shortly. We feel in the end "that to get at the true cost of producing an article—that is the "cost of making the thing—there is really something more in the "cost than the mere cost of labour and the cost of the material "that has gone into that particular article. It seems to us that "it has really cost more to build a vehicle body than just the cost "of labour and material. The object of the 'on-cost' method—"whether we are right or wrong about this—is really to get at the "cost; and as we are coming down on the side of the 'on-cost' "method it appears to us that any proportion of overheads, which "on that method is to be attributed to cost, should be limited to "factory overheads, namely, the overheads of the place where the "thing is actually being made. We realise that the expression "'factory overheads' is rather vague; but, since we are asked "to decide this matter on a broad question of principle, we feel, "as we have already said, that it is inevitable that a wide field "for discussion should be left open and we do not feel able to "define the term 'factory overheads.' We think that the pro-"portion of overheads to be attributed to the cost of building a "vehicle body should be limited to a proportion of factory "overheads. . . .

"We finish where we began by saying we know full well that "we have left a wide area open. We do not think we can help "that. If, of course, the parties are unable to come to any "settlement on the basis of what we have said today, they will "come back to us. The appeal fails."

The commissioners stated the questions of law for the determination of the court as follows: "(1) whether, on the evidence "and in view of our findings set out above, our decision that the "on-cost method should be applied in arriving at the cost of work "in progress for the purpose of computing the company's Case I "profits was erroneous in law; (2) on the basis that we were "correct in applying the on-cost method, whether our decision as

C. A.
1960
DUPLE MOTOR BODIES LTD. v. INLAND REVENUE COMRS.

"to what items should be included in arriving at cost on this "method was erroneous in law."

The actual figures considered by the commissioners are more fully stated in the judgment of Lord Evershed M.R.

Vaisey J. allowed the taxpayers' appeal and dismissed the Crown's cross-appeal, holding that the directors of the taxpaying company were entitled to decide which of the two methods of valuation should be adopted. They decided that the direct cost method was right, and it was not for the commissioners to direct an alternative method of valuation.

The Crown appealed on the ground that the commissioners were right in law in holding that in arriving at the cost of work in progress in order to compute the taxpayers' profits for income tax purposes there should be added to the direct cost of the labour and materials a proportion of indirect expenditure, but that the commissioners were wrong in law in holding that the on-costs, which should be added to the direct costs, should be restricted to "factory overheads" of the place in which work in progress was actually made.

F. N. Bucher Q.C. and *Alan Orr* for the Crown.

R. E. Borneman Q.C. and *C. N. Beattie* for the taxpayers.

The following cases, which were cited in argument, are not referred to in the judgments: *Minister of National Revenue* v. *Anaconda American Brass Ltd.*[1]; *Edwards* v. *Bairstow and Harrison*[2]; *Southern Railway of Peru Ltd.* v. *Owen*[3]; *Vallambrosa Rubber Co. Ltd.* v. *Farmer*[4]; *Naval Colliery Co. Ltd.* v. *Inland Revenue Commissioners*[5]; *Albion Rovers Football Club Ltd.* v. *Inland Revenue Commissioners*[6]; *Ryan* v. *Asia Mill Ltd.*[7]

LORD EVERSHED M.R. The question for the decision of this court may be taken as it was formulated by the special commissioners at the end of the case stated. It is as follows: "Whether, "on the evidence, and in view of our findings, our decision that "the 'on-cost' method should be applied in arriving at the cost "of work in progress for the purpose of computing the company's "Case I profits was erroneous in law." The question as formulated did not (and I will assume deliberately did not) limit the subject-matter to the company's Case I profits for particular years; but I wish to say at the beginning that the problem before the special commissioners and before us should be treated as so limited. At the beginning of the case three years are referred to (though, for the purposes of this judgment and of the argument,

[1] [1956] A.C. 85; [1956] 2 W.L.R. 31; [1956] 1 All E.R. 20.
[2] [1956] A.C. 14; 36 T.C. 207, 227; [1955] 3 All E.R. 48, H.L.
[3] [1957] A.C. 334; (1956) 36 T.C. 602; [1956] 2 All E.R. 728, H.L.
[4] 1910 S.C. 519; 5 T.C. 529.
[5] (1926) 12 T.C. 1017, H.L.
[6] (1952) 33 T.C. 331.
[7] (1949) 32 T.C. 275, 293, H.L.

one particularly has been mentioned), namely, the year 1951–52 and the two succeeding years. I repeat that I shall treat the question posed as relating to those three years. The special commissioners then put a second question, to which I may make some brief allusion hereafter.

The question arises in connection with the computation of the profits of the company, Duple Motor Bodies Ltd., for the purpose of income tax under Case I of Schedule D. Put in the language of the statute, which language is now enshrined in section 127 of the Income Tax Act, 1952, the real question to which this matter is related is: For the years in question, what were the full amounts of the profits or gains of this company's trade? Before *Whimster & Co.* v. *Inland Revenue Commissioners*,[1] the profits or gains of a trade were, I understand, ordinarily arrived at, in the case of a company such as this, by discovering what the trading receipts were for the year in question and then deducting from those receipts the proper expenses which were allowable according to the income tax legislation. But since the *Whimster* case [1] it has been recognised that, for the purpose of ascertaining the full amount of the profits or gains of a trade, it is (or, at any rate, it may be) also necessary to bring into the account at the beginning and at the end respectively of the relevant period the values of the work in progress or the stock-in-trade, or perhaps both; and that such values will, again in the ordinary case, be arrived at by looking at the market value or the cost, whichever is the less. The effect of bringing these matters into the account is this, that, if at the end of the year, the value of the work in progress or stock-in-trade is shown to be greater than it was at the beginning, then, to that extent, the full amount of the profits will be increased; and vice versa if, at the end of the year, the value of such items is less than it was at the beginning.

In the present case, it is to be noted that we are here concerned not with stock-in-trade but with work in progress. The reason for that is the nature of this company's business of manufacturing motor bodies, and we were informed by Mr. Bucher in his opening that in truth the business wholly, or at any rate very substantially, consists of making these bodies to order. That being so, there would, of course, be no question of a market value for any bodies, either partly finished or wholly finished, but still on the premises of the company; and that, indeed, is so stated in the case stated, where, in the course of formulating their decision, the commissioners say: "It is agreed that there is no question "before us of market value."

I can now state again, and more precisely, the nature of the question we have to decide, and I can further explain the reference to "on-cost" in the question as it was posed by the special commissioners. The problem is, in relation to the taxpayers' trading for the years I have mentioned, how you should arrive

[1] 1926 S.C. 20; 12 T.C. 813.

C. A.

1960

DUPLE MOTOR BODIES LTD.
v.
INLAND REVENUE COMRS.

Lord Evershed M.R.

at the value, at the beginning and end of the periods, of their work in progress. It appears quite clearly that in the profession of accountancy there are two methods or theories which are current, both of which appear to have their devotees. The methods or theories are known, the one as the "direct cost" method and the other as the "on-cost" method. The direct cost method, as the words naturally import, means that you value the subject-matter—in this case the work in progress—by looking, at the beginning and end of the relevant periods, at what has been expended on the work in progress, and expended exclusively upon it—namely, for practical purposes (or, at any rate, in this case) the cost of the materials used and the wages of the labour directly employed. The on-cost method goes further; it says that you should not exclude a proper proportion of other, more general costs of the company's business, some part of which should be attributed to the work which was in progress at the relevant dates.

When Mr. Bucher opened the case for the Crown before us, he made it plain that what the Crown desired was that we should decide this matter as one of broad principle: that of the two champions being displayed before us, we must decide as a matter of broad principle between Sohrab and Rustum. Similarly, Mr. Borneman, for the taxpayers, invited us to decide that the direct cost method was the one that, generally speaking, should receive the imprimatur of this court. In support of these views, general arguments were put before us which clearly have much force. It was said by Mr. Bucher that if you are inquiring what is the value of, say, stock-in-trade, and in the circumstances you are to arrive at it by looking at what it has cost you to produce it, then it is not realistic to exclude any part of the general costs of the company's business, and so to do simply loads those costs unduly upon the sold articles. On the other side, Mr. Borneman has said that here you are only concerned to arrive at a valuation, and in doing so—because, after all, you are merely comparing two dates—it is only necessary and only safe to look at the costs which can be certainly discovered and ascertained, and that you should not go beyond that into territory which at once becomes vague and uncharted. He supports that by saying that in this case the special commissioners, having decided in favour of on-cost, were then unable to express any concluded view as to what of the possible items of indirect expenses are those which should be included.

The special commissioners were persuaded to deal with this matter as one of general principle, and they so stated; and, as a matter of general principle, they expressed their own preference in favour of the on-cost method. In so far as they did that, it seems to me inevitable that they were not deciding a question of fact but a question of law—or, at least, of mixed law and fact. I am for my part quite clear that it would be wrong for this court to deal with this matter as one of principle, and to decide now that

either for all purposes of this company or, still less, for all purposes in the case of trading companies, one method is the right and proper method and the other is not. So to do would, I think, go altogether outside the function of the court, which is to decide the particular problem presented by the particular case before it. As Mr. Bucher more than once emphasised, that with which we are in the case concerned, and only concerned, is the full amount of this particular company's profits or gains for tax purposes for certain years. Moreover, to decide the matter as one of principle, one way or the other, would, I think, fly in the face of what has been found to be professional opinion among chartered accountants. I would also add that I entertain the strongest inclination that, if we were to decide now in favour of one champion rather than another, in a very short time a case would arise which would show quite clearly that, on those facts, the decision of this court could not be right. I add also that if we were to decide in favour of the on-cost method as a general proposition, the result, so far as I can see, would at best be inconclusive; and certainly, if we adopted the drawing of the line which was indicated by the special commissioners and which Mr. Bucher was inclined, I think, to accept, though he thought it was wrong, we should be giving our sanction to a purely arbitrary definition of the limits of indirect costs which should be taken into account. What we have to do, I repeat and emphasise, is to apply our minds to the question of the proper way of valuing work in progress at the beginning and end respectively of the three years with which we are concerned as it affects the profits or gains of the Duple Motor Bodies Ltd.

At this stage I will cite two statements which were cited by Singleton L.J. in *Patrick (Inspector of Taxes)* v. *Broadstone Mills Ltd.*[2] The first citation comes from the opinion of Lord President Clyde in the *Whimster* case[3] itself. It is as follows: "'In computing the balance of profits and gains for the purposes of income tax, or for the purposes of excess profits duty, two general and fundamental commonplaces have always to be kept in mind. In the first place, the profits of any particular year or accounting period must be taken to consist of the difference between the receipts from the trade or business during such year or accounting period and the expenditure laid out to earn those receipts. In the second place, the account of profit and loss to be made up for the purpose of ascertaining that difference must be framed consistently with the ordinary principles of commercial accounting, so far as applicable, and in conformity with the rules of the Income Tax Act, or of that Act as modified by the provisions and schedules of the Acts regulating excess profits duty, as the case may be. For example, the ordinary principles of commercial accounting require that in the profit

[2] (1954) 35 T.C. 44, 65, 67; [1954] 1 All E.R. 163, C.A.

[3] 12 T.C. 813.

C. A.
1960
DUPLE MOTOR BODIES LTD. v. INLAND REVENUE COMRS.
Lord Evershed M.R.

" ' and loss account of a merchant's or manufacturer's business the " ' values of the stock-in-trade ' "—and I would add here, though it is not in the opinion, " or work in progress "—" ' at the begin- " ' ning and at the end of the period covered by the account should " ' be entered at cost or market price, whichever is the lower; " ' although there is nothing about this in the taxing statutes.' "

The second citation is a brief citation from the speech of Lord Loreburn L.C. in *Sun Insurance Office* v. *Clark*,[4] where he said: " ' An estimate being necessary ' "—that is, for the purpose of arriving at the value of the work in progress—" ' and the arriving " ' at it by in some way using averages being a natural and prob- " ' ably inevitable expedient, the law, as it seems to me, cannot " ' lay down any one way of doing this. It is a question of fact " ' and of figures whether what is proposed in each case is fair both " ' to the Crown and to the subject.' " Founding myself upon those two citations, it seems to me that you proceed in this case and in other cases to say: What is the normal, proper accounting practice in regard to this matter, and does what is normal produce a fair result? Or, if there are alternatives, which is shown on the facts of the particular case to produce the fairer result?

With that premise, I now turn to make one or two references to the case stated. In paragraph 7, the special commissioners, who are persons of great experience, refer to certain expert evidence given, and then, in paragraph (b) they say: " On the " evidence adduced before us we find—and this naturally has " caused us difficulty—that the accountancy profession as a whole " is satisfied that either method will produce a true figure of profit " for income tax purposes." Mr. Bucher somewhat criticised the addition of the last four words, but I do not think that criticism is justified. If either method is a proper method for arriving at profits for general commercial purposes, then it satisfies the test which is suggested by Lord President Clyde, but, of course, it still leaves it to be debated whether, in the particular circumstances of a particular case, it is fair.

The commissioners went on: " In this state of affairs we find " that it is very much a matter of policy for the decision of the " directors of a company which method should be used." A little lower down the commissioners proceed to deal with the still more vexing problem, as they thought and as I think: If in any particular case you do choose the on-cost method, then what of the indirect costs do you include? As regards that, they said: " If the on-cost method is applied, different accountants may " apply different recognised variations of this method; and, what- " ever recognised variation of this method is applied, the " accountancy profession as a whole would not condemn any " particular recognised variation as being unsound. Furthermore, " we find that there is considerable scope for difference of opinion

[4] [1912] A.C. 443, 451; 28 T.L.R. 303; 6 T.C. 59, H.L.

" as to how a recognised variation of the on-cost method should be " applied to the facts of each particular case."

I pass at once to that part of the case in which their decision is recorded, and I will first of all read some four or five passages without comment. They begin: " We have been asked to decide " this appeal on a broad question of principle, and we are going " to do that, fully aware that in doing so we shall be leaving " open a wide field for discussion between the parties; but we feel " that, having to decide this as a broad question of principle, that is " really inevitable and cannot be helped." Then, after stating what the problem was, and referring briefly to certain arguments, they say: " The Crown contend that some part of these over- " heads "—that is, the general business overheads—" must go into " the cost of work in progress. When the factory is not running " at full capacity, to make a particular vehicle. That is a fact, " the Crown contend, and that kind of fact ought to be reflected " in the accounts, and the on-cost method does reflect that kind " of fact."

In the next paragraph they deal with the expert evidence, and as regards one of the accountants, they say: " Mr. Clark's " evidence comes really to this, that the two methods are both " accepted in the accountancy profession, and that you cannot " say there is a general opinion in the accountancy profession that " the on-cost method is unsound. Mr. Clark told us that each " method will produce a true view of profits for income tax " purposes "—and I emphasise the last words, to show justification for what I have already read—" and I think we might say " here that we consider it important that ascertaining profits for " income tax purposes does involve ascertaining profits year by " year." I should add that it had earlier appeared to have been his evidence that although, as he stated, both methods were regarded as acceptable and proper, there seemed recently to be a swing against the on-cost method within the accountancy profession.

The commissioners then say this: " We feel in the end that " to get at the true cost of producing an article—that is the cost " of making the thing—there is really something more in the " cost than the mere cost of labour and the cost of the material " that has gone into that particular article. It seems to us that " it has really cost more to build a vehicle body than just the " cost of labour and material. The object of the on-cost method— " whether we are right or wrong about this—is really to get at " the cost; and as we are coming down on the side of the on-cost " method it appears to us that any proportion of overheads, which " on that method is to be attributed to cost, should be limited " to factory overheads, namely, the overheads of the place where " the thing is actually being made. We realise that the expres- " sion ' factory overheads ' is rather vague; but, since we are " asked to decide this matter on a broad question of principle, " we feel, as we have already said, that it is inevitable that a wide

C. A.

1960

DUPLE MOTOR BODIES LTD.
v.
INLAND REVENUE COMRS.

Lord Evershed M.R.

"field for discussion should be left open and we do not feel able "to define the term 'factory overheads.'" They conclude: "We "finish where we began, by saying we know full well that we "have left a wide area open. We do not think we can help that."

I cannot refrain from observing that it seems to me an obvious criticism of the Crown's argument that if, as a broad principle, we must give our imprimatur to the on-cost method, then, according to the special commissioners, that leaves quite undecided (and they thought really incapable of decision) what are the exact items which should be included. That is not indirectly to say that I am intimating that the direct cost method is the proper method as a broad matter of principle, but it shows what has been emphasised in the passages I have cited: that the court should deal—and the court can only deal, as I think—as a question of fact and figures with the particular circumstances of particular cases, and say: On these facts, on these figures, is this way of doing it fair as between the Crown and the subject, or is that way the fair way of doing it?—and I do venture most strongly to emphasise that aspect of the matter.

Vaisey J. resolved the conflict in a different sense from that of the special commissioners. Mr. Bucher somewhat criticised his judgment, because he said that the commissioners had found that it was proper accounting practice to use either method, whereas, said Mr. Bucher, what the commissioners said was that they had found that the accountants were satisfied that it was proper to use either method; but, without repeating what I have already said, in my judgment that is exactly the same thing for this purpose, having regard to the Lord President's opinion. I do not therefore think, if I may say so, that there is anything in that criticism. On the other hand, I agree with Mr. Bucher that for income tax purposes you cannot say: "Well, it is a matter "for the directors. If the directors had decided to adopt in a "particular year or years the direct cost method, that concludes "it for income tax purposes." The duty of the directors is to make their decision on this matter in the best interests of the company, looking at it as a business entity, and quite plainly it could not be said that their conclusion, quite properly come to as responsible for the company's management, was decisive of the matter for income tax purposes.

I have already said more than once—and I shall be forgiven because I wish to emphasise it as strongly as I can—that I think it is wrong, and would be wrong, to decide this matter on general principle. I base that view partly on the citations I have made from the *Broadstone Mills* case [5] and also on the results it would or might appear to lead to, of which the citations from the case stated will have given sufficient illustration. I take by way of example what was said at the beginning of the Crown's contention—and I gather the special commissioners in some sense

[5] (1954) 35 T.C. 44.

founded themselves upon this—that obviously, if you are asking how much it cost to produce something, you should not exclude altogether overheads, and it is unrealistic to do so. But the conclusion of the passage I have read seems to me to be this, that if, as the commissioners say, production is slack, it follows that the proportion of overheads attributable to the work in progress is larger, from which they apparently are led to the conclusion that the taxable profits are necessarily larger—a proposition which I venture to think is self-condemnatory.

But I return to the facts of this case. There have been exhibited certain schedules, and I will make some reference to the figures. For the first year which has been the subject of debate, ended March 31, 1951—since, by section 127, you look at the preceding year—you find this on the figures: the work in progress at the end of the year according to the taxpayers' method of computation—based, that is, on direct cost—was worth £136,000 odd; at the beginning of the same year it was worth £138,000 odd. The result is that the work in progress was £2,000 less in value at the end of the year than at the beginning, with the further result, no doubt, that the taxable profits would be reduced by £2,000. The application for the same year of the on-cost method shows that if the sums are added, at the beginning and end of each year, which the Crown suggests should be added, however arbitrarily selected from overheads—and I repeat that the Crown seem to have accepted the arbitrary selection, though they said in the plainest language in opening the case that this geographical limitation is quite wrong; but, still, adding them—the curious result is that the value of the work in progress at March 31, 1951, is not £2,000 less but is £14,000 more than it was at the beginning of the year in question. So that, according to this computation, the full amount of the profits or gains to be taxed must be increased by £14,000 instead of being reduced by £2,000 in respect of that item.

Of course, if the truth is that upon a fair view the profits were £14,000 more and not £2,000 less, then it would be unfair that the tax liability should depend upon the latter and not the former calculation. But what evidence is there to show that the right view is that work in progress should be taken in at £14,000 more at the end than at the beginning? We have no idea, because there is (for example) no evidence whatever of the number of unfinished motor bodies that there were in fact on the taxpayers' premises at the beginning or at the end of the year in question. What we do know, however, is that during this year ended March 31, 1951, there was a considerable slackening off of the taxpayers' business. Whereas for the year ended March 31, 1950, the wages paid to labour were £534,000 odd, for the year ended March 31, 1951, it was £347,000 odd—nearly £200,000 less. I suppose that, as a judge, I may take some account of the general knowledge that there has been no tendency towards a reduction

C. A.
1960
DUPLE MOTOR BODIES LTD. v. INLAND REVENUE COMRS.
Lord Evershed M.R.

in wages, at any rate on that scale, during the past decade, and it therefore seems quite plain that there was far less work being done.

That of itself, of course, supports what I indicated earlier, that the special commissioners seemed to be basing themselves on the passage I have quoted. They were saying that because, owing to a slackening off of business, a greater share of overheads must be applied to work in progress, therefore the taxable profits of the taxpayers were greater. I add only this, that in order to arrive at the figure for which the Crown contend—namely, £14,000 excess of value of work in progress at the end as compared with the beginning—the proportion of overheads taken in as at March 31, 1950, was 27·9 per cent. of the whole, and at the end it was 40·5 per cent. The justification for these percentages has not been debated, but they make it perfectly plain that the increased value of the work in progress depends obviously on the fact that these taxpayers were doing less work.

There was before us some discussion on the matter of onus of proof, and, of course, I accept it that where the taxpayer is assessed and complains that the charge made upon him is wrong, he must show it to be wrong; but also, as we all know, and as Mr. Bucher naturally and frankly conceded, in discussing the case the onus may shift from time to time from one party to the other. In considering the proper way to formulate a conclusion here, I venture to think certain facts are relevant in this particular connection. In the first place, it is conceded by the Crown that the taxpayers, and their immediate predecessor, have been taxed upon the full amount of profits and gains, arrived at so as to include the value of work in progress calculated by reference to the direct cost method, for rather more than a generation, and throughout that period the Crown have accepted that method of arriving at the value, or the comparative value, of the work in progress, as being fairly represented by the application of the direct cost method. Further, as Mr. Bucher again frankly conceded, in the tax years with which we are concerned there was no relevant change of circumstances in the taxpayers' general affairs at all. In those circumstances, I should have thought that at any rate there was some obligation upon the Crown to show why they have now come to the conclusion that the on-cost method should be adopted and the direct cost method should be discarded. What I have said perhaps supports the view that, for reasons which I assume may be quite good—at any rate, it is not a matter on which we have to express an opinion—it is thought that now is the time to strike a blow for the on-cost method in this sort of case. It also may support the view or the suspicion—which accounts for this matter of principle not having been raised before—that in the end of all (that is, over a period of years) it matters not at all which method is adopted; in the end of all, it comes to the same thing.

In the result, however, if on the figures, on the facts, on the evidence, it were necessary for this court to reach an affirmative

decision, I must say I would be prepared to conclude that for these particular years and in relation to these particular taxpayers, the on-cost method was shown to produce, on the face of it, an unfair result; but again, let me say that this is not an oblique way of saying that I am affirming the view as a matter of principle that the direct cost method is the right one. In those circumstances, I am quite content to put it in this way: referring back to the question posed by the special commissioners, I think that, in relation to the particular years and to these particular taxpayers, which is the only matter with which this case is concerned, the decision of the special commissioners was wrong in law. Having come to that conclusion, I would therefore dismiss this appeal.

PEARCE L.J. I agree. There is a divergence of view in the accountancy profession as to the respective merits and defects of the direct cost and the on-cost methods. The commissioners were asked by both sides to regard this case as a conflict à outrance between the two methods, and to give their verdict to the winner. We, too, have been asked to give such a verdict, but it would be wrong to lay down such a general rule as if it were a matter of law. It is a question of fact in each case to ascertain the true profit.

The result has been that the ascertainment of the particular profits for the particular year—which, after all, was the real object of the inquiry—has been a little submerged by this ideological dispute. The costing of the work in progress, though it is a necessary part of accounting both from a commercial point of view and, since the *Whimster* case,[6] from the income tax point of view; yet it is only a means to the ascertainment of the profit and not an end in itself. Moreover, one year will correct the errors of another. And it would be unfortunate if dogmas of method obscured the real purpose—the finding of a fair, true and reasonable assessment of the real profit of the business for the year. Whatever the merits of the on-cost method as seen from one point of view, in a certain set of circumstances it can produce an unfair result. As the Master of the Rolls pointed out in argument, not only can it produce such a result, but that particular set of circumstances does apparently arise in this particular case.

When a factory has an idle and unprofitable year, the costing of the work in progress is inflated by the fact that it has, under the on-cost method, to bear an abnormally high proportion of the overheads during an uneconomic period. As a result, the profits are notionally increased, whereas in fact there are no true profits to justify that increase. In such a case, an actual loss could be converted on paper into a theoretical and untrue profit.

Both theories rest ultimately on the fact that cost is a guide to value. When, owing to trade difficulties, cost parts company from value, difficulties arise; and it may well be that the more

[6] 12 T.C. 813.

C. A.
1960
DUPLE MOTOR BODIES LTD. v. INLAND REVENUE COMRS.
Pearce L.J.

realistic the costing the greater the difficulty. It has been argued that an unfair result can always be avoided by the proviso that the market value can be taken as the touchstone wherever the on-cost calculation would produce too high a figure; but here it was common ground that the market value was not appropriate to the facts of this case. Here it would seem that a substantial amount of the figure added by the on-cost method is due to lack of work in the factory. The profits are thereby notionally increased owing to that unprofitable lack of work. That result—which, owing to the general nature of the argument, had not received the prominence to which it was entitled—must be of very great importance in these assessments; and once it is fully appreciated it becomes plain, in my view, that it would be wrong in the circumstances of these particular assessments, in these particular years, to depart from the simpler, direct cost method that had always been used by this company over so many years. For that reason, and for those that have been given in greater detail by my Lord, I agree that the appeal fails.

HARMAN L.J. I, too, agree. This case has been a good illustration of the sometimes forgotten fact that an English law suit is not a moot or a debate, but an attempt to arrive at a result on the facts before the court: broad academic arguments are quite unsuited to the processes of the English law.

Here, on-cost has been declared by the commissioners to have their vote as a general matter, regardless of the fact that when the details are looked into it produces an absurdity. Judged by that touchstone, the commissioners could not have come to the conclusion they did; but they were not looking at the facts, but at the theories which were so largely debated before them. The result is that, taking their eyes off the ball, so to speak, they came to a conclusion which is not, when the facts are looked at, tenable. The appeal must, therefore, be dismissed, though not quite on the ground on which the judge below dismissed it, for he decided upon the footing that the directors had the right to choose the method of costing for income tax purposes. In fact, of course, they have the right to choose the method vis-à-vis their shareholders and for the good of the company, but it cannot be that they are the arbiters when it comes to assessing the costs from any income tax point of view. It is, of course, well known that many things—reserves, and so on—which are not allowable as deductions for income tax purposes are proper deductions when setting out the profits of the company. But although we do not agree with all the reasoning of the judge, we do agree with his conclusion.

Appeal dismissed with costs.
Leave to appeal to House of Lords refused.

Solicitors: *Solicitor of Inland Revenue; Wilkinson.*

B. A. B.

[COURT OF APPEAL.]

* KIMPTON v. STEEL COMPANY OF WALES LTD.

C. A.

1960
March 23, 24, 25.

[1957 K. No. 1661.]

Sellers, Ormerod and Upjohn L.JJ.

Factory—Staircase—Handrails—Meaning of "staircase"—Three steps wedged into platform—Factories Act, 1937 (1 *Edw.* 8 *&* 1 *Geo.* 6, *c.* 67), *s.* 25 (2).

The plaintiff, a maintenance electrician employed by the defendants, was descending three steel steps in the defendants' factory during his employment when he slipped, fell, and sustained personal injuries. The steps were just over three feet in height, and were securely wedged into a platform, to which they gave access and egress, but they were otherwise removable. The steps were not provided with a handrail.

On the question whether the steps constituted a staircase within the meaning of section 25 (2) of the Factories Act, 1937,[1] and, therefore, required the provision of a handrail:—

Held, that notwithstanding that the three steps complied with the dictionary definition of "staircase," when considering the term under the Factories Act it should be given its ordinary everyday construction and, in the circumstances, the term "staircase" in section 25 (2) was not apt to describe the steps in the present case; accordingly, the defendants were not liable to the plaintiff for breach of statutory duty.

Dictum of Somervell L.J. in *Bath* v. *British Transport Commission* [1954] 1 W.L.R. 1013, 1015; [1954] 2 All E.R. 542, C.A applied.

APPEAL from Edmund Davies J., sitting at Cardiff.

The plaintiff, Peter Charles Kimpton, was a shift maintenance electrician employed by the defendants, The Steel Company of Wales, Ltd., at their Abbey works, Port Talbot, Glamorgan. On February 9, 1956, the plaintiff was descending, in the course of his work, three steel steps in the factory where he was employed when he slipped. The judge found that in descending the steps the plaintiff probably slipped on the second step through no fault of his own, that the plaintiff thereby struck his back, and that the accident would probably never have occurred if there had been a handrail, because if a handrail had been available, the plaintiff might have been able to save himself in some way from falling.

[1] Factories Act, 1937, s. 25: "(1) "All floors, steps, stairs, passages "and gangways shall be of sound "construction and properly main-"tained. (2) For every staircase in a "building or affording a means of "exit from a building, a substantial "handrail shall be provided and "maintained, which, if the staircase "has an open side shall be on that "side, and, in the case of a staircase "having two open sides, or in the "case of a staircase which, owing to "the nature of the construction there-"of or the condition of the surface of "the steps or other special circum-"stances, is specially liable to cause "accidents, such a handrail shall be "provided and maintained on both "sides. Any open side of a staircase "shall also be guarded by the provi-"sion and maintenance of a lower rail "or other effective means."

C. A.
1960
Kimpton v. Steel Co. of Wales Ltd.

The three steps had been placed in position at the time of the construction of the part of the factory in which they were located in 1951, and there had been no mishap in regard to them. The steps were just over three feet in height, and gave access to and means of descent from a table or platform or cat-walk. The steps were made of steel, and the treads of the steps were studded so as to give a better foothold or grip.

The steps were not attached to the building, that is the steps were not built into the building in any way; they were removable or detachable. But they were a solid structure of considerable weight and were wedged in securely, there being an inset into the uppermost step of some part of the platform which prevented lateral movement.

The plaintiff claimed damages against the defendants in respect of his injuries, alleging negligence by the defendants at common law and breach of statutory duty. At the trial, the plaintiff alleged that the steps wobbled and were unsafe so that there was a breach of section 26 (1) of the Factories Act, 1937, and that at the time of the accident they were greasy and oily so that there was a breach of section 25 (1) of the Act of 1937. The judge rejected both these allegations and there was no appeal in respect of them. The plaintiff further contended that at common law the defendants ought to have provided a handrail, and that the same duty was imposed on them by section 25 (2) of the Act of 1937. The judge accepted both these contentions and awarded the plaintiff damages. The defendants appealed. The case is only reported on the construction of statute.

John Thompson Q.C. and *Alun T. Davies* for the defendants.
F. Elwyn Jones Q.C. and *David Pennant* for the plaintiff.

The following cases on the construction of the statute were cited in argument, in addition to those referred to in the judgments: *Harrison* v. *National Coal Board*[2]; *Legge* v. *Alan West & Co. Ltd.*[3]

Sellers L.J. The court is indebted to counsel for their argument in what is, I think, on both points a difficult case. [His Lordship then stated the facts, read section 25 (2) of the Factories Act, 1937, and continued:]

The judge has found that the three steps were a staircase within the meaning of section 25 (2) of the Factories Act, 1937, and, he held, therefore, that there had been a breach of that section by there not being any handrail or, as it would have required, two handrails. He, also, found liability at common law.

Both points (which on the face of it seem quite simple matters) have created some difficulty. The judge has stated in his

[2] [1951] A.C. 639; [1951] 1 T.L.R. 1079; [1951] 1 All E.R. 1102, H.L.

[3] Unreported, C.A., March 4, 1957.

judgment the arguments whether these three movable steps should be called a "staircase" or not, and, having so done, he came to the conclusion that they did constitute a "staircase." Reference was made to section 25 (1), which provides: "All "floors, steps, stairs, passages and gangways shall be of sound "construction," drawing a distinction between "steps" and "stairs," as indeed there is or may be. Subsection (2) does not repeat the terms "steps" or "stairs" but refers to a "staircase."

The judgment likewise sets out the material parts of dictionary definitions of what may be a "staircase" and a "flight" of steps, or a "series" of steps. I think there is little doubt that on the strict dictionary definition one might say that these three steps fell within a dictionary definition. The judge, however, I think rightly, did not decide this point on a strict dictionary definition. He was no doubt guided by it (as any court would be), and arrived at his conclusion having considered what those definitions were. He took the view, looking at all the circumstances of the case, that this particular structure was a "staircase."

The approach to this matter must be I think, first of all, to recognise that the Act of 1937 does not itself define a "staircase" or, indeed, a "step" or "stairs." It is dealing with the safety of factories, and using words which have to be considered in the ordinary everyday fulfilment of what is required by its remedial and protecting measures, what is required to be done. I think that the whole Act has regard to what is the ordinary description of things in a factory.

The matter is not without some authority and we were referred to the observations of Somervell L.J. in *Bath* v. *British Transport Commission.*[1] That case was referred to in a later case which came before this court, *Tate* v. *Swan Hunter & Wigham Richardson Ltd.*,[2] in which Morris L.J. referred to what Somervell L.J. had said in the earlier case in this way[3]: "I find myself, "in approaching this case, feeling very much as Somervell L.J. "did when he expressed himself in his judgment in *Bath* v. "*British Transport Commission.* In that case it was held that "it was impossible to regard an excavation which constitutes a "dry dock as an 'opening' within the meaning of subsection (3) "of section 25, and Somervell L.J., in this court, said[4]: 'I do "'not think that I can add much on that point. One is some-"'times tempted to construe perfectly familiar words, but if they "'are, as these words are, perfectly familiar, all one can do is to "'state whether or not one regards them as apt to cover or "'describe the circumstances in question in any particular

[1] [1954] 1 W.L.R. 1013, 1015; [1954] 2 All E.R. 542, C.A.
[2] [1958] 1 W.L.R. 39; [1958] 1 All E.R. 150, C.A.
[3] [1958] 1 W.L.R. 39, 44.
[4] [1954] 1 W.L.R. 1013, 1015.

C. A.
1960
Kimpton v. Steel Co. of Wales Ltd.
Sellers L.J.

"'case.'" That particular case, which Morris L.J. was considering, concerned the definition of the word "floor." We have been referred further by Mr. Thompson to some observations of Lord Reid in *Richard Thomas & Baldwins Ltd.* v. *Cummings*,[5] where the noble Lord said: "The fact that the interpretation for "which the respondent contends would lead to so unreasonable "a result is, in my opinion, sufficient to require the more limited "meaning of 'in motion' to be adopted unless there is some very "strong objection to it, and none was suggested. It is true that "the Factories Act is a remedial statute, and one should there-"fore lean towards giving a wide interpretation to it, but that "does not justify interpreting an ambiguous provision in a way "which leads to quite unreasonable results."

Approaching this question on the facts of this case, I have formed the view that it would be unreasonable to require that these few steps should be dealt with in the way that section 25 (2) provides, and that, looking at the matter from the approach which these cases indicate, it could not be said that this was a "stair-"case." It is not the way it would be described; indeed, it was not the way it was described by the witnesses in the case who were familiar with it.

There was a somewhat similar set of steps, although one cannot usefully make comparisons with those in different premises, which came for consideration before this court in *Rogers* v. *News of the World*. That case, in which judgment was given on November 19, 1958, is unreported. The photographs of the stairway in *Rogers'* case were made available to this court by counsel for the defendants, as Mr. Thompson appeared there for the appellant. Lord Evershed M.R. said: "The first question . . . is this: do these "three steps constitute a 'staircase' within the meaning of "subsection (2) of section 25 of the Act? If you get into a debate "upon the meaning of the words 'steps,' 'stairs,' 'stairway,' "'staircase,' you find yourself, I think, in an atmosphere which "might have been appropriate to the ancient sophists; but I "agree with the judge that the construction of these words in this "Act, which are ordinary English words, must be determined "according to the ordinary standards of common sense; and if "that is right, I would myself avoid any attempt at definition "and philosophical discussion; I would confine myself to the "question posed as I have earlier posed it—looking at these three "steps as there illustrated in these photographs, do they "constitute a 'staircase' within the meaning of subsection (2) of "section 25 of the Act? With all respect to Mr. Thompson's "argument, attractive as it always is, I must say that I would "answer that question unhesitatingly in the negative."

I recognise that it is not a highly scientific basis on which to base a conclusion, but it is a very practical one, and I think one to be preferred to a rigid attempt to apply a dictionary definition

[5] [1955] A.C. 321, 334; [1955] 2 W.L.R. 293; [1955] 1 All E.R. 285, H.L.

disregarding the setting and the background in which this Act has to be construed and applied. [His Lordship then considered the judge's alternative finding that the defendants had been negligent at common law in not providing a handrail, and held that that finding was justified. He continued:] I differ from the judge with regret on the first point with regard to the staircase. I think it is a difficult point. I prefer the other view supported as it is by authority. I would uphold the judge on the second point.

I would therefore dismiss the appeal on that ground.

ORMEROD L.J. I agree, and I would only add a few words as we are differing from the judge on the question of whether there is a breach of statutory duty in the present case.

Section 25 (2) of the Factories Act provides: "For every stair-"case in a building or affording a means of exit from a building, "a substantial handrail shall be provided and maintained. . . ." The question is whether the structure in this case (which has been variously described, but generally described by the witnesses in the case as "steps") can be regarded as a "staircase" within the meaning of that section. Mr. Elwyn Jones has submitted that the proper approach to this question is what I may term the dictionary approach, and has argued that the definitions of the words "staircase" and "flight" as given in the Oxford English Dictionary are wide enough to cover this particular structure. I have no doubt that, if one relies on the definitions, Mr. Elwyn Jones is perfectly right in that submission, but that, in my view, is not the way that this matter must be approached. As Somervell L.J. said in *Bath* v. *British Transport Commission*[6]: ". . . if they are, as these words are, perfectly familiar, all one "can do is to say whether or not one regards them as apt to cover "or describe the circumstances in question in any particular case." The word "staircase" is one with which we are perfectly familiar, and one which is in common and daily use in our language. As I see it, the way to approach the question is to ask oneself whether in the circumstances, looking at this structure, one can properly say that it would be described as a "staircase." In my judgment, looking at the photograph and plan of this structure (which is, of course, all we have before us), it is not a staircase and, therefore, section 25 (2) does not apply to it.

[His Lordship then considered the issue of common law liability, and held that the judge's conclusion was right.]

UPJOHN L.J. I agree. I only desire to add a very few words because Mr. Elwyn Jones has invited us to clarify the law for the future by giving a definition to the word "staircase" to be found in section 25 of the Factories Act, 1937, and, in particular, to adopt the definition to be found in the Oxford Dictionary. It is to be observed, however, that the Act itself has carefully refrained

[6] [1954] 1 W.L.R. 1013, 1015.

C. A.
1960
Kimpton v. Steel Co. of Wales Ltd.
Upjohn J.

from any such definition. I think it would be wrong for this court to attempt to do so. Whether a structure is or is not a staircase must depend on the circumstances and facts in each particular case, and it is not possible to lay down any rule of general application.

When the court has to consider the meaning of ordinary words in common use in the English language such as "staircase," "floor," "steps," "stairs," "passages" and "gangways," the court must apply its own general knowledge and common sense to the solution of the problem. A dictionary may in some cases be of assistance, but it certainly provides no sure guide to the ultimate solution of the problem.

Like my Lords, having given the matter the best consideration I can, I have come to the conclusion that the structure in this case is quite clearly not a "staircase" for the purposes of the Act, though it may fall within the definition in the Oxford Dictionary.

[His Lordship then said that he agreed with the judge's finding on common law liability, and would dismiss the appeal on that ground.]

Appeal dismissed with costs.

Solicitors: *Kenneth Brown, Baker, Baker, for Gee & Edwards, Swansea; Rowley Ashworth & Co.*

N. P.

[COURT OF APPEAL.]

C. A.
1960
March 10, 11.
Lord Evershed M.R., Pearce and Harman L.JJ.

* HENRY BRIGGS, SON & CO. LTD. *v.* INLAND REVENUE COMMISSIONERS.

Revenue — Profits tax — Nationalised industry — Compensation — Dividends paid by subsidiary, a former colliery company in receipt of interim income payments—Subsidiary company remaining in being solely to receive compensation—Whether had "function" of holding property—Dividends received by parent company not "franked investment income"—Finance Act, 1937 (1 *Edw.* 8 *&* 1 *Geo.* 6, *c.* 54), *s.* 19 (4), *Sch.* 4, *para.* 7 (1A) (*as substituted by Finance Act,* 1947 (10 *&* 11 *Geo.* 6, *c.* 35), *s.* 32 (1)).

By section 19 (4) of the Finance Act, 1937: "Where the functions of a company . . . consist wholly or mainly in the holding of "investments or other property, the holding . . . shall be deemed "for the purpose of this section [the charging section for the tax "now known as profits tax] to be a business carried on by the "company . . ."

After the nationalisation of the coal industry in 1946 B. C. Ltd., a subsidiary of H. B., Son & Co. Ltd., and formerly a colliery company, decided that the company would remain in being for the purpose of receiving the compensation provided by the nationalising Act but would not embark on any trade or other activity. The compensation was finally paid in 1955 but in the meantime the

company received certain interim payments and paid dividends to the parent company. The parent company appealed against assessments to profits tax on the ground that the dividends received from the subsidiary had been included in the computation of the profits. It was submitted that they ought to have been excluded because the subsidiary company was to be deemed for the purposes of section 19 (4) of the Act of 1937 to be carrying on the business of holding property, that is the right to receive the compensation, and so was franked investment income as defined by paragraph 7 (1A) of the Fourth Schedule:—

Held, that as from the date when the nationalisation came into force the subsidiary company had deliberately determined to have, and had in fact had, no function or activity whatever, and was not, therefore, within section 19 (4) carrying on the business of a property holding company.

Inland Revenue Commissioners v. *Desoutter Bros.* (1945) 62 T.L.R. 110; [1945] 2 All E.R. 532; 29 T.C. 155 applied.

Per Harman L.J. The statement in *Carpet Agencies* v. *Inland Revenue Commissioners* (1958) 38 T.C. 223, that in order for a company to come within section 19 (4) it must be shown that the function of making money by holding investments has "always . . . "or for a considerable time" been a function of the company, requires qualification by omitting the long continuance of that function.

Decision of Upjohn J. affirmed.

APPEAL from Upjohn J.

Henry Briggs, Son & Co. Ltd. (hereinafter called the "parent "company") appealed to the special commissioners against assessments to profits tax for chargeable accounting periods commencing on January 2, 1947, and ending on July 18, 1951, when the parent company went into liquidation. The question was whether the parent company was liable to include in the computation of its profits for the purposes of profits tax certain dividends received by the parent company between January 1, 1947, and April 20, 1951, from a wholly-owned subsidiary, Briggs Collieries Ltd. (hereinafter called "Briggs").

The facts proved or admitted before the commissioners (with certain amendments agreed at the hearing before Upjohn J. as to the composition of the boards and the dates at which the subsidiary Briggs went into liquidation) included the following:

(a) The parent company was incorporated on April 5, 1865, as a company limited by shares with a capital of £135,000. By special resolutions from time to time passed the capital was altered and ultimately (at July 18, 1951) the issued share capital was 710,000 5s. shares. The objects for which the company was established according to its memorandum of association were those of a colliery company. On incorporation the parent company took over the trade of coal mining previously carried on at Whitwood (near Leeds) and elsewhere by a partnership under the name of Henry Briggs & Son.

(b) The parent company held shares in a number of subsidiary companies. . . .

C. A.
1960
HENRY BRIGGS, SON & CO. LTD. v. INLAND REVENUE COMRS.

(c) In 1939 the parent company [with two subsidiaries] promoted a scheme under the Mining Industry Act, 1926, the Coal Mines Act, 1930, and the Coal Act, 1938, for the amalgamation of the trade carried on by them and for the formation of a new company to be called Briggs Collieries Ltd., to acquire and carry on the coal mining activities of the three companies. . . .

(d) Briggs Collieries Ltd. was incorporated on July 1, 1939, with a share capital of £1,200,000 divided into 1,000,000 ordinary shares of £1 each and 200,000 6 per cent. non-cumulative redeemable preference shares of £1 each, all of which were issued fully paid to the parent company.

(e) On July 1, 1939, Briggs acquired the colliery undertakings owned by the parent company and by [one of the subsidiaries], together with all property and assets owned and used in connection therewith, and carried on such undertakings thereafter.

(f) Subsequent to July 1, 1939, the parent company owned and operated a brick works, a lime quarry and (until 1940) a gas works. It also held 1,500 acres (more or less) of agricultural land originally acquired for the more convenient working of its collieries with approximately 400 leasehold houses. Such houses were previously occupied by its colliery employees but subsequent to July, 1939, were occupied mainly by the colliery employees of Briggs.

. . . . . .

(h) . . . The profit and loss account of the parent company for the year ended June 30, 1946, showed that out of total receipts amounting to £136,980 net dividends of £119,592 were received from Briggs so that by far the largest item of its receipts were the dividends from Briggs.

(i) The trade or trades of the parent company and of Briggs were closely integrated. Thus the parent company acquired all coal used in its brick works and in its lime quarry from Briggs. Approximately one-third of the bricks produced at the parent company's brick works were sold to Briggs for use in the collieries. The leasehold houses owned by the parent company were almost entirely occupied by colliery officials and workmen employed by Briggs, and the minerals underlying the land owned by the parent company were worked by Briggs.

(j) Of the ten members of the board of directors of the parent company at this time five were members of the board of Briggs, and of the eight members of the board of Briggs five were members of the board of the parent company. Such five common members were persons skilled in mining and matters connected therewith. The chairman of the parent company . . . was a member of the board of Briggs and was also general manager of Briggs. Of the five common members all were employed full-time by Briggs in various positions and were paid directors' fees by the parent company only. They received no directors' fees for their position as directors of Briggs.

(k) The day-to-day business of Briggs was managed by the

board of directors of Briggs, which had informal conversations every day and a formal board meeting every month. Such formal meeting was held at 9.30 a.m. and was followed the same morning by a board meeting of the parent company. Although the board of Briggs had the normal powers and duties of a board of directors it was instructed by the board of the parent company to obtain the prior consent of the latter before it incurred expenditure upon any item of plant or otherwise amounting to more than £10,000 for one item, and if a question had arisen as to the acquisition of further seams of coal contiguous to those belonging to Briggs and the taking of leases for the working of such seams the ultimate decision would have rested with the board of the parent company. In addition to the five common members the board of the parent company had on it five persons who had no experience of mining but who had wide experience in the field of commerce. In regard therefore to any question upon which the board of Briggs had to obtain the consent of the board of the parent company the common members, who had already voted in favour of such expenditure, were in effect required to have their judgment considered and ratified by persons of wide experience outside mining.

(l) On January 1, 1947, the Coal Industry Nationalisation Act, 1946 . . . [came into force and all the] colliery assets owned by Briggs [and appearing in its balance sheet at £1,003,359] were transferred to the National Coal Board. A right to compensation in respect of the assets so vested accrued to Briggs and a like right accrued to the parent company in respect of the leasehold land still vested in it. Such land appeared in the balance sheet of the parent company at £80,318. [The parent company continued to carry on its other activities which were unaffected by the Coal Acts.]

(m) With the vesting of its assets in the National Coal Board the colliery trade of Briggs ceased, and the cessation provisions of the Income Tax Acts at that date contained in section 31 of the Finance Act, 1926, were applied. The board was reduced to four persons. Three of the directors who resigned from the board did so to take up posts with the National Coal Board, and a member who left the board in 1947 also took up employment with the National Coal Board. All executive and managerial staff below board level were transferred to employment under the National Coal Board on or shortly after January 1, 1947. No effort was made by Briggs to embark upon any other trade, but the whole energies of its directors were devoted towards the ascertainment and obtaining of the compensation to which it was entitled under the Coal Acts. This process was long and arduous, involving the furnishing of many particulars and the making of extensive valuations. The first payment of lump sum compensation under sections 10–21 of the Coal Industry Nationalisation Act, 1946, was made in May, 1948, and the final payment in June, 1955. Payments of interim income received under section 22 of the Act of 1946 and section 1 (2) of the amending Act of

C. A.
1960
Henry Briggs, Son & Co. Ltd. v. Inland Revenue Comrs.

1949 were received from time to time, the first payment being in October, 1947, and the last payment in August, 1955. The company paid dividends out of such interim income from time to time to the parent company. It was always the intention that so soon as Briggs had recovered the compensation to which it was entitled under the Coal Acts it should go into liquidation, and it was in fact put into liquidation on October 17, 1952.

(n) The directors of the parent company realised by August, 1946, that their subsidiary Briggs would shortly lose all its trading assets and that with the exception of the comparatively small activities carried on by it the parent company would possess no trading activity and be in possession of a very considerable amount of investments. Accordingly, in August, 1946, they issued to their shareholders a circular in which they pointed out the position to their shareholders. They stated in the circular that, when the subsidiary Briggs had obtained its compensation and paid it over, the parent company would find itself substantially in the position of an ordinary investment holding company, a position which they considered far removed from the original business for which the company was formed. They added that they were advised that to conduct the business of an investment holding company would not be within the legal powers of the company, being outside the objects set out in its memorandum of association. They, therefore, invited the shareholders' consideration of a scheme of reorganisation of the company, under which it would amalgamate with a trust company in which over 75 per cent. of the shareholders in the parent company were already interested, such amalgamated company becoming an investment holding company. At the same time they pointed out that in the event of some such scheme being adopted the opportunity might later present itself of applying the resources of the company, or some of them, in the enlargement of the present commercial activities of the parent company not taken over by the Coal Board, or in some new activity. A questionnaire was enclosed with this circular asking for the views of shareholders. In the years 1947 and 1948 the directors of the parent company examined the prospects of purchasing three possible businesses, each of which was in some way connected with mining, and in regard to which the mining skill and experience of the directors would be of value, but in the end none of these three businesses was found to be suitable. After this the directors found that the preparation and prosecution of the claims for compensation under the Coal Acts were of such complexity, and demanded so much time, that they felt that they should devote all the time and energy of the small number of personnel remaining in the service of the company towards these objects, and that they should cease to seek for fresh businesses. By the beginning of 1949 it was felt that some part of the large amount of liquid assets in the possession of the company should be returned to shareholders, and under a scheme sanctioned by the High Court

in March, 1949, 15s. in the pound was returned to shareholders. During the latter months of 1950 and the first three months of 1951 the parent company proceeded to realise its investments. On July 18, 1951, the parent company went into liquidation.

(o) By election of the parent company made in 1948, pursuant to section 22 of the Finance Act, 1937, the profits of the parent company and of Briggs were amalgamated for the purposes of profits tax. This treatment was withdrawn by the Inland Revenue in 1953 following on a decision of the special commissioners promulgated in another case.

It was contended on behalf of the parent company: (i) that the sole trade carried on by Briggs prior to January 1, 1947, was that of colliery owner, and that that trade necessarily ceased by virtue of the Coal Industry Nationalisation Act, 1946; (ii) that from January 1, 1947, Briggs was entitled to compensation under the Coal Industry Nationalisation Acts, and that such right was a right of property; (iii) that from January 1, 1947, the functions of Briggs consisted wholly or mainly in the holding of the said property; (iv) that the dividends, received by the parent company from Briggs from January 1, 1947, onwards, were therefore franked investment income; (v) that from July 1, 1939, the trades or businesses of the parent company comprised the making of bricks, the quarrying of lime, the distribution of gas and the ownership and management of the colliery undertaking of Briggs; (vi) that on January 1, 1947, with the vesting of the colliery undertaking of Briggs in the National Coal Board, the trade or business of the parent company (in so far as it consisted in the ownership and management of such colliery undertaking) necessarily ceased; (vii) that the dividends received by the parent company from January 1, 1947, from Briggs were not therefore profits arising from any trade or business carried on by the parent company during the chargeable accounting periods relevant; and (viii) that the parent company's shareholding at and after January 1, 1947, in Briggs, was not an investment in any way related to the trade or business carried on by the parent company during such chargeable accounting periods.

It was contended on behalf of the Commissioners of Inland Revenue that the dividends received from Briggs from January 1, 1947, onwards were to be included in the computation of its profits because the company was throughout a company whose business consisted wholly or mainly in the holding of investments or other property within section 19 (4) of the Finance Act, 1937, and that such dividends related both before and after January 1, 1947, to such trade or business. Such dividends were not exempt as franked investment income because after January, 1947, Briggs carried on no trade or business to which section 19 of the Finance Act, 1937, applied.

The special commissioners decided, first, that the dividends received from Briggs were profits of the trade or business which the parent company was deemed to carry on. On the further

C. A.
1960
HENRY BRIGGS, SON & CO. LTD. v. INLAND REVENUE COMRS.

question whether the dividends were franked investment income as being income received by way of a dividend or distribution of profits from a body corporate carrying on a business to which section 19 (4) of the Finance Act, 1937, applied, they decided that although the rights to compensation enjoyed by Briggs were "property," the functions of Briggs did not consist wholly or mainly in the holding of that property. Briggs was only kept in existence after December 31, 1946, so that the rights to which it was entitled might be realised and liquidated as early as possible. Accordingly, they decided that the dividends were not franked investment income. The parent company appealed but Upjohn J. affirmed the commissioners' decision on both questions. The parent company appealed on the second question.

Sir John Senter Q.C., *Desmond Miller* and *Neil Elles* for the parent company.

John Foster Q.C. and *Alan Orr* for the Crown.

The following cases, in addition to those referred to in the judgments, were cited in argument: *Whitworth Park Coal Co. Ltd. (In Liquidation)* v. *Inland Revenue Commissioners* [1]; *Costa Rica Railway Co. Ltd.* v. *Inland Revenue Commissioners* [2]; *Edwards* v. *Bairstow* [3]; *Inland Revenue Commissioners* v. *Westleigh Estate Co. Ltd.* heard with *Inland Revenue Commissioners* v. *Eccentric Club Ltd.* [4]; *South Behar Railway Co. Ltd.* v. *Inland Revenue Commissioners.*

LORD EVERSHED M.R. By section 19 of the Finance Act, 1937, which constituted and defined the scope of what was then called National Defence Contribution, and is now known as profits tax, it was provided by subsection (2) that, subject to what was provided in later paragraphs in the section, "the trades and "businesses to which this section applies are all trades or busi-"nesses of any description carried on in the United Kingdom, or "carried on," as there described, "by persons ordinarily resident "in the United Kingdom." Subsection (4), which is the subsection particularly involved in this appeal, reads: "Where the "functions of a company . . . incorporated by or under any "enactment consist wholly or mainly in the holding of invest-"ments or other property, the holding of the investments or "property shall be deemed for the purpose of this section to be a "business carried on by the company . . ." [His Lordship stated the facts and continued:]

The facts show that the compensation which Briggs was entitled to receive was finally paid in or about the year 1955; but

[1] [1959] 3 W.L.R. 842; [1959] 3 All E.R. 703, H.L.

[2] (1942) 29 T.C. 34.

[3] [1956] A.C. 14; [1955] 3 W.L.R. 410; [1955] 3 All E.R. 48; 36 T.C. 207, H.L.

[4] [1925] A.C. 476; 41 T.L.R. 328; 12 T.C. 657, H.L.

in October, 1952, Briggs went into liquidation. What is more important is the finding of fact in the case stated that from the time when the Nationalisation Act operated Briggs ceased any activity whatever. It is stated in paragraph (m) of the case as follows: "No effort was made by Briggs to embark upon any "other trade, but the whole energies of its directors were devoted "towards the ascertainment and obtaining of the compensation "to which it was entitled under the Coal Acts"; and after stating that the process was long and arduous, the case goes on to point out that the decision was made, when the Act operated, that this company would embark on no other activity—and I deliberately use that word—but would await the receipt, or, at least, the final ascertainment, of the compensation, and would then go into liquidation. In the meantime, however, in accordance with the Nationalisation Act it received from time to time what were called interim income payments, and out of those income payments, or out of other resources which it had, it paid from time to time dividends to the parent company.

The terms of the Act of 1937 were in some sense modified by later provisions, particularly by the Finance Act, 1947. I need not, however, take time upon the modifications. It is sufficient to say that in certain circumstances income received by the parent company might be treated as "franked investment income" as defined in the Acts of 1937 and 1947, and as such would not be taken into account for purposes of profits tax assessment. There is now no doubt, because any point to the contrary is no longer put forward, that the parent company falls within one or other of the subsections of section 19 of the Finance Act, 1937, which I have read, so that it is itself liable to profits tax, and its liability can only be limited if it can show as regards the dividends from its subsidiary, Briggs, which I understand formed a most substantial part of the total income, that they were franked investment income; and they would fall within that definition if it could be said that for the relevant accounting periods Briggs fell within the scope of subsection (4).

The point, therefore, in this appeal, is narrowed to the single point, capable of short and simple statement: after the coming into operation of the Coal Nationalisation Act, 1946, and in the light of the decisions of the subsidiary company as I have extracted them from the case, can it be said that the functions of Briggs consisted wholly or mainly in the holding of property, so that the holding of that property should be deemed for the purposes of the section to be a business carried on by Briggs? The right, under the statute, which Briggs had to obtain, when ascertained, the compensation, and to receive in the meantime interim income or other payments, is conceded for the purpose of this case (and, I should have thought, rightly conceded) as a species of property; so that it can be said that Briggs at any rate held—that is to say, owned, or was possessed of—that right, that species of property; but so to say is not to conclude the matter in favour

C. A.
1960
Henry Briggs, Son & Co. Ltd. v. Inland Revenue Comrs.
Lord Evershed M.R.

of the parent company because it must be shown, first of all, of Briggs, as regards each accounting period, that its "functions" consisted wholly—and I can leave out "or mainly"—in the holding of investments or other property. In the end of all, therefore, the matter turns upon the significance and the use of the word "functions." Upjohn J. came to the conclusion that Briggs did not fall within the subsection. "Functions," he said at the end of his judgment, referring to the observations of Atkinson J. in the case he cited of *Inland Revenue Commissioners* v. *Buxton Palace Hotel Ltd.*,[1] "may be defined as being an activity "appropriate to any business of the company. Is the company "holding property as an activity appropriate to its business? A "company whose business is temporarily stopped by requisition "does not satisfy that test; nor does one which has given up "trading." "They do not bind me," says Upjohn J. of these observations, "because in this field every case depends on its "own facts once the true meaning of the word 'functions' has "been determined; and in this case it is true to say that Briggs "never could re-enter into its colliery activities. Nevertheless, "on ceasing to trade as a colliery company, a company might do "one of several things. It might decide to engage in some other "trading activity, in which case, in my judgment, it would remain "a trading company: it might decide to become an investment "trust company, in which case it seems to me clear that it would "engage in a new business of holding property. If it does neither, "but resolves to wind up, it does not seem to me to gain any new "character in the sense of carrying on an activity of holding "property as being appropriate to its business. It really has no "business."

I will say at once that I have myself come to the conclusion that the judgment of Upjohn J. is correct, and should be affirmed. The only way, as it seems to me, by which the parent company could escape from the conclusion stated in the light of the facts, is to say that the phrase "shall be deemed for the purpose of "this section to be a business carried on . . .", etc., imported this: that the subsection contemplated a case in which there was really no business but there was nonetheless deemed to be a business if the earlier part of the subsection was satisfied. But even so, that earlier part of the subsection must be satisfied. It must be shown, in other words, that of Briggs it could truly be said it had the function or functions of holding property. Unless that is done, it seems to me that subsection (4) must inevitably cover every case one can think of, whether it is active or passive, or whatever the company is doing or not doing. So I think the judge concluded rightly that the matter must turn upon the significance of "functions," and in its context I agree with him that it cannot be said of a company that it has the "function" of holding property if, as in this case, it has

[1] (1948) 29 T.C. 329, 334.

deliberately determined to have no function, no activity in any business sense whatever; if it said: "We make no further plan; "we will do nothing; we will simply wait until the money due to "us is paid and then we shall go into liquidation."

The view taken by the judge gets some support from certain language used by my predecessor, Lord Greene M.R., in *Inland Revenue Commissioners* v. *Desoutter Bros.*[2] That case related not to the language of the Act with which we are concerned, but to the Finance (No. 2) Act, 1939. But subsection (4) of section 12 of that Act is in terms identical with the subsection of the Act of 1937 with which we are concerned. Lord Greene M.R. said[3]: "I "should have thought that the objects of that subsection were "manifest. In my view it was intended, and quite clearly "intended, to bring into the net a type of corporation which "otherwise would or might have escaped it. The commonest "type of corporation with which the subsection is dealing is what "may be called a trust investment company, whose business is "the holding of investments and deriving income from them. "Such a corporation would not be said to be carrying on a "'trade or business' within the meaning of subsection (1)." To be within the meaning of subsection (1) would involve it also being within the meaning of subsection (2) of the section there under review, which in turn corresponds with subsection (2) of the Act of 1937. "Anyhow," Lord Greene M.R. said, "if it "were not absolutely clear, subsection (4) makes it quite certain "that that type of corporation is to be included, and its opera-"tions are to be regarded as the carrying on of a trade or business. "That seems to me to be the real and sole object of sub-"section (4)." Whether that statement puts the matter rather more strongly than I might, if the question were entirely free, put it myself, I need not consider. I was troubled, because it seemed to suggest that one could not say of a trust investment company properly so called that it was carrying on a business, although in one of his sentences Lord Greene M.R. said that such would be the case. If for "trust investment company" one substitutes "property company" (of the kind commonly met with) Lord Greene M.R.'s statement would, I venture to think, be free from difficulty. But however that may be, Lord Greene M.R. may well have intended no more than to say that if there should be any argument whether such a company was or was not within subsection (2), the purpose of subsection (4) was to make it clear. In any case, as I have said, on the particular facts of this case, whatever might be said as regards other cases, I have concluded, for the reasons indicated by Upjohn J., that this company, Briggs, had not got at the relevant date or dates, "functions," and had certainly not got functions of the kind indicated in the first two lines of the subsection.

Sir John Senter referred to certain other cases. He relied

[2] 62 T.L.R. 110; [1946] 1 All E.R. 58; 29 T.C. 155, C.A.

[3] 29 T.C. 155, 160.

C. A.
1960
Henry Briggs, Son & Co. Ltd. v. Inland Revenue Comrs.
Lord Evershed M.R.

particularly upon certain language in *Inland Revenue Commissioners* v. *Butterley Co. Ltd.*,[4] and in *Inland Revenue Commissioners* v. *Parkhouse Collieries Ltd.*[5]. I do not think, upon the final point on which this case turns, that those passages really assist. No doubt the rights conferred by the Coal Nationalisation Act were of a somewhat special kind, and as I have already said, they were proprietary. That they constitute a form of property is not in dispute, and the precise question with which we are concerned was not before the court in either the *Butterley*[6] or the *Parkhouse*[7] cases. I shall not, therefore, I hope, be thought disrespectful to Sir John Senter's argument if I make no further reference to those cases but confine myself to saying, as I have already done more than once, that I agree in the end of all with the conclusion of the judge and with his reasons for it, and I would, accordingly, dismiss the appeal.

Pearce L.J. I agree with what my Lord has said. In my opinion the view taken by the trial judge was correct, and I would dismiss the appeal.

Harman L.J. I also agree. Counsel for the Crown cited to the court a decision of mine on this subject, a case called *Carpet Agencies Ltd.* v. *Inland Revenue Commissioners*.[8] I am there reported to have said that in order to get within section 19 (4) it must be proved not merely that the company is one that happens to hold some income-bearing investments, but that one of its functions—that is to say, one of its purposes—has always been, or has been for a considerable time, the making of money by the holding of investments. I want to say I think that puts it too high. I do not think one needs to say "has always been or has "been for a considerable time,"[9] but I do adhere to the part which says that one of its purposes is the holding of investments. Unless one can get so far one cannot get within the subsection. Subject to that, I agree that the appeal should be dismissed.

Appeal dismissed with costs.
Leave to appeal to House of Lords refused.

Solicitors: *Thicknesse & Hull; Solicitor of Inland Revenue.*

E. D.

[4] [1957] A.C. 32; [1956] 2 W.L.R. 1101; [1956] 2 All E.R. 197; 36 T.C. 411, H.L.
[5] (1955–56) 36 T.C. 675, C.A.
[6] [1957] A.C. 32.
[7] 36 T.C. 675.
[8] (1958) 38 T.C. 223.
[9] Ibid. 230.

[QUEEN'S BENCH DIVISION.]

* STANTON v. EWART F. YOULDON LTD.

1960
Jan. 20, 21.

McNair J.

[1956 S. No. 3788.]

Fatal Accidents Acts — Damages — Funeral expenses — Tombstone — Erection of memorial over grave six months after funeral—Law Reform (Miscellaneous Provisions) Act, 1934 (24 *&* 25 *Geo.* 5, *c.* 41), *ss.* 1 (2) (*c*), 2 (3).

The plaintiff, as executor, sued on behalf of himself and of his deceased wife's estate for damages in respect of her death. The plaintiff lived in comfortable circumstances and he received approximately £1,500 as sole beneficiary under his wife's will. His claim included a sum of £194 15s. for a marble memorial erected over his wife's grave six months after her death. No other stone had been erected over the grave:—

Held, that £40 of this sum should be allowed as the expense of a simple gravestone, which might properly be considered as part of the funeral expenses disbursed on behalf of the estate and so recoverable under section 1 (2) (*c*) of the Law Reform (Miscellaneous Provisions) Act, 1934,[1] if it were a reasonable expenditure for persons in the position of the deceased and of the relatives who were responsible for the actual ordering of the stone; but that in so far as the expense was merely of a memorial set up as a sign of love and affection, it was not recoverable.

Per curiam: Such reasonable expenditure may also be allowed upon a claim under the Fatal Accidents Act, 1846, by reason of section 2 (3) of the Act of 1934, notwithstanding that the plaintiff can prove no dependency, but such a claim must be subject to any benefits received from the estate, other than insurance benefits.

ACTION.

The plaintiff, Isaac Steingold Stanton, claimed as executor of the estate of his wife, Sarah Steingold Stanton, deceased, damages for her estate under the Law Reform (Miscellaneous Provisions) Act, 1934, and on his own behalf as widower damages under the Fatal Accidents Act, 1846, in respect of injuries suffered by her in a road accident on January 28, 1956, and her death consequential thereon on February 6, 1956. The defendants, Ewart F. Youldon Ltd., admitted that the injuries and death were caused by the negligent driving of their servant or agent.

[Reported by GROVE HULL, Esq., Barrister-at-Law.]

[1] Law Reform (Miscellaneous Provisions) Act, 1934, s. 1: "(2) Where "a cause of action survives as aforesaid for the benefit of the estate "of a deceased person, the damages "recoverable for the benefit of the "estate of that person—. . . (*c*) where "the death of that person has been "caused by the act of omission which "gives rise to the cause of action, "shall be calculated without reference "to any loss or gain to his estate consequent on his death, except that a "sum in respect of funeral expenses "may be included."

S. 2: "(3) In an action brought "under the Fatal Accidents Acts, 1846 "to 1908, damages may be awarded "in respect of the funeral expenses of "the deceased person if such expenses "have been incurred by the parties for "whose benefit the action is brought."

1960

Stanton
v.
Ewart F.
Youldon
Ltd.

The plaintiff and his wife lived in comfortable circumstances. At the time of the accident they had been married for 42 years and the deceased was nearly 70 years old; she had suffered a mild cerebral thrombosis and suffered also from diabetes. The medical evidence was that her expectation of life was between five and seven years. During the nine days for which she lived after the accident, although suffering from severe injuries, she received only mild sedation and remained conscious and able to converse with her relatives. Under his wife's will the plaintiff received, as sole beneficiary, approximately £1,500.

By the statement of claim the plaintiff claimed, inter alia, damages for funeral expenses and also £194 15s., the cost of a memorial erected by him over his wife's grave about six months after her death; no other stone was erected. The plaintiff also claimed under other heads under the Fatal Accidents Act, but these claims were withdrawn at the trial. The remainder of the facts relevant to the point reported are set out in the judgment.

The case is reported solely upon the question whether the cost of the memorial was recoverable.

Glynn Blackledge Q.C. and *L. J. Solley* for the plaintiff.

N. R. Fox-Andrews Q.C. and *Hugh Griffiths* for the defendants.

The following case, which was not referred to in the judgment, was cited in argument: *Hart* v. *Griffiths-Jones*.[2]

January 21. McNair J. stated the facts set out above, awarded £75 damages for the deceased's loss of expectation of life and a further £75 for her pain and suffering, and continued: As regards the funeral expenses, the position both in fact and in law is a little more difficult. The legal position is that section 1 (2) of the Law Reform (Miscellaneous Provisions) Act, 1934, provides: "Where a cause of action survives as aforesaid for the "benefit of the estate of a deceased person, the damages recover-"able for the benefit of the estate of that person—. . . (*c*) where "the death of that person has been caused by the act or omission "which gives rise to the cause of action, shall be calculated "without reference to any loss or gain to his estate consequent "on his death, except that a sum in respect of funeral expenses "may be included." It is clear, on the construction of that provision, that it enables the court to award damages in respect of funeral expenses to the extent that funeral expenses have been reasonably and properly incurred as a liability of the estate, and I do not think from that point of view that it matters whether the bills were in the first place paid out of the executor's account, as long as it can fairly and properly be said that those funeral expenses were expenses which were a liability of the estate.

[2] [1948] 2 All E.R. 729.

As regards the claim for funeral expenses made by the plaintiff on his own behalf under the Fatal Accidents Act, the position now is that section 2 (3) of the Law Reform (Miscellaneous Provisions) Act, 1934, provides: "In an action brought under the "Fatal Accidents Acts . . . damages may be awarded in respect "of the funeral expenses of the deceased person if such expenses "have been incurred by the parties for whose benefit the action "is brought." It seems to me that the legal position is that under the Fatal Accidents Act the plaintiff in this case can claim damages in respect of the funeral expenses which he has incurred, provided they are reasonable, notwithstanding that he has no other claim under that Act—notwithstanding that he can prove no dependency—but that his claim for the payment of damages for funeral expenses, like any other claim by a claimant under the Fatal Accidents Act, is subject to any benefit which he may have received from the estate other than those benefits which are expressly excluded by the Fatal Accidents Acts, namely, recoveries of insurance. That seems to me to be the legal position, and I now approach the factual position as regards the funeral expenses in this case. [His Lordship, having considered the facts, held that sums totalling £18 had been proved to have been disbursed by the plaintiff and were funeral expenses which were properly the liability of the estate. He continued:]

There remains for consideration an item of £194 15s., which was the amount of an account by J. Samuel & Sons, monumental masons. That account was rendered on August 27, 1956, and it covers the following items: "To marble memorial erected over "the grave of Sarah Stanton including 120 lead letters, £155; "to synagogue fees, £34 10s.; to 90 extra letters at 1s. 2d. each, "£5 5s.," making a total of £194 15s. That was paid by the plaintiff by two cheques, one for £100 dated September 3, 1956, and the other for £94 15s. dated October 10, 1956.

The question I have to consider here is whether any part of that account can properly be regarded as funeral expenses, either as funeral expenses of the estate or as funeral expenses reasonably and properly incurred by the plaintiff in his personal capacity. The evidence on this point is extremely scanty. I am quite clear that in so far as it is merely a memorial erected some six months later to the memory of the wife, although that is a perfectly proper payment for a man in the plaintiff's position to incur on his own behalf, I do not think on any view that it can be considered a funeral expense; on the other hand, if the truth be that there was no stone of any kind erected over the grave at the time, and that some time would have to elapse for the grave to settle completely, then some part of it ought to be considered as a funeral expense if a stone of some kind was necessary to complete the grave.

I think the legal position is, that a stone over a grave may properly be considered as part of the funeral expenses if it is a reasonable expenditure for the persons in the position of the deceased and of the relatives who are responsible for the actual

1960

STANTON v. EWART F. YOULDON LTD.

McNair J.

ordering of the stone; but in so far as it is merely a memorial set up as a sign of love and affection, then it would not be included. Making the best estimate I can, I have reached the conclusion that of this sum of £194 15s. the sum of £40 should be allowed in respect of the simple gravestone which would complete the funeral expenses. The result of that is that I do not find that the plaintiff on his own behalf incurred any proper funeral expenses, but that he did disburse on behalf of the estate some £58 in respect of funeral expenses. Accordingly, there will be judgment for Mr. Stanton in his capacity as executor for £208.

[On the matter of costs, his Lordship was informed that the defendants had paid into court the sum of £200 on May 20, 1957, and the further sum of £160 14s. on July 3, 1958. The first of these sums was allocated to the plaintiff's claim under the Law Reform (Miscellaneous Provisions) Act, 1934, but on the payment of July 3, 1958, this allocation ceased by permission of the master and thereafter both sums were referable to the whole of the plaintiff's claim. His Lordship, accordingly, ordered that the plaintiff should have his costs to May 20, 1957; that the defendants should have their costs from July 3, 1958; and that, having regard to the way the plaintiff's claim had been presented and persisted in, and the inevitable extra expense incurred thereby, there should be no order as to costs incurred between these dates.]

Judgment for the plaintiff.
Costs as above.

Solicitors: *Harold Miller & Co.; Wm. Easton & Sons.*

[PROBATE, ETC., DIVISION.]

* LONG v. LONG.

1960
March 9, 10.

Karminski J.

Husband and Wife — Practice (in matrimonial causes) — Pleading — Amendment to allege adultery—Discretion statement—Amendment at trial after discretion statement put in evidence—Costs.

The rule of practice that in order to succeed in an application for leave to amend pleadings at the trial of a divorce suit to allege matters contained in the discretion statement, once it has been put in evidence, the applicant must have shown reasonable activity in attempting to obtain information as to the matters likely to be contained therein does not apply unless the circumstances, including the prayer for discretion, are such as to put a reasonably diligent solicitor on inquiry as to the existence of acts of adultery which might form a ground for relief. A failure to make inquiries in the absence of such circumstances does not render the party who obtains leave to amend liable for the extra costs incurred.

Clear v. *Clear* [1958] 1 W.L.R. 467; [1958] 2 All E.R. 353, C.A. distinguished.

A husband filed a petition seeking the dissolution of his marriage in the exercise of the court's discretion on the ground of the wife's desertion. The wife, by her answer, charged the husband with cruelty, desertion and adultery, and cross-prayed for the dissolution of the marriage on those grounds. The adultery alleged occurred before 1951, at which date the parties ceased to cohabit and was alleged by the husband, in his reply, to have been condoned. Although some two years elapsed between the institution of the proceedings and the hearing of the suit no inquiries were made by the wife's solicitors as to the contents of the husband's discretion statement.

During the course of the hearing the husband put in evidence his discretion statement, which disclosed adultery subsequent to the separation. On an application by counsel for the wife leave was granted to amend her answer to include a charge based on the further adultery. She did not proceed with her charges of cruelty and desertion. At the conclusion of the hearing Karminski J. rejected the prayer of the petition and granted the wife a decree nisi on the ground of the husband's admitted adultery, holding that the pre-separation adultery, although condoned, had been revived by the post-separation adultery. On the question of costs:

Leonard Pearl for the husband submitted that, although the present case was distinguishable from *Clear* v. *Clear*,[1] in so far as the present prayer for discretion could have been taken to refer to adultery already known to the wife there was no reason why it should have been assumed to refer to that adultery only. Careful solicitors acting according to the established practice should have made inquiries as to the contents of the discretion statement and the wife, who was a woman of some means, should be ordered to bear the extra costs incurred by the failure to make inquiries and plead the subsequent adultery in her answer.

Keith McHale, for the wife, submitted that in the particular circumstances of the present case there was nothing in the prayer for discretion which should have put reasonably diligent solicitors on inquiry. It was common ground that the wife knew that the husband had committed adultery prior to the separation, and the nature of the reply was such as to direct the minds of the wife's solicitors to that adultery only. There was, therefore, no reason why the husband should not pay the entire costs of the suit.

KARMINSKI J. This case raises a somewhat unusual position on costs because of the course the suit has taken. [His Lordship referred to the relevant facts and continued:] I do not think that, in the circumstances of this case, any such obligation attached to the solicitors for the wife as was submitted by counsel for the husband, and for these reasons: It is clear from the form of

[1] [1958] 1 W.L.R. 467; [1958] 2 All E.R. 353, C.A.

1960

LONG
v.
LONG.

Karminski J.

the answer that the wife instructed her solicitors as to the adultery in 1951 which the husband had confessed to her, that it was one act which took place when they were living apart but before the final separation. The wife had no knowledge of the subsequent adultery admitted by the husband until he swore to his discretion statement; nor is it suggested that she had any means of finding out, nor that she was in any way put on inquiry by suspicious circumstances, or by any information as to the possibility of an adulterous association between the husband and any other woman since 1951. Looking at the reply the advisers to the wife may well have been confirmed in their view that the prayer for discretion related only to the adultery with the unknown woman in 1951; and for this reason, that, if that adultery had been condoned, as pleaded, by the wife cohabiting with her husband then it would require some other matrimonial offence to revive it. But the inference to be drawn from the reply is that the husband has not, by his conduct, been guilty of any other matrimonial offence sufficient to revive the condoned adultery.

On the pleadings, therefore, as it seems to me, any careful solicitor would be put off his guard or relieved from the duty of making further inquiries and that, in my view, is what happened here. I cannot myself see that the wife or her advisers could have, or should have, made these inquiries from the other side.

That being so, I see no reason to abate the full order for costs, and I condemn the husband in the costs of these proceedings.

Solicitors: *Walford & Co.; Beach & Beach.*

E. J.

[PROBATE, ETC., DIVISION.]

1960
April 27.

* PRACTICE DIRECTION (ADDRESS OF PETITIONER).

Husband and Wife—Practice—Pleading—Petition—Address of petitioner—Application for leave to omit address—Matrimonial Causes Rules, 1959 (*S.I.* 1959, *No.* 619), *r.* 4 (1) (*d*).

Where a registrar orders, under rule 4 (1) (*d*), that the residence of a petitioner be omitted from the petition, the registrar's order will contain, in addition to the directions specified in the *Practice Direction* dated March 5, 1957,[1] a direction that the petitioner's solicitors shall, on the request of the respondent's solicitors (or the respondent if he is acting in person), give notice in writing to him of any allegations contained in the affidavit in support of the application which are not referable to any specific allegations in the petition.

B. LONG,
Senior Registrar.

April 27, 1960.

[1] [1957] 1 W.L.R. 557; [1957] 1 All E.R. 860.

[CHANCERY DIVISION.]

* BEESLY v. HALLWOOD ESTATES LTD.

1960
March 24, 25;
April 11, 13.

Buckley J.

[1959 B. No. 402.]

Land Registration—Land charge—Estate contract—Option for new lease—Non-registration—Whether void against purchaser of reversion—Land Charges Act, 1925 (15 *Geo.* 5, *c.* 22), *ss.* 10 (1), *Class C* (iv), 13 (2).

Contract—Formation—No intention to create new obligations—Intention to give effect to believed existing rights—Mistake of law—Whether new contract created.

Estoppel — Conduct, by — Contract — Promise inducing — Unenforceable contract—No detriment to promisee—Whether promise can render enforceable.

Deed—Execution—Escrow—Intention to execute in duplicate—Execution of one part conditional on execution of counterpart—Whether delivery imported.

By section 10 (1) of the Land Charges Act, 1925, "The following "classes of charges on, or obligations affecting, land may be "registered as land charges in the register of land charges, "namely:— . . . Class C:—A mortgage charge or obligation affect-"ing land of any of the following kinds, . . . (iv) Any contract by "an estate owner . . . to convey or create a legal estate, including "a contract conferring either expressly or by statutory implication "a valid option of purchase, a right of pre-emption or any other "like right (in this Act referred to as 'an estate contract'). . . ." By section 13 (2): "A land charge of . . . Class C . . . shall (except "as hereinafter provided) be void as against a purchaser of the land "charged therewith, or of any interest in such land, unless the land "charge is registered in the appropriate register before the com-"pletion of the purchase: Provided that, as respects . . . an estate "contract created or entered into after the commencement of this "Act, this subsection only applies in favour of a purchaser of a "legal estate for money or money's worth."

By a lease dated May 21, 1938, for a term of 21 years from March 25, 1938, it was provided that on the tenants giving at least six months' notice in writing previous to the determination of the lease they should have the right to obtain a further lease for 21 years on the same conditions subject to certain amendments. The option was never registered as a land charge under the Land Charges Act, 1925. On January 10, 1948, the residue of the term was assigned to the plaintiff for valuable consideration; and, in August, 1955, the freehold reversion was purchased by the defendant company for money.

On July 1, 1958, the plaintiff gave notice exercising the option. Both the plaintiff and the directors of the defendant company were then of opinion that the option was binding on the defendant company. On August 27, 1958, the defendant company's solicitors wrote to the plaintiff's solicitors setting out the terms of the new lease and informing them that the grant of the new lease would be subject to an undertaking being given to redecorate the property. There was some further correspondence with regard to the terms of the undertaking but it was never given. On September 11, 1958, the defendant company's solicitors sent a counterpart lease to the plaintiff's

[Reported by Miss V. A. MOXON, Barrister-at-Law.]

1960

BEESLY
v.
HALLWOOD
ESTATES
LTD.

solicitors for execution by the plaintiff. At some date between September 13 and 26, 1958, the seal of the defendant company was attached to the new lease; on September 24 or 25, 1958, the plaintiff executed the counterpart lease. At a board meeting of the defendant company held on September 26, 1958, it was reported that a new lease had been executed, when one of the directors suggested that the position as to the registration of the option should be investigated. The defendant company were advised that the option was void for lack of registration, and on October 8, 1958, a letter was written to the plaintiff's solicitors informing them that the defendant company had decided not to grant the new lease.

In an action in which the plaintiff claimed, inter alia, that the defendants were bound by the lease sealed by them, or were bound to grant her a new lease:—

Held, (1) that, although the option was not a "contract . . . to "convey or create a legal estate," it came within the words "including a contract conferring . . . a valid option of purchase" in section 10 (1), Class C (iv) of the Land Charges Act, 1925, and therefore, not having been registered, was void as against the defendant company by virtue of section 13 (2) of the Act (post, pp. 556, 558).

Helby v. *Matthews* [1895] A.C. 471; 11 T.L.R. 446, H.L. and *Griffith* v. *Pelton* [1958] Ch. 205; [1957] 3 W.L.R. 522; [1957] 3 All E.R. 75, C.A. considered.

(2) That, since the letters written between August 27 and September 26, 1958, were written with mutual intention of giving effect to what were believed to be the existing rights of the plaintiff, and not with the intention that any new contractual rights should be created, the correspondence could not create a contract to grant a new lease, nor, on the facts, could it have constituted a contract, for there was no unqualified acceptance of any offer contained in any earlier letter or letters (post, pp. 558, 559).

British Homophone Ltd. v. *Kunz* (1935) 152 L.T. 589 distinguished.

(3) That the doctrine of "promissory estoppel" could not be invoked to render enforceable a right which would otherwise be unenforceable and, therefore, a binding obligation on the defendant company to grant a new lease could not be created by any promises in the correspondence to grant the new lease; and that, in any event, the plaintiff had not in fact acted to her detriment in not enforcing her rights against the original lessors under clause 5 of the lease, for there being no privity of contract between her and the original lessor, she did not, at any relevant time, have any rights against them (post, pp. 560, 561).

(4) That the sealing of a deed by a corporate body prima facie imported delivery of the deed and, there was no reason for the court to conclude that the sealing of the new lease did not import delivery so that the defendant company must be regarded as having executed the new lease (post, p. 562).

(5) That, where a deed was intended to be executed in duplicate to give effect to a transaction between two parties, by which each undertook obligations towards the other, execution of the deed by one party prima facie imported that he executed it as an escrow conditionally upon the other party executing his part; and that the defendant company, in sealing the lease, intended to execute it as an escrow conditionally upon the plaintiff executing the counterpart, but not on the further condition of an undertaking being given to redecorate the property (post, pp. 561, 562).

(6) That although, when the new lease was executed, all parties

mistakenly believed the option to be binding at law despite non-registration that mistake was a mistake of law and did not afford a defence to the claim that the defendant was bound by the lease which it had executed. Accordingly, subject to the plaintiff handing over the counterpart, the defendants were bound by the lease (post, p. 563).

Action.

By a lease made on May 21, 1938, the lessors, Dr. R. Collum's Representatives Ltd., granted to the tenants, Walter Weeks and Winifred Gertrude Weeks, a lease of property known as No. 132, 132a and 132b, Ewell Road, Surbiton, Surrey for a term of 21 years from March 25, 1938. Clause 5 of the lease provided that "On giving at least six months' notice in writing expiring previous "to the determination of this demise the tenants shall have the "right to obtain a further lease for twenty-one years on the same "conditions subject to the following amendments:—(a) That "there shall be no right of renewal of the said term at the end of "such further lease. (b) That the yearly rentals payable during "the said term shall be as follows:—(i) Two hundred pounds for "the first seven years. (ii) Two hundred and twenty-five pounds "for the second seven years. (iii) Two hundred and fifty pounds "for the last seven years. (c) The legal costs, stamp duties and "other expenses attendant on the granting of such further lease "shall be borne by the tenants." That option was never registered as a land charge under the Land Charges Act, 1925.

By an assignment dated January 10, 1948, made between the tenants and the plaintiff, Phyllis Eirene Beesly, the tenants, in consideration of a payment of £5,000, assigned the demised property to the plaintiff for the residue of the term subject to the rent, covenants and conditions reserved by and contained in the lease. The assignment also comprised the tenants' stock-in-trade and other chattels and the goodwill of the business carried on by them at the property. In August, 1955, the defendants, Hallwood Estates Ltd., purchased the freehold reversion expectant on the term for money. The defendants had notice of the option when they bought the property, and on August 13, 1955, their solicitors applied for an official search under the Land Charges Act, 1925, for entries affecting No. 132, Ewell Road, though not Nos. 132a and 132b under the names (inter alios) of the original lessors and obtained a certificate of no subsisting entries.

On July 1, 1958, the plaintiff's then solicitors wrote a letter to the original lessors, c/o Messrs. Whiddington, estate agents, on the plaintiff's behalf, enclosing a formal notice to exercise the option given to her by clause 5 of the lease. On August 27, 1958, the defendants' solicitors wrote to the plaintiff's solicitors that they had been instructed to act by the defendants. The letter continued: "We are instructed that the term is to be for 21 years "at a rental of £200 per annum for the first seven years, £225 "per annum for the next seven years, and £250 per annum for "the remainder of the term. In other respects the new lease will

1960

Beesly v. Hallwood Estates Ltd.

"be in similar terms to the existing one and this being so, "we shall be glad to know whether in the circumstances you "require to see a draft. Our clients inform us that the repairing "covenants have not been complied with by your client and that "the granting of the new lease will be subject to an undertaking "being given that the whole of the exterior and interior will be "redecorated within the course of the next six months, although "they understand that the work to the interior is already in "hand."

After some further letters, which are not material, the plaintiff's solicitors wrote to the defendants' solicitors on September 10, 1958, that "the rents are to be as set out in your letter and the "terms of the new lease are to be similar to those in the existing "lease. In these circumstances, we will gladly dispense with a "draft, but we should be glad to know by whom the new lease "is to be granted. Under the existing lease, the lessors are "Dr. R. Collum's Representatives Ltd." The letter also asked if the undertaking could be extended to nine months. On September 11, 1958, the defendants' solicitors wrote to the plaintiff's solicitors enclosing a counterpart lease for execution by the plaintiff and informing them that the lease would be granted by the defendants. On September 13, 1958, the defendants' solicitors wrote a further letter: "With reference to your letter to us of the "10th instant, our clients say that they are quite prepared for "the period of the exterior decorations to be extended from six "to nine months, and so far as the interior decorations are "concerned they understand that these will be completed shortly, "and they will be glad to hear from your client that this has been "done, so that they may make an inspection." At some date between September 13 and 26, 1958, the seal of the defendants was regularly attached to the new lease; and on September 24 or 25, 1958, the plaintiff executed the counterpart lease.

At a board meeting of the defendant company held on September 26, 1958, it was reported to the board as follows: "132, Ewell "Road, Surbiton. A new lease has been executed for the letting "of this property to Mrs. P. E. Weaver [the plaintiff] for a term "of 21 years from the 25th March, 1959, at a rent of £200 per "annum for the first seven years, £225 for the next seven years, "and £250 for the remaining seven years, the tenant to pay all "outgoings." At this time both the plaintiff and the directors of the defendant company believed that the option was valid; but one of the directors suggested that the position as to registration of the option should be investigated. The defendants were advised that the option was void for lack of registration, and on October 8, 1958, their solicitors wrote to the plaintiff's solicitors: "We are "instructed to inform you that our clients have decided not to grant "the new lease to your client." Further correspondence followed in which the plaintiff's solicitors called upon the defendants to execute the new lease.

On February 6, 1959, the plaintiff issued the writ claiming [as

re-amended] (1) a declaration that the defendants were bound by the further lease sealed by them; (2) an order that upon her handing over to the defendants the counterpart of the further lease they should hand over the further lease to her; alternatively (3) a declaration that the plaintiff was entitled to a further lease of the demised premises upon the terms contained in clause 5 of the original lease; (4) an order that the defendants should execute a further lease in accordance with the terms contained in the counterpart lease or otherwise in accordance with the terms contained in clause 5; in either event (5) damages. By her re-amended statement of claim she alleged that she had duly exercised the option granted to her by clause 5; alternatively, that by their execution of the new lease and by all or some of the letters dated July 1, August 27, September 10, 11 and 13, 1958, the defendants had agreed to grant and she agreed to take a further lease; and that the defendants were bound by the new lease which they had sealed.

By their re-amended defence and counterclaim the defendants denied that the plaintiff had against them any right under clause 5 of the lease and relied on section 13 of the Land Charges Act, 1925. They also denied that they had executed the further lease and that they had agreed to grant or the plaintiff to take any further lease. Alternatively they alleged that, if an agreement was constituted by the alleged execution or the letters, it was a condition precedent of the granting of the further lease that the undertaking as to repairs should be given; and, in the further alternative, that the alleged agreement was entered into under a mistake of fact or as to private right common to both parties, in that they both believed that the defendants were under a binding obligation to grant the new lease. They also denied that the further lease was binding on them, and alleged that it was delivered as an escrow and was not to take effect until the undertaking had been given and/or until the document should have been exchanged with the counterpart; alternatively, they alleged that the lease had been executed under the mistake previously alleged. The defendants counterclaimed for possession of the part of the property occupied by the plaintiff personally and for mesne profits.

It was agreed that, unless the option was unenforceable by reason of non-registration, it was exercisable by the plaintiff against the defendants, although there had been no express assignment to the plaintiff of the benefits of the option and that, if the option was valid, the notice exercising it had been effectually served on the defendants.

The facts as to the sealing of the new lease and as to what occurred at the board meeting held on September 26, 1958, were unknown to the plaintiff until one of the directors of the defendant company gave evidence at the hearing in March, 1960. On April 8, 1960, after the conclusion of the legal argument on the other points, the plaintiff applied for leave to amend her statement of claim and

1960

Beesly v. Hallwood Estates Ltd.

leave was given. The question as to the effect of the sealing of the new lease by the defendants was argued at a further hearing on April 11, 1960.

F. Bower Alcock for the plaintiff.

A. E. Holdsworth for the defendants.

The following cases, in addition to those referred to in the judgment, were cited in argument: *Robertson* v. *Minister of Pensions*[1]; *Solle* v. *Butcher*[2]; *Stromdale and Ball Ltd.* v. *Burden*[3]; *Johnson* v. *Baker*[4]; *Exton* v. *Scott*[5]; *Phillips* v. *Edwards*[6]; *Tool Metal Manufacturing Co. Ltd.* v. *Tungsten Electric Co. Ltd.*[7]; *Doe* d. *Garnons* v. *Knight*[8]; *Gudgen* v. *Besset.*[9]

Cur. adv. vult.

April 13. Buckley J. read the following judgment: In this action the plaintiff originally claimed, in effect, that she had effectually exercised an option for renewal contained in a lease dated May 21, 1938, of certain property known as Nos. 132, 132a and 132b, Ewell Road, Surbiton. By the first amendment of her statement of claim she claimed, alternatively, that by a contract by correspondence between her solicitors and the defendants' solicitors the defendants agreed to grant her a further lease of the property in question. By a further amendment she claims that the defendants are bound by a lease sealed by the defendants in purported pursuance of the option. The defendants counter-claimed for possession of No. 132b and mesne profits.

[His Lordship stated the facts and continued:] The first question for consideration is what is the consequence of the failure to register the option?

Section 10 (1) of the Land Charges Act, 1925, so far as relevant provides: "The following classes of charges on, or obligations "affecting, land may be registered as land charges in the register "of land charges, namely . . . Class C:—A mortgage charge or "obligation affecting land of any of the following kinds, created "either before or after the commencement of this Act, but if "created before such commencement only if acquired under a "conveyance made after such commencement, namely . . . "(iv) Any contract by an estate owner or by a person entitled at "the date of the contract to have a legal estate conveyed to him "to convey or create a legal estate, including a contract conferring "either expressly or by statutory implication a valid option of "purchase, a right of pre-emption or any other like right (in this

[1] [1949] 1 K.B. 227; 64 T.L.R. 526; [1948] 2 All E.R. 767.

[2] [1950] 1 K.B. 671; 66 T.L.R. (Pt. 1) 448; [1949] 2 All E.R. 1107, C.A.

[3] [1952] Ch. 223; [1951] 2 T.L.R. 1192; [1952] 1 All E.R. 59.

[4] (1821) 4 B. & Ald. 440.

[5] (1833) 6 Sim. 31.

[6] (1864) 33 Beav. 440.

[7] [1955] 1 W.L.R. 761; [1955] 2 All E.R. 657, H.L.

[8] (1826) 5 B. & C. 671.

[9] (1856) 6 E. & B. 986.

"Act referred to as 'an estate contract'). . . ." Section 13 (2) of the same Act is in the following terms: "A land charge of Class "B, Class C or Class D, created or arising after the commence-"ment of this Act, shall (except as hereinafter provided) be void "as against a purchaser of the land charged therewith, or of any "interest in such land, unless the land charge is registered in the "appropriate register before the completion of the purchase: "Provided that, as respects a land charge of Class D and an "estate contract created or entered into after the commencement "of this Act, this subsection only applies in favour of a purchaser "of a legal estate for money or money's worth."

The defendants having bought the reversion for money, the option is accordingly void as against them if it is an estate contract within section 10 (1), Class C (iv). A conditional contract to convey or grant a legal estate is registrable under the section: *Sharp* v. *Coates*.[1] An option to purchase a legal estate in land may have the appearance of a conditional contract on the part of the grantor to convey or create that estate, but this is not, I think, the true nature of such an option. In *Helby* v. *Matthews*[2] the House of Lords had to decide whether a person who had entered into a hire-purchase agreement for a piano under which he could terminate the hiring at any time was "a person having agreed "to buy goods" within the meaning of the Factories Act, 1889. It was held that what the hirer was entitled to, apart from the arrangements relating to the hire of the piano, was an option to buy the piano by continuing the stipulated payments for a sufficient period.

Lord Herschell said[3]: "It was said in the Court of Appeal "that there was an agreement by the appellant to sell, and that "an agreement to sell connotes an agreement to buy. This is "undoubtedly true if the words 'agreement to sell' be used in "their strict legal sense; but when a person has, for valuable "consideration, bound himself to sell to another on certain terms, "if the other chooses to avail himself of the binding offer, he may, "in popular language, be said to have agreed to sell, though an "agreement to sell in this sense, which is in truth merely an "offer which cannot be withdrawn, certainly does not connote an "agreement to buy, and it is only in this sense that there can be "said to have been an agreement to sell in the present case." I particularly draw attention to the words "which is in truth "merely an offer which cannot be withdrawn."

Lord Watson said[4]: "Apart from the arrangement for hire of "the piano, the only right given to Brewster by the agreement "in question was the option to become a purchaser. It is true "that whilst he was under no obligation to buy, the appellant was "legally bound to give him that option, and could not retract it,

[1] [1949] 1 K.B. 285; 64 T.L.R. 605; [1948] 2 All E.R. 871, C.A.
[2] [1895] A.C. 471; 11 T.L.R. 446, H.L.
[3] [1895] A.C. 471, 477, H.L.
[4] Ibid. 471, 479, H.L.

1960

BEESLY v. HALLWOOD ESTATES LTD.

Buckley J.

"if the other stipulations of the contract were duly observed by "the hirer. But the possession of such a right of option was, in "no sense, an agreement by Brewster to buy the piano; and the "appellant's obligation to give the option was not, in the sense "of law, an agreement by him to sell. In order to constitute an "agreement for sale and purchase, there must be two parties who "are mutually bound by it. From a legal point of view the "appellant was in exactly the same position as if he had made an "offer to sell on certain terms, and had undertaken to keep it "open for a definite period." A little later on Lord Wason said [5]: "Whilst, in popular language, the appellant's obligation might be "described as an agreement to sell, it is in law nothing more than "a binding offer to sell."

In *Griffith* v. *Pelton* [6] Jenkins L.J., delivering the judgment of the court, referred to an option to purchase land in the following terms [7]: "An option in gross for the purchase of land is a con-"ditional contract for such purchase by the grantee of the option "from the grantor, which the grantee is entitled to convert into a "concluded contract of purchase, and to have carried to com-"pletion by the grantor, upon giving the prescribed notice and "otherwise complying with the conditions upon which the option "is made exercisable in any particular case."

This language, at first sight, seems to be at variance with what was said in *Helby* v. *Matthews* [8]—which was not, apparently, brought to the attention of the Court of Appeal [9]—but I think that Jenkins L.J.[10] cannot have meant by the expression "conditional "contract" to describe a concluded contract under which the rights and liabilities of the parties were dependent on a condition, but a state of affairs capable of resulting in a concluded contract upon a certain contingency.

In my judgment, the option contained in clause 5 of the lease in the present case did not constitute a contract, albeit conditional, by the lessor to grant a further term in the land upon the exercise by the lessees of the option: it constituted an offer to grant such a term which the lessor was contractually precluded from withdrawing so long as the option remained exercisable. I am consequently of opinion that the option did not fall within what may be called the first limb of section 10 (1), Class C (iv).

Does it, then, fall within the second limb introduced by the word "including"? As a matter of syntax and interpretation according to the strict sense of the words used this phrase does not seem appropriate to extend the ambit of the paragraph, but merely to emphasise that options of purchase and the like, so far as they fall within the class of contracts to convey or create legal estates, come within the ambit of the paragraph. But if I am right in the views I have expressed as to the nature and effect of

[5] Ibid. 471, 480, H.L.

[6] [1958] Ch. 205; [1957] 3 W.L.R. 522, C.A.

[7] [1958] Ch. 205, 225, C.A.

[8] [1895] A.C. 471, 477, 479, 480, H.L.

[9] [1958] Ch. 205, C.A.

[10] Ibid. 205, 225, C.A.

an option (which must, I think, apply equally to a right of pre-emption or other like right), no such right would ever constitute a contract to convey or create a legal estate. Accordingly, I consider that in this context the word "including" must, as a matter of construction, be given the effect of "which for this "purpose shall be treated as including," and what I have called the second limb of the paragraph must be read as extending the operation of the paragraph. Indeed, both counsel before me argued upon this footing.

Did clause 5 of the lease create a valid option of purchase within the meaning of the paragraph? It is clear from section 20 (8) of the Act that, unless the context otherwise requires, the term "purchaser" includes a lessee and the term "purchase" includes a lease. It must follow, again subject to the context, that the term "option of purchase" includes "option of lease," or "option to take a lease."

Counsel for the plaintiff has referred me to section 142 (1) of the Law of Property Act, 1925. He says that, as the option runs with the land it is, under the express terms of that section, binding on the reversioner and enforceable by an assignee of the term. He points out that the section says nothing about registration. Reference may also be made to section 6 of the same Act. In their note to the last-mentioned section the editors of Wolstenholme & Cherry's Conveyancing Statutes, 12th ed. (1932), p. 246, say: "Thus no land charge has to be registered to protect lessor's "or lessee's covenants, for the lease is the charter of the title." With all respect to the editors, I think that statement is too wide.

Counsel for the plaintiff says that section 142 (1) of the Law of Property Act, 1925, and section 10 (1), Class C (iv) of the Land Charges Act, 1925, must be construed so as to be mutually consistent, and that the way to achieve this is to exclude from the latter any obligation which falls within the former. He says that the term "purchase" does not in its ordinary sense apply to a renewal of a lease. That may be so, but I am concerned with the statutory definition of the term and not merely with its ordinary meaning. Counsel relies, I think, upon section 142 of the Law of Property Act, 1925, as affording a context which requires me to construe "purchase" in paragraph (iv) of Class C otherwise than according to the statutory definition. I do not consider that it does so. Section 142 renders obligations to which that section is applicable enforceable against a reversioner for the time being "if and so far as the lessor has power to bind" such reversioner. The section does not empower a lessor to bind a reversioner in respect of any obligation which the legislature has said shall not be enforceable against such reversioner. If an obligation which would otherwise run with the reversion is of a kind which, unless registered as a land charge, will be void against a purchaser for money or money's worth, the lessor cannot, in my judgment, bind in respect of that obligation the reversionary estate in the hands of such a purchaser, who acquires the reversion at a time when

1960

BEESLY v. HALLWOOD ESTATES LTD.

Buckley J.

the obligation is not registered. The effect of the Land Charges Act, 1925, is to take such an obligation out of the scope of section 142 upon a purchase of the reversion for money or money's worth taking place while the obligation is unregistered.

I consequently reach the conclusion that the option contained in clause 5 of the lease was registrable under section 10 (1), Class C (iv), and that, as it was not registered when the defendants bought the reversion immediately expectant on the term, it is void as against the defendants.

I now proceed to the question whether the parties entered into a new contract by correspondence. The letters relied on by the plaintiff in her statement of claim in this respect in conjunction with the sealing of the new lease by the defendants are those dated July 1, August 27, and September 10, 11 and 13, 1958, to which I have referred. These letters were all written at a time when the plaintiff and her solicitors and the directors of the defendant company and their solicitors all believed that the option was exercisable by the plaintiff and enforceable against the defendant company. They were written with the mutual intention of giving effect to what were believed to be existing rights of the plaintiff. I am satisfied that none of the parties concerned thought or intended at the time that any new contractual rights would or should be created by this correspondence, except, of course, so far as the exercise of the option (if valid) would have constituted a new contract. Any transaction between two or more parties can, in my judgment, only result in a contract between them if they enter into that transaction with an intention to create binding contractual obligations, or in circumstances in which such an intention must be attributed to them. The facts of the present case negative such an intention, for these letters were written with the intention of carrying out what were thought to be existing obligations, not of creating any new obligation. On this ground I am of opinion that no contract is shown to have been established by the correspondence.

This view is not, I think, in conflict with *British Homophone* v. *Kunz*.[11] In that case the well-known jazz pianist, Charlie Kunz, had entered into a contract of service with the plaintiff company containing an option for either party "to extend same "for a further period of twelve months on terms to be hereafter "agreed." This option was held to have no binding effect as being too uncertain. Neverthless, the company and Kunz, both believing that the clause was binding, before the expiration of the term of the agreement negotiated and entered into a new formal written agreement. This, it seems, was not merely a continuation of the earlier agreement, the terms being different. The company was anxious to retain the services of Kunz and he, although he would otherwise have wished to enter into a contract with another company—and had, in fact, done so, although he thought the

[11] (1935) 152 L.T. 589.

arrangement was only provisional—felt himself bound by the option clause to contract with the plaintiff company if they offered him satisfactory terms. Counsel for Kunz (who had subsequently committed breaches of the later contract) contended that because both parties entered into the later contract in the mistaken belief that the option clause in the earlier contract was binding, Kunz was not liable in damages for breach of the later contract.

du Parcq J. said [12]: "I can deal shortly with Mr. Macaskie's "second contention. I know of no authority for the proposition "that if two parties enter into what is on the face of it a binding "contract, in ignorance of their legal rights, each believing the "other to be legally bound to enter into such a contract when he "is not so bound, the contract so entered into is not enforceable. "So to hold would be to decide that a common mistake of law "vitiated a contract, and I believe that such a decision would be "unsound in principle."

The judge was in that case [13] considering the binding character of a formal written agreement, the terms of which did not flow from an earlier contract but had been independently negotiated, and the case is, in my judgment, clearly distinguishable on its facts from the present case, where the correspondence was not, in my view, intended to create any new rights or embody any new agreement.

Even if I am wrong in the views I have expressed, I should still hold that the correspondence did not constitute a contract, for I cannot find in any of the letters an unqualified acceptance of any offer contained in any earlier letter or letters. If the letter of July 1 be regarded as an offer to take a lease incorporating such terms as are indicated in clause 5 of the existing lease, the letter of August 27 introduces a new term as to an undertaking to do interior and exterior redecorations within six months, which would give that letter the character of a counter-offer. The letter of September 10 asked for the period of the required undertaking to be extended to nine months, and so would constitute a further counter-offer. The letter of September 13 accepts the last proposal, but only as regards exterior decorations, and once again this would constitute a further counter-offer. The question of the form and extent of the proposed undertaking was never fully resolved on the correspondence; and no undertaking was ever given.

The defendants' sealing of the new lease cannot, in my judgment, advance the plaintiff's case in this respect. If it is to be regarded as an acceptance of an offer on the part of the plaintiff, it was never communicated to her and so cannot have constituted a contract. There is no other way in which it can be regarded as relevant to the question whether a contract to grant a new lease was ever concluded between the parties in 1958.

Accordingly, in my judgment, the plaintiff fails to make out her case of a contract for a further lease.

[12] (1935) 152 L.T. 589, 593. [13] Ibid. 589.

1960

BEESLY v. HALLWOOD ESTATES LTD.

Buckley J.

This renders it unnecessary for me to decide the validity of the plea in the defence that, if there was such a contract, it was entered into under a common mistake that the option was binding. As, however, the argument as to mistake is relevant to a later point, and would, of course, be relevant to the present point if the case were to go to a higher court, I should state my view on this.

Such a mistake would, in my judgment, have been a mistake of law; viz., a mistaken view held by all parties that on the known facts the option was binding at law irrespective of registration; for until September 26, 1958, none of them had addressed his mind to the question whether the option was registered, but all the other relevant facts were known. The mistake was as to the nature and effect of the general law applicable to those known facts. The mistake would not, I think, have been one that would have afforded a defence to a claim under the alleged contract.

By her amended reply the plaintiff claimed that the defendants could not in any case rely upon section 13 of the Land Charges Act, 1925, (a) because they had accepted rent from her since the end of the term (but I have had no evidence of payment of any such rent), and (b) because of promises said to be contained in the letters of August 27, September 11 and 13, 1958, which, as she alleges, were intended to, and did, induce her to believe that the defendants would grant the further lease and would not rely on the section. The plaintiff alleges that she acted on these promises in taking no steps to enforce against the original lessors her rights under clause 5 of the lease.

One short answer to this contention is that, as there was never any privity of contract between the plaintiff and the original lessors, the plaintiff did not at any relevant time have any rights which she could have enforced against the original lessors and, accordingly, she has not altered the position to her detriment in this respect.

On this part of the case Mr. Alcock for the plaintiff referred me to *Central London Property Trust Ltd.* v. *High Trees House Ltd.*,[14] *Hughes* v. *Metropolitan Railway Co.*,[15] and to the statement derived from *Combe* v. *Combe*,[16] which is contained in Halsbury's Laws of England, 3rd ed., vol. XV, p. 175. As I understand this part of the law, which has been described as promissory estoppel, it is that where one party is under an existing legal obligation to another, who has so acted as to lead the former party to believe that the latter will not enforce that obligation, or not enforce it to its full extent, or for the time being, intending the former party to act on that footing, and the former party has so acted, the latter party may be restrained in equity from enforcing the obligation on any footing inconsistent with the belief so induced, and may be so restrained notwithstanding that he has

[14] [1947] 1 K.B. 130; 62 T.L.R. 557; [1956] 1 All E.R. 256n.

[15] (1877) 2 App.Cas. 439, H.L.

[16] [1951] 2 K.B. 215; [1951] 1 T.L.R. 811; [1951] 1 All E.R. 767, C.A.

received no consideration for the modification of his rights. The doctrine may afford a defence against the enforcement of otherwise enforceable rights; it cannot create a cause of action. It cannot, in my judgment, be invoked to render enforceable a right which would otherwise be unenforceable, nor to negative the operation of a statute.

I now pass on to the question whether by sealing the new lease the defendants bound themselves. This falls into two parts: (a) whether the defendants ought to be regarded as having executed the new lease, and (b) if so, whether they ought to be regarded as having done so unconditionally, or as an escrow, and if so, on what condition?

It is clear from authorities which Mr. Holdsworth cited to me, including *Murray* v. *Earl of Stair* [17] and *Bowker* v. *Burdekin* [18]—and see *Lady Naas* v. *Westminster Bank Ltd.*[19]—that the latter question depends upon the intention of the executing party, and is a question of fact to be determined upon the whole evidence of the circumstances attending the execution.

Before I consider the law, I should say a further word about the facts. The minute of the board meeting of September 26, 1958, is in the following terms: "2. Chairman's report on the "matters in hand. (d): 132, Ewell Road, Surbiton. A new lease "has been executed for the letting of this property to Mrs. P. E. "Weaver [the plaintiff] for a term of 21 years from the 25th "March, 1959, at a rent of £200 per annum for the first seven "years, £225 for the next seven years and £250 for the remaining "seven years, the tenant to pay all outgoings." That is the whole of the relevant passage in the minute.

Mr. Holdsworth concedes that the seal of the defendants was regularly attached to the lease. I know nothing further about the actual circumstances of its being attached. It will be recollected that the correspondence to which I have made reference discussed an undertaking to be given by the plaintiff relating to certain decorations. By September 13, a point had been reached at which the defendants' solicitors had said that the defendants were quite prepared for the period of the exterior decoration to be extended from six months to nine months, inferring that the period of the interior decorations should be six months. The lease was sealed at some date before September 26, and, as I think, subsequent to September 13, but I have had no evidence enabling me to fix the date more precisely. The counterpart was executed by the plaintiff on September 24 or 25. Nothing, in my view, turns on the sequence of these events. The two parts were never exchanged.

In my view, in accordance with contemporary practice, where a deed is intended to be executed in duplicate to give effect to a transaction between two parties by which each undertakes obligations towards the other, the execution of such a deed by one of

[17] (1823) 2 B. & C. 82, 87, 88.
[18] (1843) 11 M. & W. 128, 147.
[19] [1940] A.C. 366, 399; 56 T.L.R. 381; [1940] 1 All E.R. 485, H.L.

1960

BEESLY v. HALLWOOD ESTATES LTD.

Buckley J.

those parties prima facie imports that he executes it in escrow conditionally upon the other party executing his part of the contract so as to become bound thereby in respect of his obligations thereunder.

In this connection I respectfully accept what was said by Harman J. in *Hollington Bros. Ltd.* v. *Rhodes.*[20] In that case the court was not considering whether a deed was executed conditionally or unconditionally, but whether the sealing of a deed could be relied upon as establishing a contract to grant a lease, so that the point considered by the judge was rather different from the one I am at the moment concerned with; but what he said was this[21]: "It is a commonplace that in many, indeed, in "most cases, where a lease is to be granted everything remains in "negotiation until the lease and its counterpart are finally "exchanged between the parties, and it seems to me impossible to "spell out of the course of business which I have described, and "which appears from the correspondence, anything more than "the ordinary course of negotiations."

The sealing of a deed by a corporate body, in my judgment, prima facie imports delivery of that deed, either unconditionally or conditionally: Norton on Deeds, 2nd ed. (1928), pp. 12–13; *Mayor, etc., of Merchants of the Staple of England* v. *The Governor and Company of the Bank of England*,[22] and I see no reason, in the present case, to conclude that the sealing of the lease by the defendants did not import delivery so as to constitute due execution either unconditionally or in escrow. Indeed, the plaintiff being a "purchaser" within the meaning of the Law of Property Act, 1925, I think that I am bound, by section 74 of that Act, to treat the lease as having been duly executed by the defendants, and this, in my judgment, involves treating the lease as having been not only sealed but also delivered. The lease, being a deed intended to be executed in duplicate for giving effect to a transaction between the parties whereby each undertook obligations towards the other, was, in my opinion, executed by the defendants conditionally upon the plaintiff executing a counterpart: the crucial question, however, is whether it was also conditional on an undertaking being given in suitable form by the plaintiff in respect of the decorations.

In this connection I do not think that I am at all concerned with what was at this relevant time in the minds of the defendants' solicitors. What is of importance is what was the intention of the directors of the defendant company when the lease was executed. As I have already said, I know nothing about the circumstances in which the seal was actually affixed. I do, however, know that the seal is countersigned by the chairman of the board meeting of September 26, 1958, and that the minute of that meeting contains no reference to the execution of the lease being in any way conditional upon an undertaking being given by

[20] [1951] 2 T.L.R. 691.
[21] [1951] 2 T.L.R. 691, 694.
[22] (1887) 21 Q.B.D. 160, 165.

the plaintiff as to decorations. On the contrary, it is clear from the evidence that everybody present at the board meeting of September 26 regarded the lease sealed by the defendant company as binding, albeit they did so with regret. Whereas this attitude of mind would, in my opinion, not be inconsistent with the binding quality of the lease being conditional on the lessee binding herself by execution of a counterpart to obligations on her part expressed in the lease, it is inconsistent with any idea that it was also conditional on some matter wholly extraneous to the lease, as was the proposed undertaking as to redecoration.

I, therefore, reach the conclusion of fact that the defendants, by sealing the lease, intended to deliver, and did deliver, it as their deed intended to bind them conditionally only upon the plaintiff executing a counterpart, but subject to no other condition.

The plaintiff has, as I have already stated, executed the counterpart, and in her statement of claim she alleges that she holds the same as an escrow. She is, and has at all material times been, ready and willing to exchange her counterpart for the lease executed by the defendants.

The defendants plead that the lease was executed under a mistake, namely, the mistake to which I have already alluded. The mistake having been a mutual mistake of general law would not, in my judgment, entitle the defendants to have the lease rescinded and they do not, in fact, claim rescission. Indeed, they claim no relief based on mistake but merely rely on the mistake as a ground of defence. In my judgment, the mistake can have no bearing on the question whether the defendants have executed the new lease (including delivery thereof) and, if so, whether unconditionally or as an escrow, or upon its binding effect upon them so long as the lease is allowed to stand unrescinded.

In these circumstances I propose to declare that subject to the plaintiff handing over to the defendants the counterpart lease referred to in paragraph 8 of the re-amended statement of claim duly executed by her, the defendants are bound by the lease referred to in paragraph 9 of the re-amended statement of claim, and I propose to make the order asked for in paragraph 2 of the plaintiff's claim at the end of the re-amended statement of claim.

Declaration accordingly.

Order that upon the plaintiff handing over to the defendants the counterpart of the further lease they should hand over the further lease to her.

Defendants to pay plaintiff's costs, including costs of re-amendment of statement of claim but excluding costs of application for leave to amend and further hearing.

Counterclaim dismissed with costs.

Solicitors: *S. Sydney Silverman; George C. Carter & Co.*

[CHANCERY DIVISION.]

1960
May 2.

Pennycuick J.

* *In re* SERVERS OF THE BLIND LEAGUE.

[No. 00353 of 1960.]

Company—Winding up—Void dissolution—Bequest to company after dissolution—Application for declaration that dissolution void—Whether discretion of court should be exercised—Charity—Companies Act, 1948 (11 *&* 12 *Geo.* 6, *c.* 38), *s.* 352.

By her will a testatrix gave a fourth share in her residuary estate to a company established for charitable purposes. The company was dissolved before the date of death of the testatrix. On an application by the liquidator after the testatrix's death for an order under section 352 of the Companies Act, 1948,[1] declaring the dissolution of the company void:—

Held, that the purpose of an order under section 352 was, generally, to enable distribution to be made of an asset which belonged to the company before dissolution, but which had vested in the Crown as bona vacantia; and that, since the asset in question had never belonged to the company, and the order sought would dispossess other persons who had obtained a vested interest in the residuary share under a title not derived from the company, it was not a case in which the court should exercise its discretion under section 352 to declare the dissolution void.

MOTION.

The Servers of the Blind League, a charity, was a company limited by guarantee incorporated under the Companies Act, 1929. On September 20, 1955, it was resolved, by special resolution, that the company be put into voluntary liquidation and that the applicant, John Alfred Godfrey, be appointed liquidator. On February 17, 1958, the liquidator, in compliance with clause 9 of the memorandum of association of the company, executed an assignment of the assets, both present and future, of the company in favour of the Royal National Institute for the Blind. The final meeting of the company was held on February 18, 1958; and the liquidator filed his final accounts on March 6, 1958, pursuant to section 290 of the Companies Act, 1948. The company was accordingly dissolved, under section 290 (4) of the Act, on June 6, 1958.

By her will dated May 12, 1950, the testatrix, Margaret Moir Petrie, gave one fourth of her residuary estate to the company.

[Reported by Miss V. A. MOXON, Barrister-at-Law.]

[1] Companies Act, 1948, s. 352 (1): "Where a company has been dissolved, the court may at any time within two years of the date of the dissolution, on an application being made for the purpose by the liquidator of the company or by any other person who appears to the court to be interested, make an order, upon such terms as the court thinks fit, declaring the dissolution to have been void, and thereupon such proceedings may be taken as might have been taken if the company had not been dissolved."

The testatrix died on January 5, 1959, and her will was proved in the Principal Probate Registry on April 3, 1959.

On April 6, 1960, the liquidator issued a notice of motion seeking a declaration under section 352 of the Companies Act, 1948, that the dissolution of the company was void.

C. A. Settle Q.C. for the liquidator.

No cases were cited in argument.

PENNYCUICK J. stated the facts and continued: It is clear, apart from the order which I am now asked to make, that the gift of a residuary share to the company lapsed, and it must follow, in the absence of any express provision in the will, that the share devolved on the footing of a partial intestacy. I have not seen the will of the testatrix.

The liquidator now makes an application under section 352 of the Companies Act, 1948, for a declaration that the dissolution of the company is void. [His Lordship read section 352 (1) of the Act and continued:] The effect of this order, if made, would be that the dissolution would be void ab initio, with the consequence that the company must be regarded as having been in existence at the date of the death of the testatrix; and, accordingly, the gift to it of a residuary share would have been effective. Equally, the order would now divest the interest which the next-of-kin took on the date of death, and with which they were in a position to deal from that date.

In my judgment, it would not be right to make such an order. Generally speaking, the purpose of an order under section 352 is to enable distribution to be made of an asset which belonged to the company before dissolution but which, for some reason, was overlooked and has vested in the Crown as bona vacantia under section 354 of the Act. The position here is wholly different. The asset in question, namely, the residuary share under the will of the testatrix, never belonged to the company at all, and the order would dispossess other persons who obtained a vested interest in the asset under a title not derived from the company.

No authority for such an order has been cited. The power under section 352 is discretionary; and, without seeking to lay down any rule of universal application, I do not think it would be right for me to exercise the discretion in the present circumstances. I therefore dismiss the application.

I am informed that an originating summons is pending to determine the question whether, if the gift to the company failed, there was a general charitable intent. I would make it clear that nothing in this judgment is intended to prejudice that application.

Application refused.

Solicitors: *Joynson-Hicks & Co.*

[PROBATE, ETC., DIVISION.]

1960
April 27.

* PRACTICE DIRECTION (MAINTENANCE).

Husband and Wife—Maintenance—Justices—Variation of registered order—Appeal—Procedure—R.S.C., Ord. 41*a, r.* 3 (3).

An appeal made under rule 3 (3) of Order 41a of the Rules of the Supreme Court to a judge of the Probate, Divorce and Admiralty Division from an order of a magistrates' court varying or refusing to vary an order of the High Court made under sections 19–27 of the Matrimonial Causes Act, 1950, and registered in the magistrates' court under the Maintenance Orders Act, 1958, shall be by summons to a judge, in chambers in the first instance, issued within 14 days of the order appealed from.

The summons shall set out the terms of the magistrates' court order, the terms of the order asked for and the grounds of the appeal.

The appeal shall not, unless otherwise ordered, act as a stay of the order appealed from.

B. LONG,
Senior Registrar.

April 27, 1960.

[CHANCERY DIVISION.]

1960
March 22.

Roxburgh J.

* MORRIS MOTORS LTD. *v.* PHELAN.

[1960 M. No. 661.]

NOTE.

The final form of the order as drawn up on this motion (supra, pp. 352, 353) was as follows:

UPON MOTION for an injunction this day made unto this court by counsel for the plaintiffs

AND UPON HEARING counsel for the defendant

AND UPON READING the writ of summons issued March 8, 1960

AND the plaintiffs and the defendants by their counsel desiring that the said motion should be treated as a motion for judgment and consenting to this judgment

AND the defendant by his counsel undertaking that he will not do at any time hereafter (whether by himself or by his servants or agents or any of them or otherwise howsoever) the following acts or any of them that is to say advertise offer for sale or sell any motor vehicle not being a new motor vehicle of the plaintiffs' manufacture as and for a new motor vehicle or falsely represent that any motor vehicle of the plaintiffs' manufacture is new after it has been the subject of a retail sale by a distributor or dealer has been registered with the local county council has had number plates put upon it and has been driven away by the purchaser

THIS COURT DOTH ORDER that the defendant do pay to the plaintiffs their costs of this action such costs to be taxed by the taxing master.

[Reported by Miss PHILIPPA PRICE, Barrister-at-Law.]

[PRIVY COUNCIL.]

J. C.†
1960
May 2.

* PAROCHIAL CHURCH COUNCIL OF LITTLE LEIGH . . . . . APPELLANTS;

AND

CHURCH COMMISSIONERS . . . RESPONDENTS.

Ecclesiastical Law — Union of benefices — Scheme — Jurisdiction of Judicial Committee to consider proposed scheme de novo and on its merits—Compliance by scheme framing authorities with statutory requirements—Union of Benefices Measure, 1923 (14 *&* 15 *Geo.* 5, *No.* 2), *s.* 10 (3) (5)—*Pastoral Reorganisation Measure,* 1949 (12 *&* 13 *Geo.* 6, *No.* 3), *s.* 3 (2).

Privy Council—Jurisdiction—Union of benefices—Jurisdiction to consider proposed scheme de novo and on its merits—Union of Benefices Measure, 1923, *s.* 10 (3) (5)—*Pastoral Reorganisation Measure,* 1949, *s.* 3 (2).

APPEAL by the Parochial Church Council of Little Leigh against a scheme formulated by the respondents, the Church Commissioners for England, for the union of the benefices of Little Leigh and Lower Whitley, both in the diocese of Chester.

1960. March 21, 22. *W. S. Wigglesworth* for the appellants. *J. G. Le Quesne* for the respondents.

May 2. LORD JENKINS, in the course of delivering their Lordships' report sanctioning the scheme, said: At the outset of his argument before their Lordships in support of the scheme Mr. Le Quesne submitted (in effect) that as it was not shown that the Pastoral Committee in making their recommendations or the Bishop in approving them had failed to take into account any of the matters set out in section 3 (2) of the Pastoral Reorganisation Measure of 1949,[1] or that the Committee, the Bishop or the Church Commissioners had in any other respect failed to comply with the terms of the relevant legislation, the appeal must be dismissed, their Lordships having no jurisdiction to interfere with such a scheme unless it was shown to be vitiated by some such irregularity. Their Lordships have no hesitation in rejecting this argument. It appears to them that the right of appeal conferred

† *Present*: LORD TUCKER, LORD JENKINS and SIR JOHN BEAUMONT.

[1] Pastoral Reorganisation Measure, 1949, s. 3 (2): "In making their recommendations the Committee shall take into account each of the following matters—(*a*) the making of the best possible provision for the ministry of the Word and Sacraments in the diocese as a whole, including the provision of appropriate spheres of work and conditions of service for all persons engaged in the cure of souls and the provision of reasonable remuneration for such persons; (*b*) respect for the traditions, needs and characteristics of individual parishes; and (*c*) the possibility of the use of the ministry of duly authorised laymen."

J. C.
1960
LITTLE LEIGH PAROCHIAL CHURCH COUNCIL v. CHURCH COMRS.

by section 10 (3), and the jurisdiction with respect to appeals conferred by section 10 (5), of the Union of Benefices Measure, 1923, are plainly wide enough to empower their Lordships to consider any scheme submitted to them on appeal de novo and on its merits. This does not, however, mean that their Lordships should not be slow to dissent, save for the most cogent reasons, from the recommendations embodied in a scheme regularly brought into existence with the concurrent approval of the Pastoral Committee, the Bishop and the Church Commissioners, and with proper regard for the matters stated in section 3 (2) of the Measure of 1949.

Solicitors: *Church, Adams, Tatham & Co. for Moss & Haselhurst, Northwich; Milles, Day & Co.*

C. C.

[HOUSE OF LORDS.]

H. L. (E.)†
1960
May 9.

* HENRY BRIGGS, SON & CO. LTD. . . PETITIONERS;
AND
INLAND REVENUE COMMISSIONERS . RESPONDENTS.

PETITION for leave to appeal to the House of Lords from the decision of the Court of Appeal in HENRY BRIGGS, SON & CO. LTD. *v.* INLAND REVENUE COMMISSIONERS.[1]

The Appeal Committee granted the petition.

† *Present*: LORD COHEN, LORD KEITH OF AVONHOLM and LORD DENNING.

[1] [1960] 1 W.L.R. 532; [1960] 1 All E.R. 800.

[COURT OF APPEAL.]

C. A.
1960
March 29, 30, 31.
Lord Evershed M.R., Pearce and Harman L.JJ.

* PEAK (VALUATION OFFICER) *v.* BURLEY GOLF CLUB.
HARDING (VALUATION OFFICER) *v.* BRAMSHAW GOLF CLUB LTD.

Rates and Rating — Rateable occupation — Golf course — Golf courses occupied in New Forest under licence without prejudice to the rights of commoners—Public not prevented from wandering over golf courses—Whether any rateable occupation of golf courses.

Pursuant to licences duly granted by the Forestry Commissioners under their statutory powers, in the one case to a members' golf club and in the other to a limited company, two golf courses had been constructed and maintained in the New Forest. The licences were granted without prejudice to the rights of the commoners of the New Forest. Further, it appeared from the facts found by the Lands Tribunal, that the public were accustomed to wander at will through the unenclosed portions of the New Forest, and whatever was the legal nature of the public's rights, they were exercised over the golf courses where people came to picnic and park caravans. It also appeared that on occasions members of the public played over the golf courses without payment of green fees and had not been stopped. The boundaries of one of the courses was shown on a plan on the licence. The boundaries of the other course were not defined. The Lands Tribunal, reversing the decision of the local valuation court, held that the two golf clubs were in rateable occupation of their respective golf courses:—

Held, that the two clubs were not in exclusive occupation of the respective golf courses for the purposes for which the land was used by them and, accordingly, they were not in rateable occupation.

Test laid down by Tucker L.J. in *John Laing & Son Ltd.* v. *Assessment Committee for Kingswood Assessment Area* [1949] 1 K.B. 344, 350; 65 T.L.R. 80; [1949] 1 All E.R. 224, C.A. applied.

Westminster City Council v. *Southern Railway Co., The Railway Assessment Authority and W. H. Smith & Co. Ltd.* [1936] A.C. 511, 532; 52 T.L.R. 541; [1936] 2 All E.R. 322, H.L. considered.

APPEALS from the Lands Tribunal (Sir William FitzGerald).

These two appeals were heard together. The appellants in the first case were the Burley Golf Club, an unincorporated members' club, the appellants in the second case were the Bramshaw Golf Club Ltd., a limited company. Both appellants had golf courses in the boundaries of the New Forest. These two clubs and a third club, which did not appeal, had been assessed by the local valuation officers on the footing that they were in rateable occupation, both of their respective golf houses and of their respective golf courses. The appellants admitted that they were in rateable occupation of the club houses but contended that they were not in exclusive occupation of the golf courses. On appeal the local valuation court for Hampshire deleted the assessments of the golf courses.

The golf courses in question were maintained by the appellants pursuant to licences granted by the Forestry Commissioners under their statutory powers. The boundaries of the Burley golf course were shown on a plan annexed to the licence. The boundaries of the Bramshaw golf course were not defined. The licences were granted in consideration of annual payments but were subject to the rights of the commoners. Both clubs charged green fees, but if members of the public played on the courses and refused to pay green fees nothing was done to prevent them, it being recognised that the public had some right of wandering over the unenclosed parts of the forest. The terms of the licences and the facts are fully stated in the judgment of Harman L.J.

C. A.
1960
PEAK
v.
BURLEY GOLF CLUB.

The Lands Tribunal held, reversing the local valuation court, that both golf clubs were in rateable occupation of their respective golf courses.

The two clubs appealed. The question of law for the opinion of the court was whether the clubs were in rateable occupation of the respective courses, and whether they were rateable in respect of the licences granted to them by the Forestry Commissioners.

Ramsay Willis Q.C. and *Frank Whitworth* for the appellant clubs.

Maurice Lyell Q.C. and *Raymond Phillips* for the respondent valuation officers.

The following cases were mentioned in argument, which are not referred to in the judgments: *Mitcham Golf Course Trustees* v. *Ereaut* [1]; *Harper* v. *Charlesworth*.[2]

LORD EVERSHED M.R. I will ask Harman L.J. to deliver the first judgment.

HARMAN L.J. These are appeals by way of cases stated signed on June 15 and 19, 1959, from a decision of the Lands Tribunal dated October 31, 1958, by which it was decided that three golf clubs had rateable occupation of their several courses situated within the boundaries of the New Forest in the County of Southampton. That decision was pronounced at the instance of the land valuation officer on appeal from decisions of the local valuation court for Hampshire given on November 15, 1957. There were three appeals to the tribunal which heard all the cases together and decided each of them in favour of the Revenue. There are two appeals to this court. Some technical difficulty is caused by the fact that one appellant is a members' club, which cannot properly appear by its name, and the other is a limited company, which can.

The members' club is styled the Burley Golf Club and its appeal concerns the "golf course and club house at Burley, "Ringwood, Hampshire." The corporation is styled the Bramshaw Golf Club Ltd., and that appeal concerns "land used as a "golf course, Brook, Bramshaw, Hampshire.": the company's club house is not within the boundaries of the forest. The third body is styled the New Forest Golf Club, and its case concerned "land used as a golf course with a club house at Southampton "Road, Lyndhurst, Hampshire"; it has not appealed.

These appeals are not concerned with the club houses within the boundaries of the forest, they being admittedly in rateable occupation. The decision treated all these cases as turning on the same point. In the Burley case the local valuation court had confirmed an assessment of £30 which the tribunal increased to

[1] [1937] 3 All E.R. 450. [2] (1825) 4 B. & C. 574.

£45, while in the Bramshaw case the local court had deleted the assessment altogether, while the tribunal made an assessment of £50.

When the facts are looked into they are not altogether similar, the documents under which the two courses are occupied being in different terms. Moreover, the area occupied by the Burley Club is shown in outline on a plan, whereas the plan in the Bramshaw case gives no indication of metes and bounds.

The question in each case is whether the appellant is in rateable occupation of its course. The first question, therefore, is, what is the nature of rateable occupation? To answer this, the best guide drawn to our attention is to be found in *John Laing & Son Ltd.* v. *Assessment Committee for Kingswood Assessment Area.*[1] That was a case in which contractors at an aerodrome had put up buildings for the purposes of their contract work, garages, canteens and so on. The question was whether, in spite of the paramount occupation of the site by the Crown, the company was in rateable occupation of the structures so put up. Tucker L.J., giving judgment, laid down this test.[2] He says: "I do not think there is any controversy with regard to those "ingredients" (of rateable occupation): "First, there must be "actual occupation; secondly, it must be exclusive for the par-"ticular purposes of the possessor; thirdly, the possession must "be of some value or benefit to the possessor; and, fourthly, the "possession must not be for too transient a period." Of these four ingredients the second is the material consideration here; that is to say, whether the possession of the courses by the occupying golf clubs is exclusive for the particular purposes of the possessor. It is admitted that the occupation is of value because green fees are collected, also that it is not of so transient a nature as not to be rateable, because, although precarious, on a yearly licence, it has, in fact, continued for half a century.

As a pendant to that case, I should refer to *Westminster City Council* v. *Southern Railway Co.*[3] Lord Russell, in giving judgment, pointed out that it is no longer the law that a tenancy is an essential to rateable occupation. Occupation under a licence or easement may be enough. His Lordship said this: "In my "opinion, the crucial question must always be what in fact is the "occupation in respect of which someone is alleged to be rateable, "and it is immaterial whether the title to occupy is attributable "to a lease, a licence, or an easement."

The question for us is how do the appellants measure up to these criteria? Such facts as there are, and they are jejune enough, must be gathered from the cases stated, but before examining these it may be well to say a word about that romantic area styled the New Forest, well known to all of us from our youth up, if not from personal knowledge, then from Captain Marryatt's

[1] [1949] 1 K.B. 344; [1949] 1 All E.R. 224, C.A.
[2] [1949] 1 K.B. 344, 350.
[3] [1936] A.C. 511, 532, 533; 52 T.L.R. 541; [1936] 2 All E.R. 322.

C. A.
1960
Peak
v.
Burley Golf Club.
Harman L.J.

"The Children of the New Forest," or Maurice Hewlett's "The "Forest Lovers." The area of the forest extends, we are told, to over 80,000 acres in the County of Southampton, and it has been the subject of a number of statutes in comparatively recent times. We were referred to a local Act, the New Forest Act, 1877, which referred to parts of an Act of 1698, another Act of 1808, and another of 1851. In section 3 of the Act of 1877 the forest is defined as meaning for the purposes of the Act: "The unenclosed "lands whereof Her Majesty is seised in her domain as of fee, "subject to the rights of commoners therein or thereover, situate "within the boundaries of the New Forest in the County of "Southampton including all such lands as may at the commence-"ment of this Act be enclosed in pursuance of any commission" under former Acts. There is mention there of a register kept of commoners and their holdings in the forest. The latest Act seems to have been the New Forest Act, 1949, which is styled "An Act "to make further provision as respects the New Forest in the "County of Southampton," and deals first with the "verderers" of the forest who are the principal officers in charge of the area. They have various powers such as that of making by-laws under section 9. Under section 18, there is power in the Minister—by which is meant the Minister of Agriculture and Fisheries—to grant easements and licences for any period not exceeding 60 years on such terms as to payment and otherwise as may be specified in the licences. The licences in the present case do not seem to have been given under those powers, but under, I suppose, earlier powers vested in the Forestry Commissioners. We were also referred to the Forestry Act, 1927, and certain by-laws made under that Act which apply when made with the consent of the verderers to the New Forest. In the year 1945 the ownership of most of the Royal Forests was transferred to the Ministry of Agriculture, but it appears that the Minister has in many cases, including the New Forest, delegated the management of the forest to the Forestry Commissioners, and that is the governing body which appears in the cases before us. There are, as is well known, many commoners in the forest having rights of turbary, estovers, pasture, pannage, and so forth: but when one comes to the general public the position is less clear. Whether the general public, as such, has any legal rights is obscure. But it was agreed (and it is notorious) that the public has for many years been accustomed, whether under a dedication by the Crown or by sufferance, to wander at will and according to inclination over the unenclosed portions of the forest subject in recent times to the by-laws promulgated, as I have said, by the commissioners under the Act of 1927. These by-laws set out a long list of acts prohibited except under the written authority of the commissioners. They do not appear to me to be relevant to the appeal.

I turn now to the cases stated and first to the Bramshaw case. After a formal part, the case cites some facts to which I will revert in a moment, and annexed to it is the decision of the

tribunal. There are a number of statements in this which I find it a little difficult to reconcile with any evidence before us. It begins by saying this, so far as is relevant: "The local valuation "court accepted the contention of the respondents that the golf "courses themselves were not rateable because the respective "clubs are not in exclusive occupation of the land. Each of the "golf courses has been in existence for over 50 years. Each "course is held by the club under a licence granted by the "Forestry Commission. This licence is granted on the payment "of a certain sum per year. The licence states that it gives to "the club a licence to use the links for the purpose of playing golf "and for maintaining the links and generally to take charge of "the ground." That last is a very unfortunate statement, because it appears that it can only be based on a document dated in 1913, a licence long superseded in the case of this golf club. Having gone so far, the president says this: "It is admitted that "forest ponies wander over the courses, caravans are parked "there and people come and picnic there. It is, of course, a well-"known fact that many golf courses all over the country are on "common land and that the committees of these golf clubs cannot "prevent the public from exercising their right to enter such "land and to enjoy themselves on it." Where he got that from I do not know—presumably from his own knowledge, as there is no evidence on the subject. He goes on to say: "Those clubs "have not the exclusive possession of the golf courses in the sense "that many other golf clubs have which own the land on which "they play, but in my view this does not bar these golf clubs "from possessing a right over and above that possessed by the "public using the common."

I cannot find any evidence to support that finding either. "I ask myself the question what does this licence give to these "golf clubs? It gives them the right to lay out and maintain the "golf course." With all respect to the president, there is nothing about "laying out" in any licence here. He goes on: "That "involves the making of greens and tees and erecting on the land "the usual appurtenances of a golf course such as flags and "direction boards. It must be borne in mind that we are not "attempting to rate the game of golf, what it is sought to rate is "a golf course. It appears to me that each of these clubs has, by "virtue of its licence, an exclusive right to construct these golf "courses and to play golf on them. This, in my opinion, is "sufficient to give them rateable occupation." It may well be that, if there were such an exclusive right as the president mentions, that would be a conclusion of law which would be unassailable. It is a conclusion of law because, as he states, it is "by virtue of its licence." He is, therefore, construing the licence.

When one looks at "the licence" in the Bramshaw case there are two letters, one of March 20, 1913, which looks like the beginning of the Bramshaw Club. That is an answer by the

C. A.
1960
PEAK
v.
BURLEY GOLF CLUB.
Harman L.J.

secretary of the Office of Woods and Forests to an application made to him on behalf of the appellant club, or its predecessor in title, for the use of a golf course then already laid out, apparently by a private person. The application was "for permission to "play golf on the above links originally formed by the late Mr. de "Crespigny and for that purpose to maintain the greens and "generally to take charge of the ground." That is the source of the words "generally to take charge of the ground," quoted by the president. The letter then says that the Secretary of State, Mr. Runciman, "is willing to give a new permission during "the pleasure of this department," and then there are set out certain conditions, one of which is that if the permission be determined "the surface of the soil, if required, is to be restored "to its original condition." It was an annual permission which has gone on ever since subject apparently to renewed applications. The next document we have is apparently the current permission dated October 8, 1954, and signed by Mr. Foard for the deputy surveyor of the New Forest, and it states: "I refer to your "application for permission to maintain (1) a golf course" and a number of other chattels on the land of the golf courses at Bramshaw "as shown by red crosses on the enclosed tracing." Then he says: "I am instructed to grant you the required permission "on the following terms and conditions." There is to be a payment, and then it provides: "This permission constitutes a "revision of the existing permissions numbered 26." No. 26 is the one I last read. Then it goes on to state that there is to be no interference with the pasturage, that is to say, with the rights of the commoners. I need not read more except that there is a repeated stipulation that the ground shall be put right, if the permission be withdrawn. The plan annexed or attached shows somewhere more or less in its middle the "golf course at Brook "Common," and there is no other indication where the golf course is, except that, I suppose, it is somewhere within the four corners of the plan.

The case stated in the Burley case is in the same terms as the other, but the letter of licence, though written on October 9, 1954, only one day after the one I have last read, is in a different form. Why that should be so passes the wit of a lawyer to understand. Mr. Foard, writing to the club's honorary secretary, says this: "I refer to your application on behalf of the Burley Golf Club "for permission to maintain a golf course, a length of track, two "wicket entrances and a notice board at Burley, near Ringwood, "Hants., as shown by red colour and crosses and brown colour "on the enclosed tracing. . . . I am instructed to grant you the "required permission on the following terms and conditions." There is a condition as to payment, and then follows this: "The "Forestry Commission will not be responsible for any repairs to "any of the subjects of the permission and this permission does "not afford exclusive right of user over the area comprising the "golf course." It is said to be revocable and personal to the

grantees. There is provision for reinstating the hedge or fence or wall and the surface of the soil if permission be withdrawn. The plan shows by lines the extent of the area covered by the licence.

There apparently the case stated ended, but the parties were not unnaturally not satisfied that all the facts relevant had been stated by the tribunal, and they asked for further facts to be stated. This was done in the same terms at the end of each case and runs as follows: "(a) The respondent golf club maintained "the course occupied by it, including the greens, fairways, "bunkers and tees in a fit state for play, and the course was "regularly used for the purpose of playing golf; (b) although "the respondent golf club demanded and accepted green fees of "people who played on the course, if people (as they did) came "and played on them and refused to pay green fees the club did "nothing about it; (c) the sums received by the respondent golf "club from the collection of green fees formed a substantial part "of their total income."

To my mind, the conclusion of the tribunal in each case is based simply on the construction placed on what is called the licence. This seems to me an ambiguous conclusion when there are, as I have explained, three different documents of licence, and the tribunal seems to have based itself on the 1913 one in the Bramshaw case which has been superseded. Each of the two documents of 1954 permits the maintenance of a golf course, that is to say, of an existing golf course and no more. In the Bramshaw case no area is defined on the plan. In the Burley case the plan does show a line of demarcation. The licence in the Burley case expressly states that it gives no exclusive right of user over the area. The Bramshaw licence is silent on this point but provides that the commoners' right of pasture be not interfered with. One adds the findings that the forest ponies wander over the course at will, that caravans are parked there and picnickers frequent the place. Finally, members of the public who do not pay green fees when asked are suffered to play, nevertheless, without let or hindrance. I cannot see any occupation which can be based on the second of the tests applied in the 1949 case, namely, that the occupation must be exclusive for the purpose for which the land is used by the licensee.

I hold that the tribunal was not justified in its statement at the end of the decision that each of the clubs has by virtue of its licence "an exclusive right to construct these golf courses and to "play golf on them." There is no exclusive right as is shown expressly in one case and impliedly in the other by the fact that the commoners as of right still have the right of pasture over the course and cannot be excluded. Moreover, I see nothing in either licence to justify the exclusion of the public.

In my judgment, it does not appear that either of these appellants has a rateable occupation of its golf course. There is the additional element in the Bramshaw case that I cannot find any rateable hereditament defined; I should have thought that before

C. A.
1960
Peak
v.
Burley Golf
Club.

levying a rate you must be able to say what the hereditament was on which you were to levy. That element is not present in the other case but, nonetheless, I think the two are in pari materia, and I would allow both these appeals.

Pearce L.J. I agree with the reasons which my Lord has given. It is not correct to say that each of these clubs has by virtue of its licence "an exclusive right to construct these golf "courses." Nor can it be properly said, in my view, that by the terms of their licence the clubs have an exclusive right to play golf on the courses. One of the licences expressly says that it does not afford an exclusive right of user over the area comprising the golf course. In practice, the clubs do not prevent unauthorised persons playing on the courses. Nor, I think, do their licences give them any right to do so, as long as the Crown allows the public free access to this part of the forest. I cannot agree with the suggestion that the Crown by granting the licence are impliedly forbidding the public to play golf on the course or giving to the licensees an implied authority to prevent the public from doing so. The by-laws do not prevent it. There is no finding that such user by the public is trivial. Moreover, in seeing how far the club's occupation is exclusive for its purposes, namely, keeping up the course and playing golf, one cannot disregard the members of the public who walk there and picnic there and park their caravans there. The club has no right to prevent them, and although their presence on the course is directed to a different end from the purposes of the members, it does, I think, constitute some interference with the club's occupation for its particular purposes.

I agree that the appeal should be allowed.

Lord Evershed M.R. I, too, am of the same opinion. An alternative suggestion made by Mr. Lyell was that we should refer the matter back to the tribunal for further findings of fact, but I do not think in this case it would be right so to do. The president of the tribunal founded his conclusion upon what appears to be the construction placed by him on the licences. For the reasons which my brother Harman has stated, I do not think that the licences as a matter of fair construction suffice to determine, certainly not to establish, the essential requirements of exclusive possession for the purposes of the golf courses. But, in addition, the parties, as my brother also explained, have requested the tribunal to state further facts, and those further facts are found in paragraph 4 in each of the cases. As I think, they clearly fall short of establishing as a fact the necessary quality of possession.

In those circumstances, I do not think it would be right in these cases to say that there should be, so to speak, a second hearing of the matter, with the possibility that then a more clear or precise conclusion of fact would be reached. As I think, the

Revenue, who were the appellants before the tribunal, did not establish the necessary premises for rateable occupation.

I agree that the appeals accordingly should be allowed.

C. A.
1960
PEAK v. BURLEY GOLF CLUB.

Appeals allowed with costs, here and below, the costs before the Lands Tribunal being fixed by the court at £25 in each case.

Solicitors: *Mawby, Barrie & Letts for Bell, Pope & Bridgwater, Southampton; Solicitor of Inland Revenue.*

B. A. B.

[COURT OF APPEAL.]

* CORN v. WEIR'S (GLASS) LTD. AND ANOTHER.

[1957 C. 230.]

C. A.
1960
March 22, 23; *April* 4.
Hodson, Willmer and Devlin L.JJ.

Building—Safety regulations—"Hand-rail" or "guard-rail"—Meaning of—Factories Act, 1937 (1 *Edw.* 8 & 1 *Geo.* 6, *c.* 67), *s.* 25 (2)—*Building (Safety, Health and Welfare) Regulations,* 1948 (*S.I.* 1948, *No.* 1145), *reg.* 27 (1), (2).

Causation—Breach of statutory duty—Onus of proof—Lack of hand-rail for stairs—Fall.

The Building (Safety, Health and Welfare) Regulations, 1948, provide by regulation 27: "(1) Stairs shall be provided throughout "their length with hand-rails or other efficient means to prevent the "fall of persons except for the time and to the extent necessary for "the access of persons or the movement of materials. If necessary "to prevent danger to any person the hand-rails shall be continued "beyond the ends of the stairs. (2) All gangways, runs and stairs "from which a person is liable to fall a distance of more than "6 feet 6 inches shall be provided with—(*a*) suitable guard-rails of "adequate strength to a height of at least 3 feet above the gangway, "run or stair. . . ."

The plaintiff was a glazier in the employment of the defendants, who were carrying out work in an uncompleted building. The plaintiff, while carrying a sheet of glass down a stairway 5 feet 6 inches wide unprovided with any kind of rail, fell from a height of between two and three feet and sustained injury:—

Held, (1) that regulation 27 (1) applied, as it was applicable to uncompleted stairs, and (on the facts) there was no necessity for the absence of a hand-rail.

(2) That, in construing the regulation, "hand-rail" in paragraph (1) must be something different from "guard-rail" in paragraph (2); the latter paragraph did not apply, as the plaintiff fell from too low a height, and the former paragraph did not require the provision of anything so substantial as to prevent a fall from the outer side of the stairs; accordingly, the plaintiff had not established that his fall was caused by any breach of the regulation.

APPEAL from Mr. Commissioner Marshall Q.C.

The plaintiff, Archibald Corn, was a glazier in the employment

C. A.
1960
Corn
v.
Weir's
(Glass) Ltd.

of the defendants, Weir's (Glass) Ltd., who were engaged on a contract in a building which was being erected. He was descending the stairs, carrying a sheet of plate glass measuring 5 feet by 2 feet 6 inches, which he was holding with both hands. The stairs were 5 feet 6 inches in width, and were disposed in two flights, with a half-landing between. There was no rail of any sort fitted on either side of the stairs. The upper flight hugged the wall on one side, while the other side was open to the hall below. The lower flight consisted of seven stairs, set at an angle to the wall, so that it was open on both sides, no rail of any sort being fitted. The plaintiff, after stumbling on the top flight, reached the half-landing in safety, but, while he was descending the lower flight, a gust of wind blowing through a window just above him caught the glass which he was carrying and upset his balance. He was close to the open side of the stairs and fell over from the fourth or fifth step up from the hall, a distance of between 2 and 3 feet, and sustained injury.

In an action for damages the commissioner held that the defendants had not been guilty of negligence or breach of statutory duty, and that the plaintiff would have been guilty of contributory negligence to the extent of two-thirds. [The defendants cited the head contractors, Bates Ltd., as a third party, on issues which are not material to this report.]

Stephen Brown for the plaintiff.
E. Brian Gibbens for the defendants.
E. W. Eveleigh for the third party.

Case cited in argument: *Attorney-General* v. *Walker.*[1]

Cur. adv. vult.

April 12. The following judgments were read:

Hodson L.J. I have had the advantage of reading a copy of the judgment which Willmer L.J. has prepared and I will ask him to deliver his judgment, with which I agree.

Willmer L.J. The plaintiff, a glazier by trade, brought this action against the defendants, his employers, claiming damages for personal injuries alleged to have been sustained in consequence of their negligence or breach of statutory duty. The commissioner found that the defendants were guilty of no negligence or breach of statutory duty, but that the plaintiff was himself, in the words of the commissioner, "the main architect "of his misfortune." He accordingly dismissed the action, but at the request of the parties he assessed the plaintiff's damages, at £435. He further intimated that, if he had found any breach of statutory duty on the part of the defendants, he would have

[1] (1849) 3 Ex. 242.

held the plaintiff guilty of contributory negligence to the extent of two-thirds. By the terms of the notice of appeal the plaintiff appealed against all these findings. But the argument before us has been confined to two submissions, namely (1) that the defendants ought to have been found guilty of breach of statutory duty, and (2) that the plaintiff was wrongly found guilty of contributory negligence. The defendants entered a cross-notice, by which they submitted, inter alia, that the plaintiff's injuries, loss and damage were not caused by the breach of statutory duty alleged. [His Lordship stated the facts and continued:]

The plaintiff's case is founded on an alleged breach by the defendants of regulation 27 (1) of the Building (Safety, Health and Welfare) Regulations, 1948, which provides as follows: "(1) Stairs shall be provided throughout their length with "hand-rails or other efficient means to prevent the fall of persons "except for the time and to the extent necessary for the access "of persons or the movement of materials. If necessary to "prevent danger to any person the hand-rails shall be continued "beyond the ends of the stairs."

It will be convenient also to refer to part of paragraph (2) of this regulation, not because any breach of its provisions is alleged, but because its terms were much relied on by the defendants as throwing light on the construction of paragraph (1). The material words are: "(2) All gangways, runs and stairs from "which a person is liable to fall a distance of more than 6 feet "6 inches shall be provided with—(*a*) suitable guard-rails of "adequate strength to a height of at least 3 feet above the "gangway, run or stair."

The plaintiff's case is that his fall was due to the defendants' failure to provide any hand-rail as required by regulation 27 (1). It has been contended that the type of rail contemplated by this regulation would be a rail on the open side. Had such a rail been provided, the plaintiff, it is alleged, would have been protected from falling over the open side of the stairs, and consequently the accident would not have occurred.

The commissioner found that there had been no breach of regulation 27 (1), for two reasons. First, he held that the regulation only applied to completed stairs, and these stairs had not been completed. Secondly, he considered that the absence of a rail was justified, as being necessary for the movement of materials.

I find myself unable to agree that either of these is a good reason for holding regulation 27 (1) to be inapplicable. As to the first, the defendants have not sought to support the commissioner's judgment on this point. There is nothing in the terms of the regulation to restrict its application to completed stairs. On the contrary, it could well be said that when stairs are incomplete there is all the more reason for applying the regulation and insisting on the provision of a hand-rail.

C. A.
1960
CORN
v.
WEIR'S
(GLASS) LTD.
Willmer L.J.

With regard to the second reason, the commissioner relied on evidence that was given to the effect that certain heavy equipment, such as book-cases and cupboards, had still to be taken up the stairs to the upper floors. He considered that the words of the exception in the regulation should be construed broadly, and that the evidence justified him in concluding that the non-provision of a hand-rail was necessary in a broad sense. If the commissioner meant that "necessary" was to be construed as in effect equivalent to convenient, I should certainly be unable to agree with him. But if he meant no more than that necessity does not have to be the subject of absolute mathematical proof, I should not be disposed to quarrel with his view. It seems to me that the defendants could bring themselves within the exception in the regulation by showing that the absence of a hand-rail was reasonably necessary as a practical matter. But in my judgment the evidence fell far short of proving any such thing. The stairs in question were broad, and had only a slight turn at the half-landing. Even if fitted with rails on both sides I cannot see that there would be any practical difficulty for skilled men in carrying upstairs articles of equipment such as were described.

In my judgment, therefore, there is no room for doubt that regulation 27 (1) applied. If so, it was clearly not complied with. The defendants indeed have not sought to deny that, unless excused on the ground of necessity, they were in breach of this regulation. The main contention on their behalf has been that their breach of regulation 27 (1) was not the cause of the plaintiff's fall. The validity of this contention depends upon the true construction of regulation 27 (1). It has to be determined what, upon the true construction of the regulation, the defendants were required to do. The question then arises whether, if this had been done, it can be shown that the plaintiff's accident would have been avoided.

I think it is clear, from the fact that different words are used, that a distinction is to be drawn between a "hand-rail," as prescribed by regulation 27 (1), and "guard-rails," which are the subject of regulation 27 (2). There can be no doubt that down to a height of 6 feet 6 inches above the floor of the hall guard-rails ought to have been provided on the open side of the stairs in accordance with regulation 27 (2). I think that in this context guard-rails must be construed as rails of such a character as will provide a physical barrier against the possibility of falling over the side. That this must be so is, I think, borne out by the provision that such guard-rails must be of "adequate "strength." Moreover, it seems to me clear from its wording that regulation 27 (2) contemplates the provision of a plurality of guard-rails. This, I think, is clear enough from the wording of sub-paragraph (*a*), but it is placed beyond doubt by the reference to "the lowest guard-rail" in sub-paragraph (*b*). All this goes to emphasise what I have already said, namely that

the guard-rails contemplated by regulation 27 (2) must be intended as a physical barrier. Admittedly no guard-rails were provided on these stairs, and their absence no doubt constituted a breach of regulation 27 (2). It is not, however, suggested that this had any causal connection with the plaintiff's fall. Since the height above the floor level was less than 6 feet 6 inches, there was no requirement that guard-rails be fitted to any part of the lower flight, where the plaintiff was when he fell.

The plaintiff's case is that regulation 27 (1) may be called in aid to fill in, as it were, the gap left by regulation 27 (2). Undoubtedly a hand-rail ought to have been provided for the whole length of the stairs, including the lower flight, and it is suggested that such a hand-rail ought to have been fitted on the open side, so as to serve in lieu of a guard-rail and provide a physical barrier to prevent a person falling over the side. But, as I have already said, a hand-rail must in my judgment be construed as something different from a guard-rail. A hand-rail —which is not required by regulation 27 (1) to be of any particular strength—connotes to my mind a rail that can be gripped by the hand. Such a rail need not necessarily act as a physical barrier; it need only be such a rail as will enable any person, by gripping it, to steady himself against falling. There is no requirement that the hand-rail prescribed shall be fixed on the open side of the stairs. I see no answer to the argument that, if a hand-rail was intended to serve the same purpose as a guard-rail, there would have been no need to apply regulation 27 (2) to stairs at all. It seems to me that regulation 27 (1) would be fully satisfied by the provision of a hand-rail fixed on the wall side, or even, as was suggested in argument, in the case of broad stairs by a hand-rail fixed in the middle, such as is commonly found on the stairways of Underground Railway Stations in London. If this is the correct view, I can see no answer to the defendants' contention that the mere provision of a hand-rail, as required by regulation 27 (1), would have made no difference whatsoever to the plaintiff in the present case. I say this for two reasons. First, the regulation would have been complied with even though no hand-rail, certainly no hand-rail of adequate strength to serve as a physical barrier, had been fitted on the open side of the stairs. Secondly, as previously pointed out, the plaintiff did not in any event have a free hand with which to grip any hand-rail that might have been provided.

In the course of the argument before us reference was made to section 25 (2) of the Factories Act, 1937, the statute under which the regulations here in question were made. This sub-section, which of course applies to staircases in completed buildings in use as factories, rather than to staircases in use for the purpose of building operations, is in the following terms: "(2) For every staircase in a building or affording a means of "exit from a building, a substantial hand-rail shall be provided "and maintained, which, if the staircase has an open side shall

C. A.
1960
Corn
v.
Weir's
(Glass) Ltd.
Willmer L.J.

"be on that side, and, in the case of a staircase having two open "sides, or in the case of a staircase which, owing to the nature "of the construction thereof or the condition of the surface "of the steps or other special circumstances, is specially liable "to cause accidents, such a hand-rail shall be provided and "maintained on both sides. Any open side of a staircase shall "also be guarded by the provision and maintenance of a lower "rail or other effective means." Both sides relied on the terms of this subsection as tending to support their respective contentions. For the plaintiff it was argued that the word "hand-rail" in this subsection is clearly used as meaning something equivalent to a guard-rail—hence the specific provision that it must be fitted on the open side of the stairs. On the other hand, the defendants contended (1) that the requirement that the hand-rail shall be "substantial" is enough to differentiate what is required under the subsection from the kind of hand-rail required by regulation 27 (1); (2) that the requirement that a hand-rail fitted in pursuance of the subsection shall be fitted on the open side shows that, but for this provision, a hand-rail could be fitted on either side, or indeed in any position; and (3) that the subsection is specifically directed, as regulation 27 (1) is not, to the danger of a person falling over the side of the stairs.

The argument that the word "hand-rail" should be given the same meaning both in section 25 (2) of the Act, and in regulation 27 (1) is certainly attractive. But after consideration I do not think it is possible to draw any conclusion from it beyond this. A hand-rail may in certain circumstances be required to fulfil the same function as a guard-rail—that is to say, in some cases a hand-rail may be required to be fitted in such a way that it serves also as a guard-rail. Equally, as it seems to me, a guard-rail may in certain circumstances serve also as a hand-rail. Thus, it is doubtless permissible, where guard-rails are required to be fitted, as for instance under regulation 27 (2), to allow the top guard-rail on the open side to serve as a hand-rail, without the necessity of fitting a separate hand-rail to comply with regulation 27 (1). But to say this, is far from equating a hand-rail with a guard-rail, or vice versa. The two expressions are both used in the course of the same regulation, and each must, therefore, in my judgment, be assigned its own meaning.

The plaintiff further relied on the additional words in regulation 27 (1)—"or other efficient means to prevent the fall "of persons." It was argued that at least the presence of these additional words imported a duty on the defendants to fit something which would prevent a fall such as that of the plaintiff. But to my mind these words must be construed in their context as meaning something ejusdem generis with hand-rails. In my judgment they mean neither more nor less than some form of alternative device that will serve in lieu of a hand-rail, that is to say something that will serve to prevent a fall in the same way

and to the like extent as a hand-rail would. I do not think, therefore, that the presence of these additional words advances the argument for the plaintiff any further.

What then is the result in the present case? It is clear that regulation 27 (2) has no application here, since in the position from which the plaintiff fell there was no possibility of falling more than 6 feet 6 inches. Unless, therefore, regulation 27 (1) is to be construed as requiring the defendants to fit something equivalent to a guard-rail on the open side of the stairs, in a position where there was no possibility of a fall of more than 6 feet 6 inches, I do not see how the plaintiff can establish that the mere absence of a hand-rail caused his fall. For my part, I do not think that any such construction is permissible. For these reasons, though they are different from those which the commissioner himself gave, I do not feel able to say that he came to a wrong conclusion. On the contrary, the argument on behalf of the defendants satisfies me that the breach of duty, of which they were admittedly guilty in failing to fit a hand-rail, was in no sense a cause of the plaintiff's injuries.

This conclusion renders it strictly unnecessary to deal with the issue of contributory negligence. [His Lordship dealt with this issue and upheld the conclusions of the commissioner.]

It follows, therefore, that although I do not agree with all his reasons, I find myself unable to say that the commissioner came to a wrong conclusion, and I would, accordingly, dismiss the appeal.

DEVLIN L.J. The decision in this appeal must turn almost entirely on the true construction of regulation 27 of the Building Regulations, 1948.

I agree completely with the interpretation which Willmer L.J. has put on the word "stairs" and the word "necessary," and there is nothing that I can add on those points. I agree also that the evidence about the articles of equipment that had to be carried upstairs was insufficient to show that the removal of the hand-rail would have been necessary. I do not therefore need to consider or determine whether the carrying of equipment, such as book-cases and cupboards, comes within the phrase "move-"ment of materials" in the regulations; I reserve my judgment on that point.

I have hesitated a great deal about the meaning of "hand-"rail" in the regulation. It is said that this point was taken before the commissioner, but it can hardly have been pressed on him; he does not deal with it in his judgment and so we have not the benefit of his view on it.

It is clear that in some parts of the Factories Acts and the regulations made thereunder a hand-rail is thought of as something that can be used to guard against a fall. Willmer L.J. has quoted section 25 (2) of the Act of 1937. There is another

C. A.
1960
CORN
v.
WEIR'S
(GLASS) LTD.
Devlin L.J.

example to be found in regulation 2 of the Shipbuilding Regulations, which provides that gangways should be "securely protected "on each side . . . by strongly constructed upper and lower hand-"rails." The word "prevented," which is used in regulation 27 (1) in conjunction with "hand-rail," is to my mind more suited to a guard whose function is to obstruct a fall than to a hand-rail whose function is to make a fall less likely. On the other hand, the change of language from "hand-rail" in subsection (1) of regulation 27 to "guard-rail" in subsection (2) raises a very strong presumption that "hand-rail" has a different meaning from "guard-rail," at least when used in this regulation.

I have had the opportunity of reading the judgment of Willmer L.J. in advance and of studying it, and I am respectfully satisfied that he has found the right solution. A hand-rail is in itself merely something that provides a continuous handhold; but it can also, if suitably constructed and positioned, be made to serve as a guard. When it is so required, as in section 25 (2) of the Act and regulation 2 of the Shipbuilding Regulations, one may expect to find some provision made about its strength and about the placing of it. In regulation 27 (1) no provision is made in respect of these matters; and the fact that such provision is made in regulation 27 (2) in respect of guard-rails shows that the hand-rail in regulation 27 (1) is intended to serve merely as a handhold. This means, I think, that the word "prevent" must be construed in the way in which Willmer L.J. has construed it.

Accordingly, I agree that the plaintiff has failed to show that his injury was a consequence of the breach of regulation 27 (1). But I do not accept to the full the argument that has been addressed to us on this point. The rule of law on causation was, after some divergence of opinion about the burden of proof, declared in the House of Lords in *Bonnington Castings* v. *Wardlaw* [1] and applied by this court in *Clarke* v. *E. R. Wright*.[2] It is that the plaintiff must show that on balance of probabilities the breach of duty caused or materially contributed to his injury.

But this does not, in my judgment, leave it open to the defendant when the nature of the accident is known, to think out as many ways as he can in which the regulation could conceivably be complied with and then demand that the court tests the question of causation by reference to the way which is of least use to the plaintiff in the circumstances of his accident. The rule requires the plaintiff to show that, if before the accident the regulation had been complied with, his injury probably would not have occurred; and this test of probability means, I think, that the court should consider independently of the accident how the employer would probably have complied with the regulation if he had done as he ought. If there are two or more ways in which he might have done so and one would, on the facts of the accident,

[1] [1956] A.C. 613; [1956] 2 W.L.R. 707; [1956] 1 All E.R. 615.

[2] [1957] 1 W.L.R. 1191; [1957] 3 All E.R. 486, C.A.

have protected the plaintiff and the others not, and no one can say that any one way is more likely to have been chosen than the others, then the plaintiff as a matter of probability fails. But in my judgment the defendant cannot rely on a method that he is unlikely to have used simply because it is within the letter of the regulation.

One method of compliance proposed to us was the erection of a hand-rail down the middle of the stairs, as is done on broad stairways in stations and other public places, primarily, I should imagine, so as to separate the up-stream and the down-stream of passengers. I should dismiss that entirely from consideration. It seems to me to be most unlikely that the persons responsible for safety in this case would have thought of dividing in that way a stairway 5½ feet wide. I should go further and should say on balance of probability that if the defendants or persons responsible for safety had erected a hand-rail they would be more likely to put it on the open side than against the wall. It would certainly be more useful on the open side and I doubt if the cost would be substantially greater. I should expect a prudent employer to have regard to such considerations and, when he has got to carry out a regulation, to do the work in the way that, in the particular situation he is dealing with, gives the greatest protection and benefit to his workmen.

Where the plaintiff in this case fails, I think, is in showing that a hand-rail or other equivalent support erected on the open side would probably have protected him from injury. It might have withstood him if he had fallen against it, but I think that that must be conjectural.

For these reasons I agree that this appeal should be dismissed.

Appeal dismissed with costs.

Solicitors: *T. D. Jones & Co. for Riley, Sutcliffe & Co., Blackburn; Simmonds, Church Rackham & Co. for P. J. McKnight & Ryder, Hanley, Stoke-on-Trent; Peacock & Goddard for R. W. Beswick, Hanley, Stoke-on-Trent.*

F. R. D.

[QUEEN'S BENCH DIVISION.]

* REGINA *v.* LIVERPOOL JUSTICES. *Ex parte* ROBERTS.

1960
May 10.

Lord Parker C.J., Ashworth and Salmon JJ.

Crown Practice — Certiorari — Costs — Successful application to quash conviction—Application not resisted by prosecutor—No appearance by prosecutor—Whether costs may be awarded against non-appearing party.

Costs — Justices — Crown practice — Liability of justices for costs — Certiorari—General practice.

It is not the general practice of the court to make an order for costs against a party who has not appeared to resist a successful

1960

Regina
v.
Liverpool
Justices.
Ex parte
Roberts.

application for an order of certiorari when that party has not materially contributed to the error giving rise to the application.

Application for costs.

The applicant, Kenneth Thomas Roberts, applied for an order of certiorari to bring up and quash an order, dated May 20, 1959, made by Liverpool justices sitting at Dale Street, whereby they imposed on him a fine of £2 and ordered that his driving licence be indorsed. The ground of the application was that the justices' order was contrary to the principles of natural justice in that the applicant's solicitor was not given an opportunity of being heard by the justices before the conviction was announced. The court allowed the application and granted an order of certiorari.

Neither the justices nor the prosecutor appeared or were represented at the hearing of the application.

Raymond Stock, for the applicant, asked for costs against the prosecutor.

[Lord Parker C.J. If this had been a case stated you would be entitled to costs, but it was an application for certiorari; the prosecution were not at fault in any way and have not resisted the application.]

The applicant was not at fault in any way; he was entitled to have an injustice put right, and it has been held that certiorari is the proper remedy in these circumstances: *Rex* v. *Wandsworth Justices, Ex parte Read.*[1]

[Ashworth J. Is there any case in which costs have been awarded against a party who has taken no part in proceedings of this sort?]

The need for the proceedings arose out of the prosecution, although not out of anything done by the prosecution. It is more common now for the prosecution to be ordered to pay costs when they have not been attacked in any way. The applicant was in fact wrongly convicted; he could only get the matter put right by incurring costs, and it is not wrong that he should receive those costs out of public funds. It is submitted that there is no reason for making a distinction in the matter of costs between proceedings by way of certiorari and other proceedings whereby appeals may be brought before this court.

The court adjourned for a short time.

Lord Parker C.J. Mr. Stock, who has successfully applied for an order of certiorari, now asks for costs. So far as costs against the justices are concerned, it has been the practice not to grant costs against justices or tribunals merely because they have made a mistake in law, but only if they have acted improperly, that is to say, perversely or with some disregard for the elementary principles which every court ought to obey, and even

[1] [1942] 1 K.B. 281; 58 T.L.R. 88; [1942] 1 All E.R. 56, D.C.

then only if it was a flagrant instance. In the present case the court is satisfied that the denial of justice here was a pure mistake and was not a flagrant instance; indeed, Mr. Stock has not asked for costs against the justices. He asks for costs only against the prosecution. So far as that is concerned, it is the recollection of all the members of this court that the general practice is not to award costs against a party who does not appear to resist an application of this sort. That is not to say that there may not be cases where the court thinks it right to order a party to pay costs if, for instance, he had materially contributed to the error giving rise to the application. Accordingly, following that usual practice, the court in the present case refuses costs.

1960

REGINA v. LIVERPOOL JUSTICES. *Ex parte* ROBERTS.

Lord Parker C.J.

No order for costs.

Solicitors: *J. B. Izod for Arthur D. Dean & Co., Manchester.*

J. F. L.

[QUEEN'S BENCH DIVISION.]

*REGINA v. MINISTER OF HOUSING AND LOCAL GOVERNMENT. *Ex parte* CHICHESTER RURAL DISTRICT COUNCIL.

1960 *April* 28.

Lord Parker C.J., Gorman and Ashworth JJ.

Town and Country Planning — Purchase notice by owner — Minister's reasons for confirming notice—Whether fact that land of less use to owner than if developed proper test—Town and Country Planning Act, 1947 (10 *&* 11 *Geo.* 6, *c.* 51), *s.* 19 (1) (2).

An owner of land subject to coastal erosion and having the benefit only of temporary planning permissions for a number of bungalows and caravan sites, finding that he would have to spend large sums of money to protect his land, applied for planning permission to develop it permanently for residential purposes. His application was refused, and his subsequent appeal to the Minister of Housing and Local Government was dismissed. He thereupon served a purchase notice on the local authority pursuant to section 19 (1) of the Town and Country Planning Act, 1947.[1] The Minister

[1] Town and Country Planning Act, 1947, s. 19: "(1) Where permission to "develop any land is refused, whether "by the local planning authority or "by the Minister, on an application "in that behalf made under this Part "of this Act, . . . then if any owner "of the land claims—(*a*) that the land "has become incapable of reasonably "beneficial use in its existing state; ". . . he may, . . . serve on the "council of the county borough or "county district in which the land is "situated a notice (hereinafter referred "to as a 'purchase notice') requiring "that council to purchase his interest "in the land in accordance with the "provisions of this section. (2) Where "a purchase notice is served on any "council under this section, that "council shall forthwith transmit a "copy of the notice to the Minister, "and . . . the Minister shall, if he "is satisfied that the conditions speci-"fied in paragraphs (*a*) to (*c*) of the "foregoing subsection are fulfilled, "confirm the notice. . . ."

1960

REGINA
v.
MINISTER OF HOUSING AND LOCAL GOVERNMENT.
Ex parte
CHICHESTER R.D.C.

purported to confirm the notice on the grounds that "the land in "its existing state and with the benefit of the temporary planning "permissions that have been granted is of substantially less use "and value to its owner than it would be if planning permission "had been granted (without limitation as to time) for the rebuild-"ing of the buildings which stood on the land on the appointed "day, or which formerly stood there and have been demolished "since January 7, 1937."

On an application by the local authority for an order of certiorari to quash the Minister's confirmation on the ground that the reasons given in his decision letter did not come within the provisions of the relevant paragraph (*a*) of section 19 (1):—

Held that, in considering whether a purchase notice should be confirmed, the test was whether the land in its existing state had become incapable of reasonably beneficial use, and the fact that the land was less useful in its present state than if developed was not the correct test; accordingly, the Minister's decision should be quashed.

APPLICATION for order of certiorari.

The owner, G. E. J. Bunn, of a strip of land on the coast at Selsey, Sussex, some two and a half acres in extent and subject to severe coastal erosion, had spent some £1,000 on coastal defence, and would, so he claimed, have to spend a further £8,500 if he was to preserve his land effectively. There were 14 bungalows and 17 caravan sites on the land, but these were the subject of temporary planning permissions only. Together they produced a gross revenue of some £930 a year.

In 1958, the owner applied to the Chichester Rural District Council for permission to develop the land permanently for residential purposes, this being in his view the only circumstances in which he could afford to incur the necessary expenditure to preserve his land; this application was refused. He appealed to the Minister of Housing and Local Government against that refusal, and his appeal was dismissed. On October 23, 1958, he served a purchase notice on the local authority and on April 1, 1959, there was a hearing before an inspector appointed by the Minister, and on April 6 the inspector reported to the Minister. On April 20 the Minister issued his decision whereby he confirmed the purchase notice on the ground that "the land in its existing "state and with the benefit of the temporary planning permis-"sions that have been granted is of substantially less use and "value to its owner than it would be if planning permission "had been granted (without limitation as to time) for the "rebuilding of the buildings which stood on the land on the "appointed day or which formerly stood there and have been "demolished since January 7, 1937."

The local authority applied for an order of certiorari to quash the decision of the Minister.

R. E. Megarry Q.C. and *Jeremiah Harman* for the applicants.

J. R. Cumming-Bruce for the Minister of Housing and Local Government.

No cases were cited in argument.

LORD PARKER C.J. stated the facts, read section 19 of the Town and Country Planning Act, 1947, and continued: The Minister's letter setting out his decision reads: "The inspector's "report stated that in view of the legal complications involved "in the case, he did not consider that he was in a position to "make a comprehensive recommendation. He went on, "however, 'the existing use of the site is a mixture of holiday, "'caravan and residential use, some of which has only temporary "'planning permission. The planning application in respect of "'this site was for "redevelopment of building sites for resi-"'"dential purposes." Because of this my feeling is that the "'land in its existing state and with its existing permissions is "'substantially less useful to the server than it would be with "'permission for the permanent redevelopment for residential "'purposes'." Pausing there, I think it is quite clear that that of itself is not the test. I suppose that in every case where land is worth developing and permission to develop is refused, the existing use of the land will be of less beneficial use, it will be less useful to the owner, than if it were developed. The test is whether it has become incapable of reasonably beneficial use in its existing state.

It may be that the word "reasonably" invokes some comparison, but the fact that the land is less useful, to use a comprehensive term, in its present state than if developed is clearly not the test. The Minister continues: "The Minister "therefore accepts his inspector's view that the land in its "existing state and with the benefit of the temporary planning "permissions that have been granted is of substantially less "use and value to its owner than it would be if planning "permission had been granted (without limitation as to time) "for the rebuilding of the buildings which stood on the land on "the appointed day, or which formerly stood there and have "been demolished since January 7, 1937. He is accordingly "satisfied that the conditions specified in paragraphs (*a*) to (*c*) "of subsection (1) of section 19 of the Act are fulfilled."

In my judgment that passage discloses an error of law in this speaking order. It is not, as I have said, a question of whether the land is of less use or substantially less use in its present state than if developed, and it is a non-sequitur to say that because it is of substantially less use than if developed, therefore the conditions specified in the paragraph are fulfilled. I prefer to say nothing more about the case, because it may well be that there would have been other grounds for justifying the confirmation of this purchase notice, but I am satisfied that the ground, and the only ground, stated by the Minister, is not a valid ground at all and accordingly in my judgment this decision will have to be quashed.

1960

Regina v. Minister of Housing and Local Government. *Ex parte* Chichester R.D.C.

Gorman J. I agree and I desire to add nothing.

Ashworth J. I also agree.

Order of certiorari.

Solicitors: *Lees & Co.; Solicitor, Ministry of Housing and Local Government.*

J. D. P.

[COURT OF APPEAL.]

C. A.

1960 *April* 29; *May* 2.

Sellers, Willmer and Harman L.JJ.

* BOHNEL *v.* BOHNEL.

Husband and Wife—Cruelty—Intention to injure—Effeminacy of husband—Feminine proclivities concealed from wife—Chance discoveries by wife—Failure of husband to undergo treatment—Treatment unlikely to cure marital difficulties.

A wife petitioned for the dissolution of her marriage on the ground of her husband's alleged cruelty, in that he had constantly desired and shown his desire to dress and behave like a woman. The petition was undefended.

The husband had done his best to conceal his desires and practices from his wife and she had discovered them in 1955 only by an unforeseeable chance. After the discovery the wife had a nervous breakdown, but she recovered and returned to cohabitation with the husband, who continued to conceal his proclivities and practices from her. In 1958 the wife, again by a chance, discovered the husband dressed as a woman, and he told her later that he wished to be a woman and live with another man. He consented to see a psychiatrist, and did so, but did not undergo treatment. The treatment would not have remedied the lack of sexual desire which the husband manifested to his wife but would in fact have decreased it. The wife continued to live with him for a further period of eight months without suffering any further injury to her health. She then left the matrimonial home and petitioned for divorce. Her petition was dismissed and she appealed:—

Held, dismissing the appeal, that in view of the husband's efforts to conceal his tendencies and activities from his wife, it was impossible to impute to him or to infer from his conduct any intention to injure her, or to say that he had deliberately pursued a course of conduct after 1955 which he must have realised would be likely to cause her injury; and that as any possible treatment would not have effected a cure of the marital difficulties, his failure to undergo treatment was not unreasonable; accordingly, the wife had failed to establish the charge of cruelty.

Jamieson v. *Jamieson* [1952] A.C. 525, 550; [1952] 1 T.L.R. 833; [1952] 1 All E.R. 875, H.L. applied.

Williams v. *Williams*, The Times, March 15, 1958 distinguished.

Appeal from Judge Armstrong, sitting as special commissioner in divorce at Bournemouth.

The facts, as stated in the judgment of Willmer L.J., were as follows: A wife petitioned for the dissolution of her marriage

on the ground of her husband's alleged cruelty. The petition was undefended. The parties were married on April 10, 1943, the husband being then 33 years of age and the wife 29. At the time of the marriage the husband, who was of Czechoslovak origin, was serving in the forces, and continued to do so until the end of the war, after which the parties settled down and lived in this country. There were two children of the marriage, one of whom survived. The parties lived together first with the wife's parents and later in a caravan. There was then a period, from about 1949 to 1953, during which they were separated, the wife living with her parents and the husband remaining in the caravan, though he continued to visit the wife at intervals. They came together again in 1953 and lived together until the end of 1958, when the wife left the husband. Her petition was presented on January 20, 1959.

The wife's case, as set out in the particulars of the petition, was as follows: "The nature of the petitioner's case is that since "the year 1945 the respondent has constantly desired and shown "his desire to dress and behave like a woman. In 1945 the "respondent possessed a suitcase filled with women's clothes. "In 1948 he acquired a pair of women's shoes. In 1955 at the "matrimonial home the petitioner discovered the respondent "attempting to conceal women's clothes in and under a wardrobe. "On this occasion the respondent possessed unguents and powder "more usually possessed by women than men. In 1958 at the "matrimonial home the petitioner found the respondent dressed "like a woman and the respondent told the petitioner he wished "to live with another man. The respondent is repelled by sexual "intercourse."

The wife's story as given in evidence, so far as material, was as follows: From the beginning the relationship between the parties was cool, and sexual intercourse took place only at rare intervals, usually at the instigation of the wife. As early as 1945, when the parties were about to go away on a visit to Czechoslovakia, the wife, on opening the suitcase which the husband had packed, discovered that it contained women's clothes. The husband, when challenged about this, said that in his youth he had been in the habit of dressing up as a woman. For the time being the wife accepted this explanation, though she was left with a suspicion that there might be another woman involved. Nothing further was proved until 1955, when an incident of considerable consequence occurred. The parties had been away for a visit to the wife's parents, from which the husband returned to the matrimonial home before the wife. When the wife reached home she was unable to get into the place, the latch on the door having been dropped, and she had to wait until the husband opened the door and let her in. The husband was wearing a dressing gown over his jacket and trousers, but on following him upstairs the wife discovered that he had women's clothing in the bedroom and that there were cosmetics and face-cream, of a type

C. A.
1960
Bohnel
v.
Bohnel.

used by women, on the dressing table. The wife admitted that she had never seen the husband with his face actually made up, nor up to that time had she ever seen him actually wearing women's clothing. The wife challenged the husband about her discovery, and a discussion ensued, in the course of which he started crying and asked for her help. She suggested that he should see a doctor, and he agreed to do so. The discovery which the wife made caused her a very great shock, and shortly afterwards she had a complete nervous breakdown. She was received into Holloway Sanatorium, Virginia Water, as a voluntary patient and was under treatment there from June 13 to November 26, 1955. The husband did, in accordance with his promise, see a psychiatrist, but he never in fact underwent any treatment.

After her discharge from the sanatorium the wife returned to live with her husband, and the next thing that happened according to her evidence—though that was not pleaded in the petition—was that she discovered that he was again collecting women's clothing. She took no action about that, and nothing further happened till a date early in 1958, when the wife, who was working at the time, was given some time off on a Saturday afternoon, returned home unexpectedly and found the husband actually dressed in women's clothing. When challenged about this the husband said that she could have a separation or a divorce or anything she wanted. During a later discussion that same weekend he said that he wanted to be a woman, and in reply to a further question he admitted that he would like to live in a house with another man.

The wife said that she was very upset by this further discovery, but there was no evidence to show that on that occasion her health was adversely affected. She again attended the sanatorium, where she interviewed Dr. Irwin, but she did not require or receive any treatment herself. She appeared to have gone there primarily to discuss the possibility of her husband receiving treatment. The husband in fact went to see the doctor, and admitted his taste for dressing up in women's clothing; but although Dr. Irwin expressed the view that he could have been given certain treatment which might have controlled his impulses, the husband never in fact underwent any such treatment.

After that date the parties continued to live together, though more or less at arm's length. The wife said that the husband ignored her and the child. No further sexual intercourse took place, the last occasion having been, according to the wife, at Christmas, 1957. There were no further incidents, and eventually, in December, 1958, the wife left.

Evidence was given by Dr. Smedhurst, who attended the wife during her stay in the sanatorium in 1955, that at the time of her admission she was suffering from what was described as "agitated depression," requiring intensive treatment. She had to be accommodated at first in a protected room, and thereafter she received intensive electrical treatment. This was so far

successful that by October of that year she was able to give a lucid history of her married life. She was discharged during the following month, apparently cured, and there was no evidence of any further breakdown in her mental health after that date. The doctor's view of the cause of the wife's breakdown in 1955 was given in answer to questions put to her, when she was asked: "Are you prepared to say whether or not within your knowledge "what Mrs. Bohnel was suffering from when she came into "Holloway on that first occasion was consistent with a woman who "had had a shock perhaps of finding out about that sort of side "of her husband's life?" To this she answered, "Yes. At that "time in fact it seemed dramatically so from the patient's point "of view. She felt at that time that he was the obsessive factor, "and we were inclined to agree that she had been trying to conceal "from herself the full significance of her husband's perversion, of "which shortly before her admission she had discovered the full "extent and its consequences; she had reacted to this by being "unable to face up to it and in time she had become more and "more shattered until she could see no way out of her predica-"ment." The doctor also said in answer to a question from the commissioner: "I think that our patient was disgusted with this "sort of thing at the time, and I think it took a violent form, "because she felt that this was a perversion that would affect "the whole family."

Dr. Irwin, who saw the wife in 1958, said that in his view there was a possibility of a recurrence of what had happened to the wife in 1955, the circumstances being similar. But in fact no such recurrence took place and it was not necessary for the wife to receive any further treatment.

On the hearing of the wife's petition, the commissioner reserved his decision, and on August 18, 1959, delivered a considered judgment dismissing the wife's petition. The wife appealed.

Roger Ormrod Q.C., *T. G. Field Fisher* and *George Dobry* for the wife.

The husband did not appear and was not represented.

The following cases, in addition to those referred to in the judgments of the court, were cited in argument: *King* v. *King*[1] and *Lang* v. *Lang*.[2]

WILLMER L.J. giving the first judgment, stated the facts set out above and continued: Though undefended the case is not without difficulty, for the allegations made by the wife against the husband are of an unusual nature. The commissioner himself clearly found

[1] [1954] P. 55; [1953] 3 W.L.R. 767; [1953] 2 All E.R. 1029, C.A.

[2] [1955] A.C. 402; [1954] 3 W.L.R. 762; [1954] 3 All E.R. 571, P.C.

C. A.
1960
BOHNEL
v.
BOHNEL.
Willmer L.J.

the case one of some difficulty, for after hearing evidence at considerable length on two separate dates, he took time to consider his decision, and in due course delivered a considered judgment in which he dealt very fully with the issues raised. It is not, as I understand it, suggested that the mere fact of the husband having a tendency which impelled him to collect women's clothes, cosmetics, and so forth, was of itself sufficient to amount to cruelty. What has been contended, both here and before the commissioner, is that the cruelty lay in continuing the practice after the events of 1955, when its damaging effect on the wife's health was brought so forcibly to his attention. The husband, it is said, is in a dilemma from which there is no escape. Either he was able to control his tendency, in which case there could be no excuse for continuing a practice which he knew was extremely distressing to his wife, or else the tendency was one which he could not control without undergoing treatment, in which case his refusal to undergo the treatment that was offered to him in 1955 was inexcusable. In either event the result must be the same—namely, that the husband continued to pursue a course of conduct which he could have avoided. Reliance was placed on *Williams* v. *Williams*,[1] in which Collingwood J. found cruelty proved against a husband who persisted in the practice of dressing up as a woman, despite the distress which to his knowledge it caused to his wife.

The commissioner came to the conclusion that the wife's nervous breakdown in 1955 was largely contributed to by the shock she received when she discovered how her husband was behaving. This conclusion was well warranted by the evidence, and must in my judgment be accepted. He took the view, however, that the decisive feature of this case was the secretive nature of the husband's behaviour. So far from flaunting his feminist tendencies, he did his best throughout to conceal from his wife the way in which he was behaving. This alone, in the view of the commissioner, was enough to distinguish the present case from *Williams* v. *Williams*,[1] in which the gravamen of the charge against the husband was that he was constantly parading his tendencies, both in his conversation and in his behaviour, to the manifest distress of his wife. On this point again I find myself in agreement with the commissioner. Moreover, the fact of the husband making every effort to conceal what he was doing from his wife makes it impossible to impute to him any actual intention to injure her. In these circumstances, the commissioner rightly applied his mind to the question whether an intent to injure ought to be inferred, on the basis that the husband deliberately pursued a course of conduct which, as a reasonable man, he must have realised would be likely to cause injury. He came to the conclusion that no such intent ought to be inferred, his reasoning, as I understand the judgment, being

[1] The Times, March 15, 1958.

substantially as follows: If and so far as the husband was able to control his actions, he was indulging his tendencies in circumstances in which he could reasonably suppose they could never come to the knowledge of the wife. In so far as he was incapable of controlling his actions without treatment, his refusal to undergo the treatment that was offered was not in all the circumstances unreasonable; nor, in the view of the commissioner, would the treatment available to the husband have been effective to cure what he regarded as the real cause of the wife's distress.

With regard to this last point, the view of the commissioner appears to have been that the real cause of the wife's distress was not so much the discovery of the husband's abnormal tendencies and behaviour, but the fact that she had little sexual attraction for him, of which his abnormal tendencies were merely a symptom. The treatment which would have been available for the husband would not have had any effect by way of encouraging sexual desire on his part; on the contrary, it would have been actually repressive of the sexual drive. The commissioner accordingly concluded that it would not have been in any way effectual to remove what he regarded as the basic cause of the wife's distress. It is undoubtedly true that, on the evidence, sexual relations between the parties always were cool, and became cooler as time went on. But it is complained that the commissioner's view that this was the basic cause of the trouble finds scant support in the evidence. I am not satisfied that this criticism is justified, for it is not to be forgotten that the commissioner was not confined, as we are, to the written record of the evidence as it appears in the transcript, but had the advantage of seeing the wife herself, and the opportunity of forming his own conclusions as to her personality. But I do not think the matter is of any great relevance, and I am prepared to deal with the case on the basis that, as contended on her behalf, it was simply the discovery of the husband's habit of collecting and using female clothes, cosmetics, and so forth, that was the cause of the wife's distress.

As I have already indicated, I am satisfied that the evidence fell short of proving that the husband deliberately intended to hurt or cause injury to the wife. This is the only possible inference to draw from the fact that he was at such pains to conceal his abnormal activities from her. In these circumstances, I think the commissioner directed himself correctly in asking himself the question whether, in pursuing his abnormal course of conduct, the husband was doing something which, as a reasonable man, he ought to have foreseen was likely to cause injury to the wife. If so, there is good authority for saying that such conduct might amount to cruelty, so as to warrant the court in granting relief to the wife. But the question is one that it is rarely easy to answer, and, in the case of conduct such as is in question in this case, it is always a matter of difficulty to decide on which side of the line it falls. I do not think that the

C. A.
1960
Bohnel
v.
Bohnel.
Willmer L.J.

law, as it applies to a case of this class, can be better or more succinctly stated than it was by Lord Tucker in *Jamieson* v. *Jamieson*[2]: "Every such act must be judged in relation to its "attendant circumstances, and the physical or mental condition "or susceptibilities of the innocent spouse, the intention of the "offending spouse and the offender's knowledge of the actual "or probable effect of his conduct on the other's health (to "borrow from the language of Lord Keith) are all matters which "may be decisive in determining on which side of the line a "particular act or course of conduct lies."

Applying this test, it seems to me that, in order to found a charge of cruelty on the conduct of the husband in continuing to practise his abnormal tendency after 1955, it would have to be shown (*a*) that there was some real probability of the wife finding out about it, (*b*) that if she did find out it would probably cause her another serious shock, and (*c*) that such shock would be likely to cause further injury to her health, as it did in 1955. So long as the husband succeeded in concealing his continued practice of the abnormal tendency from the wife, it is clear that it could do her no hurt. As to this, the commissioner said: "He "practised it in circumstances which he, I think, could reason-"ably suppose could not come to the knowledge of his wife. "There is no case where he flaunted it or talked about it, that "he was emotional, or in any way sought to bring it into the "married life in any single form." I can find nothing to criticise in this statement. It was by the merest accident, and an accident not readily foreseeable, that the wife made her discovery in 1958, through returning home unexpectedly in the middle of the afternoon. It is, however, important to observe that on this occasion the discovery does not appear to have caused any great shock, nor did it have any adverse effect on the wife's health. Events proved, therefore, that there was in fact no such danger of injury to the wife. Moreover, it is, I think, highly relevant to remember that after the discovery the wife continued to reside with the husband, with no apparent untoward results, for another eight months, before she finally left in December, 1958. Were it proved that the previous conduct did in truth amount to cruelty, this circumstance would have been of no little materiality in considering the question of condonation. But it is also material, in my judgment, in considering the prior position, namely, whether the husband's conduct ever amounted to cruelty at all. It seems to me that the only fair inference to be drawn from the fact that the wife was prepared to continue living with the husband for another eight months is that she was not in fact unduly disturbed by her discovery that the husband was still continuing to practise his abnormal tendencies. If this be right, it makes it all the more difficult to draw the inference that the husband, by continuing his practices in secret, was pursuing a course of conduct which he

[2] [1952] A.C. 525, 550.

might reasonably have foreseen was likely to cause injury to the wife.

The case is, no doubt, near the border-line; but, giving the matter the best consideration that I can, I find myself unable to say that the commissioner came to a wrong conclusion in deciding that in all the circumstances cruelty had not been proved. I think it is impossible to interfere with his decision, and accordingly, the appeal must, in my judgment, be dismissed.

HARMAN L.J. I agree with all that Willmer L.J. has said, and with the reasons which he has adduced in the course of his judgment. This case is near the border-line and it has not been made easier for us by the fact that it was undefended and that the examination of the complainant wife was conducted by counsel almost entirely through the medium of leading questions. Further than that, he occasionally volunteered a certain amount of evidence on his own behalf, no doubt on instructions. When one adds that the shorthand note is obviously not the work of a practised hand, and that the transcript of the judgment was obviously inaccurate in a number of respects and has not been revised by the judge, the difficulties of this court become apparent.

The case depended in the end on two incidents in 1955 and 1958. There was also an incident in 1945 when the wife found a suitcase full of women's clothes, but that the husband passed off so successfully that the wife thought that there was another woman behind it and, therefore, was far from guessing the truth at that stage. In 1955 she made a discovery which was a very great shock to her, but it is to be remembered that on this occasion the husband had no reason to suppose his wife would turn up at the flat. The couple had been living with her parents and he alone had returned to the matrimonial home. She followed him and found the door locked and, after waiting a certain amount of time, he came down the stairs in his dressing gown and let her in. When she got upstairs on this occasion she found a lot of women's clothing which he had attempted to hide under the wardrobe. In fact, it is quite clear that he was practising this aberration at a time when he supposed, and I think not unreasonably supposed, that she would not find out anything about it. Be that as it may, she made the discovery, and one must accept that it was a very great shock to her, and one cause, no doubt, of her subsequent breakdown.

The whole case, therefore, depends on whether the incident of 1958 shows that he was continuing a course of conduct which he knew would be likely to be detrimental to her health, and did so in reckless disregard of her welfare. It is contended that he must have contemplated the ordinary consequences of his acts, and must, therefore, have been in fact willing to hurt her, although the evidence shows that he did not intend to do so. The incident of 1958 occurred because the employers for whom she was then working at her request allowed her to go home early on a certain

C. A.
1960
Bohnel
v.
Bohnel.
Harman L.J.

Saturday afternoon. She was anxious to see what it was that he was doing, and she found him wearing one of her dresses. Again this is at a time when she was supposed to be out at work and he gave way to the temptation which this aberration put on him when he had reasonable cause to suppose that she would not be at home, and, therefore, would know nothing about it. On the whole, I cannot question the commissioner's decision that he was not acting in a way so reckless of her welfare as to be guilty of cruelty.

The second ground alleged was that it was a cruel thing on his part to decline to undergo a certain course of treatment. But I cannot accept that view. The evidence was that, if he had undergone such a course of treatment, it would have done no good to the marital relations between these parties. Her real complaint was that he was cold to her and the shock to her was finding out the reason why he was so. If by suppressing his sexual desires the psychiatrist had been able to cure him, or to suppress all the evidence of this aberration, that, so far from making him less cold to her, would on the evidence have made him more so—at any rate, it would not make him other than he already was in that respect. Therefore, things being as they were, it does not seem to me to be unreasonable on the whole for him to say that he did not propose to have this treatment but to battle with this aberration himself as best he might. If we were to hold this conduct to be cruelty, we would, in my judgment, be going beyond any case which has been drawn to our attention or is now known to the court. The cruel acts were not brought, so to speak, into the matrimonial home, except by the action of the wife, unexpected by the husband, which he had no reason to anticipate. It seems to me that there is all the difference in the world between a tendency of this sort being flaunted before others or emphasised to the wife, and a case like this where the husband struggled, unhappily in vain, to conceal it and was discovered because the wife had curiosity about it and so found out. I cannot help feeling that cruelty here is not established and I would dismiss the appeal.

Sellers L.J. I have felt considerable sympathy with the wife. There was much in the husband's conduct to humiliate and distress her. The evidence adduced at the trial seems to me to have been not wholly satisfactory. I do not feel at all convinced that the case which the wife wished to put forward was fully advanced, but, for the reasons given by my Lords, as the case stands, I do not feel that I can say that the commissioner decided the case wrongly, and I would dismiss the appeal.

Appeal dismissed.

M. M. H.

Solicitors: *Pennington & Son.*

[COURT OF APPEAL.]

* HOPKINS v. MANNERS.

C. A.

1960
April 7, 8.

Pearce and Harman L.JJ.

[Plaint No. P. 2317.]

Costs—County court action—Payment into court with fixed costs accepted—Subsequent application for "further costs"—Costs incurred before issue of summons—Discretion of court—Refusal to allow amendment of incomplete bill—County Court (Amendment) Rules, 1957 (*S.I.* 1957, *No.* 174 (*L.*1), *amended by County Court (Amendment) Rules,* 1959 (*S.I.* 1959, *No.* 1251 (*L.*7)), *Ord.* 11, *r.* 1 (3) (*c*).

Paragraph (*c*) of Order 11, r. 1 (3) of the County Court Rules, 1957, which was added by the County Court (Amendment) Rules, 1959, provides that where under the previous paragraphs to that rule a plaintiff has elected to accept a lesser amount than the sum claimed by him, together with the costs which would be entered on a summons for that amount, and the defendant has been duly notified of the acceptance and the action stayed, "the defendant shall not be "liable for any further costs unless the court otherwise orders."

A plaintiff issued a summons in a county court claiming £200 damages for personal injuries sustained in a road accident. Before issuing the summons she incurred costs in obtaining a medical report and a report from the police of criminal proceedings brought against the defendant. The defendant admitted liability and within eight days of the issue of the summons he paid £60 into court. Fixed costs and fees amounting to £8 2s. had been endorsed on the summons by the officers of the court. The plaintiff accepted the offer but a few days after notice of acceptance had been sent to the defendant her solicitors applied to the registrar for leave to have their costs taxed as between party and party, and to be allowed costs in excess of those stated on the summons. They produced a schedule of expenditure and disbursements totalling £21 but at the hearing of the application they sought to add to the bill the cost of obtaining the reports. The registrar said that these items could be added if the bill was brought in for taxing, but he refused to order the payment of further costs. The county court judge, stating that he had to consider whether this was a case where costs before action were unavoidable, affirmed the registrar's decision. On appeal it was submitted that the cost of obtaining the reports, allegedly necessary in order to make certain that the plaintiff had a good case before issuing the summons, ought to have been considered, and that the judge had exercised his discretion wrongly in refusing to order payment of further costs:—

Held, that the onus was on the plaintiff to satisfy the court that justice demanded that further costs should be allowed, and she had failed to do that. The court's discretion to allow extra costs was to be applied narrowly. The judge had approached the problem rightly and the court would not interfere with the exercise of his discretion.

INTERLOCUTORY APPEAL from Judge Conolly Gage sitting at Southend County Court.

On September 18, 1959, the defendant, William Henry Manners, whilst driving a Ford van, collided with the plaintiff, Eileen Mary Hopkins, riding a pedal cycle. On December 16,

C. A.
1960
Hopkins
v.
Manners.

1959, she issued a summons claiming £200 damages for personal injuries. Fixed costs and fees totalling £8 2s. were endorsed on the summons. On January 6, 1960, the plaintiff's solicitors received notice of payment in of £60 with the appropriate fixed costs and an admission of liability. Within four days the plaintiff gave proper notice of acceptance and took out the sum. The plaintiff's solicitors took the view that their disbursements and costs exceeded the fixed costs stated on the summons and they determined to apply under Order 11, r. 1 (3) (*c*), in order to obtain further costs. Application was made to the registrar asking for leave to have their costs taxed as between party and party, and a list of expenditure and disbursements entitled a "bill of costs" was produced to the registrar showing a total of £21. In the Court of Appeal counsel for the plaintiff submitted that this was not a bill of costs but merely a list of the items in respect of which they intended to make application, but Pearce L.J. commented that, in his view, it was a "bill of costs" to which the plaintiff claimed to be entitled.

At the hearing of the application the plaintiff's solicitors sought to add to the list the cost of obtaining a medical report and a report from the police of criminal proceedings which had been brought against the defendant. The cost of obtaining these reports had been incurred before the summons was issued and the solicitors said that it had been omitted inadvertently from the list. The registrar said that if a bill was brought in for taxation these items could be added but he dismissed the application for an order for further costs. The plaintiff appealed to the judge but he dismissed the appeal.

The plaintiff appealed.

The relevant rules are set out in the judgment of Pearce L.J.

James Miskin for the plaintiff.

Barry Chedlow and *A. Gregory* for the defendant.

In addition to the case referred to in the judgment of Pearce L.J., the following were cited in argument: *Davis* v. *Dysart (Earl)* [1]; *Pêcheries Ostendaises (Soc. Anon.)* v. *Merchants Marine Insurance Co.* [2]

Pearce L.J. This is a plaintiff's appeal from a refusal of the judge of the Southend County Court to allow certain costs to the plaintiff under Order 11, r. 1 (3) (*c*). The relevant parts of rule 1 read: "(1) Where the only relief claimed in an action is "the payment of money, the defendant may, within eight days "of the service of the summons on him inclusive of the day of "service, pay into court in satisfaction of the claim—(*a*) the "whole amount of the claim and the costs stated on the sum-"mons; or (*b*) so much of the claim as he admits to be due from

[1] (1855) 21 Beav. 124.

[2] [1928] 1 K.B. 750; 44 T.L.R. 270, C.A.

"him to the plaintiff, together with the costs (including court "fees) which would be entered on a summons for that amount "under Part I of Appendix D." Rule 2 deals with the case where the whole amount of the claim is paid in. Rule 3 reads: "Where "a lesser amount is paid into court, together with the appropriate "costs under paragraph (1) (*b*) of this rule, and the plaintiff "elects to accept that amount in satisfaction of his claim— "(*a*) he shall within four days after receipt by him of notice of "payment into court deliver or send by pre-paid post to the "registrar and to every defendant a notice of acceptance; (*b*) on "receipt by the registrar of the notice of acceptance the action "shall be stayed; and (*c*) the defendant shall not be liable for "any further costs unless the court otherwise orders." The words "unless the court otherwise orders" were added by a recent amendment made in consequence of *Reid* v. *Bolton (Thomas) & Sons Ltd.*[1] There this court, in holding that the rule applied to unliquidated as well as to liquidated claims, pointed out that the rule as then framed caused hardship in cases where a plaintiff had had to incur unusual costs before the plaint was actually issued, and was prevented by the rule from recovering them on accepting a payment in made by the defendant in accordance with the rule. The amendment gives the court a discretion to make an order allowing further costs. [His Lordship stated the facts and continued:]

The county court judge considered *Reid* v. *Bolton (Thomas) & Sons Ltd.*[2] and certain words used in the judgment therein, and said: "It seems to me therefore that in order to decide whether "the registrar has exercised his discretion aright in this case I "must look to see whether it is a case where costs before action "could not be avoided, bearing in mind, of course, that the "solicitors will receive the sum of £4 from the defendant in "respect of such costs." He then considered the matter in more detail and dismissed the appeal.

It is plain that the wording of Order 11, r. 1 (3) (*c*), vests a discretion in the court. The plaintiff on this appeal seeks to show that the judge exercised that discretion wrongly and misdirected himself. He relies on two points. The first is this: the judge excluded from his consideration two items, namely, the cost of obtaining the medical report and the cost of obtaining the police report. With regard to those he said this: "Mr. "Lusty also tells me that he has incurred expense in respect of "a medical and police report. Neither of these items are in the "bill of costs which was before the registrar and is now before "me, and I do not see that I can accept as evidence something "said by an advocate in the course of his argument."

It is said that the judge erred and that he should have referred the matter back for investigation by the registrar, or should have

[1] [1958] 1 W.L.R. 266; [1958] 1 All E.R. 465, C.A.

[2] [1958] 1 W.L.R. 266.

C. A.
1960
Hopkins v. Manners.
Pearce L.J.

adjourned it for affidavit evidence from the solicitor as to those items. Mr. Miskin, for the plaintiff, argues that the application was being made to the judge under Order 13, r. 1 (*c*), which says: "No affidavit shall be necessary in the first instance, but the "judge or registrar may direct evidence to be adduced in such "manner as he thinks fit."

As to this first point, I see no good ground for interference by this court. Whether the application to the court was an interlocutory application under Order 13, r. 6, as the plaintiff contends, or was an appeal under Order 37, r. 5, from a final order made by the registrar, as the defendant contends, the onus was on the plaintiff to satisfy the judge that an order should be made. He failed to do so. The judge had a discretion, if he wished, to adjourn the matter for further evidence, and I have no doubt that he would have done so had he felt that justice required it. No doubt he viewed with a certain disfavour items which had been omitted from the bill and which the plaintiff afterwards sought to obtain. It may be that they did not get such favourable consideration as they would have had if they had been inserted in the bill in the first instance; but that is often the fate of omissions. I certainly do not accept the contention that the judge had a duty to send the case back for taxation. The rule does not, as it seems to me, envisage that procedure where cases have been settled by payment in. No doubt the judge has power to make such an order if it is appropriate, but even where further costs are allowed, I should surmise that that cumbrous method, with its necessary further expenses, would rarely commend itself to the judge.

The second point was this: it is said that the judge was plainly wrong in saying that the work dealt with under item 6 of the bill of costs was not necessary before the issue of the summons. That item reads as follows: "Part fee preparing "for trial including considering facts, evidence and law, prepara-"tion of notices of fact or argument, attending plaintiff taking "proof of evidence, attending magistrates' court taking notes of "evidence, correspondence with defendant's insurers, attending "their representative discussing case." Mr. Miskin argues that it is obvious on general grounds that the plaintiff's solicitor must have, and should have, incurred costs exceeding the amount endorsed on the summons: costs in investigating the case, in considering the law and in ascertaining that he had a good case before issuing the summons. But this argument would apply in every case, and an order for further costs would, if it is sound, be the normal order. The words of the rule, however, show a clear intention that an order for further costs should not be the normal order. In spite of Mr. Miskin's fair and forcible argument, he has not persuaded me that the court should interfere. In my view the judge was right in his approach to the problem and it was a matter for his discretion.

Unless there is some reason for ordering otherwise, the rule that the defendant shall not be liable for any further costs still

holds good. The recent amendment now allows the court to order otherwise, but on the wording of the rule it is for the plaintiff to satisfy the court that it should do so. The object of the rule was to promote a speedy settlement of just claims; it was designed to encourage defendants to make reasonable payments into court with the knowledge that thereby the costs would ordinarily be limited to the sum endorsed on the summons and to prevent their being deterred from so doing from fear that thereby they might be incurring an unliquidated liability for costs. The county court rules as to costs are designed on austere rather than luxurious lines. Just as party and party costs exclude things which, though not strictly necessary, may well be prudent and desirable expenditure as between solicitor and client, so this rule in the general interests of litigants keeps the costs down to a level which may in general be ungenerous to the plaintiff's solicitor. Where, in the opinion of the court, the circumstances are such that ungenerosity becomes injustice, it has discretion to make an order. But there are two sides to the question. It is hard that a plaintiff who has incurred costs should not receive them in full; but it is also hard that a defendant who has paid a sum into court with a general expectation of limiting his liability to the amount of costs endorsed on the summons should find it increased after the acceptance of his payment in. It is for the judge to find the solution in each case and to order otherwise in cases where he is satisfied that justice needs it.

I would dismiss the appeal.

HARMAN L.J. I agree. This seems to me clearly a matter for the discretion of the judge. Extra costs must be the exception and not the rule, as the form of the rule shows, and it is for the judge to decide whether justice demands that something more than the normal reward should be given. It was said in this case that the judge erred in the exercise of his discretion because he excluded the two items amounting to £3 5s. 0d. to which my Lord has referred. Even if he should not have excluded them, but should have taken them in, he was still in a position to say, as I see it, that there was nothing sufficient to convince him that the conventional £8 2s. 0d. was not the proper measure of the plaintiff's reward, and, as he had materials on which he could exercise that discretion in that sense, I do not think it is for us to interfere, still less to encourage the view that something which adds to the costs of proceedings and the uncertainty of litigation should be made not the exception but the rule.

Appeal dismissed with costs.
Leave to appeal refused.

Solicitors: *Drysdale, Lamb & Jackson; John Holt.*

E. D.

[COURT OF APPEAL.]

C. A.

1960
April 4, 5.

Lord Evershed M.R., Pearce and Harman L.JJ.

*HOLLOWAY AND ANOTHER *v.* DOVER CORPORATION.

Compulsory Purchase—Compensation—Expired lease—Notice to treat during term—No claim until lease expired—Validity—Whether any interest expropriated.

The claimants occupied premises, in which they carried on a bakery business, under a lease for 21 years expiring on October 11, 1954. In 1947 the local authority obtained a compulsory purchase order affecting the area in which the claimants' premises were situate, and by a special completion procedure incorporated in the order a notice to treat was deemed to have been served on all persons interested in property in the affected area. No further step was taken by the claimants or the local authority. In March, 1957, the claimants claimed compensation from the local authority who thereupon, in exercise of their statutory powers as acquiring authority, caused the freehold of the premises to be vested in themselves. In October, 1957, the local authority served on the claimants a notice to quit under the Landlord and Tenant Act, 1954, expiring October 11, 1958. Early in 1958 the claimants served on the local authority a notice requiring the grant of a new lease under the Act of 1954. That claim was settled by payment to the claimants of an agreed sum expressed to be paid without prejudice to any claim they might have under the Acquisition of Land (Assessment of Compensation) Act, 1919, for expropriation of their interest in the premises. In May, 1958, the claimants referred the question of the assessment of compensation arising out of the notice to treat to the Lands Tribunal:—

Held, that at the time when the reference was made to the Lands Tribunal no proprietary right of the claimants had been compulsorily acquired by the local authority and, therefore, there was no subject-matter for which compensation was payable; moreover, in 1957, when the claim was made, the only right which the claimants had was a right to continue in possession until they were served with a notice to quit; accordingly, the claim failed.

Reg. v. *Kennedy* [1893] 1 Q.B. 533, D.C. considered.

Appeal by case stated from the Lands Tribunal (Mr. J. P. C. Done) on a preliminary point of law.

On May 7, 1958, Carrie Elizabeth Holloway and Ernest George Harlow (hereinafter called the "claimants") gave notice of reference to the Lands Tribunal of the question of the compensation payable for the compulsory acquisition of the leasehold interest in premises known as Hopper's Bakery, 33, Woolcomber Street, and garage, Trevanion Street, Dover. In September, 1958, pursuant to an application by the Corporation of Dover, the acquiring authority, the president of the tribunal directed that the questions whether the reference was maintainable at law, and which of the heads of compensation claimed ought to be included, should be dealt with as a preliminary point of law. The following were the facts found by the tribunal relevant to this issue:

The property was acquired by the corporation pursuant to the Borough of Dover (Central Area No. 1) Compulsory Purchase

Order, 1947, as confirmed by the Minister of Town and Country Planning on February 8, 1949, with modifications not affecting the said property. The purpose of the acquisition was to permit the comprehensive redevelopment of an area of extensive war damage. The compulsory purchase order incorporated expedited completion procedure, and notice to treat pursuant to the compulsory purchase order was deemed to have been served on the claimants on February 11, 1949. The corporation executed a vesting declaration on April 30, 1957, vesting the freehold of the said property in the corporation with effect from May 16, 1957.

The claimants' interest was leasehold and arose as follows: A lease of the entirety of the property was granted by the then freeholders, G. W. Chitty & Co. Ltd., to George Victor Hopper on November 3, 1933, for a term of 21 years from October 11, 1933, at an annual rent of £40 subject to the covenants and conditions therein set out. The said lease was assigned by the lessee to Carrie Elizabeth Holloway (the first claimant) on January 21, 1937. On June 9, 1947, a partnership agreement was made between the said Carrie Elizabeth Holloway of the one part and Ernest George Harlow (the second claimant) of the other part, whereby it was agreed that the business of Hopper's Bakery carried on at 33, Woolcomber Street should belong to both parties in equal shares, and that they should share the profits and loss in the same proportion. The term of the said lease expired on October 11, 1954. Thereafter, the claimants continued in occupation paying the same rent of £40 per annum to the said freeholders, G. W. Chitty & Co. Ltd., but no rent had been paid to the corporation since their acquisition of the freehold.

A notice pursuant to the provisions of section 25 of the Landlord and Tenant Act, 1954, was served by the corporation on the claimants on October 26, 1957, terminating the tenancy on October 11, 1958. It was stated in the notice, that the corporation would oppose the grant of a new tenancy on the grounds that the whole premises were to be demolished. The claimant served a counter-notice by letter through their solicitors dated December 21, 1957, to the effect that the claimants would not be willing to give up possession of the premises on the date mentioned in the said notice served by the corporation. On January 20, 1958, at the request of the claimants and in order to avoid the necessity of a formal application to the county court, the corporation agreed to pay compensation under section 37 of the Landlord and Tenant Act, 1954, in a sum equal to twice the rateable value of the property as defined in subsection (5) of the said section. The beforementioned counter-notice and request was expressed by the claimants' solicitors to be without prejudice to any claim their clients might have to compensation under the Town and Country Planning Acts. [At the time when the matter came before the Court of Appeal this compensation had not yet been paid.]

Since 1944 there were negotiations with the corporation with

C. A.
1960
Holloway
v.
Dover
Corporation.

regard to the future of the business and the provision of alternative accommodation. The claimants did not object to the making in 1947 of the said compulsory purchase order, and by a letter dated May 28, 1947, addressed to the town clerk by G. W. Chitty & Co. Ltd., the freeholders, the wish was expressed for a suitable site, preferably in the same locality where shop, dwelling-house, bakery and garage accommodation could be provided. Attempts were made, without success, by both the freeholders and the corporation to find alternative accommodation for Messrs. Hopper, and on August 27, 1956, the town clerk wrote to G. W. Chitty & Co. Ltd. asking whether they were still wishful to pursue the suggestion to buy or lease for the erection of new premises. In reply G. W. Chitty & Co. Ltd. stated that neither they nor Messrs. Hopper could contemplate the purchase or leasing of land for the erection of new premises, on the ground that the present-day cost of erecting a new bakery of the size required for Messrs. Hopper's trade and of equipping it with new ovens and the necessary plant would be far too high for it to be made an economic proposition.

On November 28, 1956, a meeting took place at the town clerk's office at which representatives of the freeholders, the claimants and the corporation were present. The subject for discussion was the provision of alternative premises, but the freeholders stated they were not prepared to finance a rebuilding, and that their only interest was to obtain compensation for the premises to be purchased from them. Mr. Harlow of Messrs. Hopper asked the corporation to find him an alternative site not too far removed from his present business, he referred, however, to the difficulty of finance. He asked if the corporation would erect new premises and lease them to him. He was informed that the rent chargeable for new premises would have to be commensurate with cost and that, inevitably, such rent would far exceed the rent of his existing premises. On March 21, 1957, claims were made on behalf of both the freeholders and the claimants [for £440 "profit rental" and £2,345 "goodwill and loss on forced sale"].

On June 4, 1957, the district valuer, accompanied by another surveyor qualified in the valuation of plant and machinery, inspected the premises but nothing was said as to whose claim was being considered.

In May, 1957, the corporation applied to the Minister of Transport and Civil Aviation for a certificate under section 57 (1) of the Landlord and Tenant Act, 1954. This certificate was refused and the Minister in his letter of refusal addressed to the corporation wrote: "As you will realise, the Minister is not concerned in his "consideration of this application with the question whether, and "if so what, compensation is payable by your council to the "tenant. He has simply to consider whether it is appropriate "for him to grant the certificate for the purposes of enabling your "council to obtain early possession of the property in question.

"In this case it appears to him that the council already have "full powers under the Town and Country Planning Acts to "obtain speedy possession of the premises occupied by Mrs. C. E. "Holloway and that for this purpose a certificate under section 57 "is unnecessary. He is moreover advised that it would not be "proper to invoke section 57 procedure for the purposes of "restricting the tenant's compensation to that prescribed by "section 59 of the Landlord and Tenant Act, 1954. In all the "circumstances, therefore, the Minister has decided not to grant "the application.

"I am to add that the Minister wishes to acquire the properties "in question for incorporation in the trunk road and the district "valuer will be getting in touch with your council on the matter "in due course."

Following this letter, the corporation served the statutory notice to quit under section 25 of the Landlord and Tenant Act, 1954.

[After referring to the submissions made at the hearing, the tribunal decided as follows:] "(1) The 'proceedings' in this case "arise out of the submission on March 21, 1957, of a claim for "compensation arising out of a notice to treat deemed to have "been served on February 11, 1949 (the material date). (2) At "that time (March 21, 1957) the acquiring authority had not "acquired the freehold interest which was vested in them on "May 16, 1957. The relationship of landlord and tenant did not "exist between the parties until the latter date and notice to quit "was not served upon the claimants until October 26, 1957. "(3) That the circumstances referred to in (1) above are distinct "from those in *Reg.* v. *Kennedy*[1] in so far as: (a) in this case "action was taken by the claimants under the notice to treat in "that a form of claim was submitted before the tenancy was "determined; and (b) in *Reg.* v. *Kennedy*[2] according to the "judgment of Cave J. 'proceedings were not taken under the "'notice to treat, they were taken in pursuance of the company's "'having acquired and taken possession in July, 1892, under "'section 85.' (4) That compensation is to be assessed as at the "material date in accordance with the provisions of section 2 of "the Acquisition of Land (Assessment of Compensation) Act, "1919, as modified by the Town and Country Planning Acts, 1947 "to 1954. (5) That rule 1 of section 2 of the 1919 Act refers "only to any addition to the compensation assessed under rule 2 "specifically on account of the fact that acquisition is compulsory. "It would not operate in this case to limit compensation to that "arising out of the relationship of landlord and tenant which did "not exist between the parties until after the material date, "provided that it could be shown that neither the parties nor "anyone else could have foreseen that legislation would be passed

[1] [1893] 1 Q.B. 533, D.C. [2] Ibid. 537.

C. A.
1960
HOLLOWAY v. DOVER CORPORATION.

"limiting the compensation payable by a public authority on the "termination of a tenancy.

"I find then that compensation is to be assessed as at the "assumed date of the notice to treat in accordance with the pro-"visions of section 2 of the Acquisition of Land (Assessment of "Compensation) Act, 1919. . . ."

J. Ramsay Willis Q.C. and *E. A. Vaughan-Neil* for the corporation.

D. P. Kerrigan and *Michael Rich* for the claimants.

In addition to the cases referred to in the judgment of Lord Evershed M.R., the following were cited in argument: *Grice* v. *Dudley Corporation*[3]; *Syers* v. *Metropolitan Board of Works*[4]; *Horn* v. *Sunderland Corporation*[5]; *Cranwell* v. *Mayor of London*[6]; *Oppenheimer* v. *Minister of Transport*[7]; *Tyson* v. *Mayor of London*[8]; *Bwllfa and Merthyr Dare Steam Collieries (1891) Ltd.* v. *Pontypridd Waterworks Co.*[9]; *Reg.* v. *Stone.*[10]

LORD EVERSHED M.R. This is an appeal upon a preliminary question whether, in the circumstances, there can be any right to compensation at all on the part of the present claimants? The claimants are two persons, Mrs. Holloway and Mr. Harlow. It is not clear that Mr. Harlow ever had any direct proprietary interest, but he is a partner with Mrs. Holloway in the business of a bakery carried on on the premises in question, 33, Woolcomber Street and Trevanion Street, Dover. [His Lordship stated the facts and continued:]

It has been clearly conceded that a notice to treat is deemed to have been served on Hopper's bakery on February 11, 1949, at which date the lease still had five and a half years or more unexpired. Therefore, it clearly was an interest in land which was capable of being acquired compulsorily by an acquiring authority. In fact, however, no further step was taken by the claimants on the one side or the corporation on the other. I gather that the negotiations continued, but that is all. So you reach October 11, 1954, when the lease, according to its terms, expired. Apart from certain statutory rights, it would then, of course, have followed that the claimants ceased to have any interest whatever in the property. There would have been nothing which anybody could have acquired, compulsorily or otherwise. [His Lordship referred to the statutory protection given to lessees who carry on businesses by the Landlord and Tenant Act, 1954, to the claims made on the corporation under

[3] [1958] Ch. 329; [1957] 3 W.L.R. 314; [1957] 2 All E.R. 673.
[4] (1877) 36 L.T. 277, C.A.
[5] [1941] 2 K.B. 26; 57 T.L.R. 404; [1941] 1 All E.R. 480, C.A.
[6] (1870) L.R. 5 Exch. 284.
[7] [1942] 1 K.B. 242; 58 T.L.R. 86; [1941] 3 All E.R. 485, Divl.Ct.
[8] (1871) L.R. 7 C.P. 18.
[9] [1903] A.C. 426; 19 T.L.R. 673, H.L.
[10] (1866) L.R. 1 Q.B. 529.

that Act and for compensation for compulsory acquisition. After stating further facts, his Lordship continued:]

The preliminary question which arises at once, and for obvious reasons, is whether the claimants could make any claim for compensation under the Acquisition of Land Act, 1949? It was argued that they could not. The tribunal, however, held otherwise and thought that they could. [His Lordship referred to the conclusions set out above, and continued:] The tribunal was of opinion that one had to look back to February, 1949, at which date the claimants had an interest, namely, the unexpired residue of five and a half years of the terms of the lease of 1933.

I confess that I have come clearly to the conclusion that, in the circumstances of this case, no claim for compensation under the Acquisition of Land Act can be put forward by the claimants. The effect of a notice to treat is stated, among other places, in Cripps on Compensation (1938), 8th ed., at p. 59, and is in similar terms by Blackburn J. in *Reg* v. *Stone*.[1] I read from Cripps at p. 59: "A notice to treat is not in itself a contract, nor is it "necessarily a step putting in force compulsory powers, but is an "act of a neutral character which, according to circumstances, "may be followed either by an agreement or by the enforcement "of compulsory purchase. A notice to treat creates a relation "between owner and promoters, but does not constitute a con-"tract of sale until the price has been agreed or ascertained under "the provisions of the Lands Clauses Acts. The land remains "the property of the owner at law and in equity, but the pro-"moters or the owner have acquired the right to have the price "ascertained by the procedure indicated in the Lands Clauses Acts "or the Acquisition of Land Act, 1919, and the owner may compel "the settlement of the price," the settlement now being by the Lands Tribunal.

But the answer, I think, to the claimants lies in the simple proposition that, as things turned out, the corporation never acquired anything from them at all. No interest in the land of any kind was acquired by the corporation under their compulsory powers. The notice to treat, a notice which is sometimes described as creating a quasi-contract, no doubt affected the rights of the claimants under the subsisting lease, because, had the corporation proceeded to exert their compulsory powers, then the interest might have been compulsorily taken over. The claimants have said with force at this hearing that the leasehold interest was to that extent rendered precarious. Its value for commercial purposes was adversely affected. That is true. They could, no doubt, have invoked the provisions of the Act of 1919 and had a price fixed for payment as upon a compulsory acquisition, and in that way have had their interest assured for the purposes of compensation as it was back in 1949 and 1950. Had

[1] (1866) L.R. 1 Q.B. 529, 533.

C. A.
1960
Holloway v. Dover Corporation.
Lord Evershed M.R.

they invoked the necessary provisions to that effect, the corporation would then have had to make up their mind whether they would go on and acquire the remainder of the lease (as they could have done), or whether they would tell the bakery that they would withdraw the notice so far as it affected the bakery. In the latter case they might well under section 5 of the Act of 1919 have had to pay compensation for the expenses and loss incurred by reason of the service of the notice to treat or the deemed service of the notice to treat. But nothing like that happened. The claimants continued in enjoyment of the premises. They continued to carry on throughout their bakery business not only until the lease expired but for some time thereafter. They made a claim under the Act of 1954 against their landlords (who in the meantime had become the corporation) and, indeed, we were informed that they did not even give up possession when the notice to quit expired in 1958.

The position in the end of all seems to me plain and incontrovertible, namely, that when the powers and jurisdiction of the Lands Tribunal were invoked it had become quite clear that no proprietary right of the claimants had been compulsorily acquired by the corporation, and, therefore, there was no subject-matter for which the corporation were liable to pay to the claimants any compensation. That seems to me the common sense of it, and nothing that Mr. Kerrigan in his careful argument has adduced has satisfied me that there is any answer to it. The same, in effect, is no less true at the date when the claim was put forward, because at that time (in 1957) the only right which the claimants had was a right to continue in possession until they were served with a notice to quit. That was a right which they enjoyed apart altogether from the Acquisition of Land Act, but which again had not been affected by anything that the corporation had done.

Reg. v. *Kennedy*[2] was much relied upon before the tribunal, and the tribunal has distinguished the present case from it. In that case the person whose property had been affected was a Col. North. The Bexley Heath Railway Co. under its statutory powers served a notice to treat upon Col. North in May, 1891. At that time Col. North's interest in the land was the unexpired residue, which was quite substantial, of a 30 years' lease. Under the lease, however, his landlords had at certain dates the right to terminate the lease on three months' notice. Nothing further after the notice to treat was immediately done by the railway company or by Col. North. The next event was that on June 30, 1892, Col. North's landlord, who happened to be the Crown, exercised their powers under the lease and gave three months' notice, so that the lease would expire on September 30, 1892. Shortly after that event, namely, on July 20, 1892, the railway company invoked their powers under section 85 of the Lands Clauses Act, 1845, and took possession. So that they did, in fact,

[2] [1893] 1 Q.B. 533, D.C.

by virtue of their compulsory powers, expropriate Col. North's proprietary interest. But the point of the case was this. It was said for Col. North that he was entitled to be compensated by assessing his interest as it had stood at the date of the notice to treat, in May, 1891, when he still had a considerable number of years to run. On the other side, on behalf of the company, it was said: "No. At the relevant date the only interest Col. North "had was the rest of a three months' period which was left to him "under the notice to quit." Cave J. said[3]: "Nothing was done "under that notice to treat. The company might have taken "proceedings to settle the compensation; Col. North might have "compelled them to take proceedings; but neither party acted, "both apparently being content that matters should remain in "statu quo." I observe that all that is exactly parallel to the present case. The citation continues: "and it was not until after "the Crown had given the notice to quit that the railway com-"pany took proceedings under section 85." That means that it took steps under that section to evict Col. North and possess themselves of his property. "I endeavoured to elicit from the "learned counsel for Col. North what his claim was; but he "was very reticent upon the subject. The claim had either not "been made out, or was not ready for production, and the result "was that I could not ascertain what the claim precisely was. I "have therefore arrived at the conclusion, perhaps not unnatur-"ally under the circumstances, that Col. North has no claim "except for the loss of the right to occupy the particular piece of "land in question from July 20, 1892, when possession was taken, "down to the expiration of his interest, which would be less than "three months."

It was said that the case was distinguishable from the present case because there were independent proceedings which had superseded in all respects the notice to treat. There was no doubt that Col. North was entitled to some compensation because his interest was expropriated by the railway company; but the interest which he had at the date of his expropriation was very much less than the interest which he had at the date of the notice to treat. I do not think it follows from anything that is said in the judgment that the "section 85" steps taken by the railway company superseded entirely and for all purposes the original notice to treat. I do not find any intimation to that effect in the arguments, including the argument put forward by the railway company. Rather, as it seems to me, the "section 85" steps were taken consequentially upon the original notice to treat. I do not, therefore, think that that case is so distinguishable on the facts from the present case that we should hold, as the tribunal seem to have done, that the material date for the purposes of assessing compensation in the present case was the date of the notice to treat. Certainly I do not think there is anything which

[3] [1893] 1 Q.B. 533, 537.

C. A.
1960
Holloway v. Dover Corporation.
Lord Evershed M.R.

by implication can be extracted from *Reg.* v. *Kennedy*[4] which produces that result. As I have said, however, I prefer to base my conclusion on the simple fact that at what I think were the relevant dates (which I prefer to put as being either the date of the institution of the Lands Tribunal procedure, or, putting it at the best for the claimants, the date when they made their claim) no proprietary rights owned by them had been compulsorily acquired for which, therefore, the Acquisition of Land Act provided compensation.

The truth is, that in the event there never was any expropriation. No doubt, as I have indicated and as was said in *Reg.* v. *Kennedy*,[4] the claimants might have forced the hands of the corporation, had they chosen to do so, at a much earlier stage. Into that I need not go further because they did not do so. I conclude, therefore, that, in the circumstances of the present case, the claim for compensation by the claimants fails. Although we have not gone at all fully into the facts, I am at any rate comforted that this conclusion, I think, accords with plain common sense, and I also feel strongly that, on the material before me, even if there were some ground upon which the claimants could have compensation determined, in the circumstances the amount would be nothing or entirely negligible.

Pearce L.J. I agree, and I have nothing to add.

Harman L.J. I also agree, and I cannot usefully add anything to what my Lord has said.

Appeal allowed with party and party costs in the Court of Appeal, and on the High Court scale of the hearing before the Lands Tribunal.

Solicitors: *Wilkinson, Howlett & Moorhouse for the Town Clerk, Dover Corporation; Long & Gardiner for Bradley, Chitty & Scorer, Dover.*

E. D.

[4] [1893] 1 Q.B. 533, D.C.

[CHANCERY DIVISION.]

* WINE SHIPPERS (LONDON) LTD. *v.* BATH HOUSE SYNDICATE LTD.

1960
May 3, 4.

Buckley J.

[1960 W. 233.]

Landlord and Tenant—Business premises (security of tenure)—Discovery—Landlords' intention to demolish or reconstruct—Landlord and Tenant Act, 1954 (2 *&* 3 *Eliz.* 2, *c.* 56), *s.* 30 (1) (*f*).

Practice — Discovery — Originating summons — Landlord and tenant — Application for a new lease — Affidavit evidence — Summons adjourned for trial on affidavit and oral evidence—Whether tenants entitled to discovery.

Landlords served a notice under section 30 of the Landlord and Tenant Act, 1954,[1] determining a tenancy of business premises, stating in the notice that they would oppose any application for a new tenancy on the ground that they intended to demolish or reconstruct the whole of the premises and could not reasonably do so without obtaining possession. The tenants served a counter-notice under the Act stating that they were unwilling to give up possession, and applied to the court by originating summons for the grant of a new tenancy.

The tenants filed an affidavit stating that they did not admit that the landlords had the requisite intention to demolish or reconstruct the premises on the termination of their tenancy, and the master adjourned the originating summons into court to be tried on cross-examination of the deponents on their affidavits and on oral evidence in chief to be cross-examined to.

The tenants applied by summons for further directions asking for discovery of a large number of documents:—

Held, that the lanlords' project was for redevelopment as well as demolition, their intention to demolish depending on their ability to redevelop satisfactorily, and it was for them to prove a firm and settled intention to carry out the project; that the evidence so far filed was by no means all that would be required; and that, to enable all the evidence to be tested by cross-examination, the tenants ought to have discovery of documents bearing upon the question whether the landlords had a firm and settled intention to carry out the project.

In re Borthwick [1948] Ch. 645; 64 T.L.R. 471; [1948] 2 All E.R. 635, C.A. applied.

Cunliffe v. *Goodman* [1950] 2 K.B. 237; 66 T.L.R. 109; [1950] 1 All E.R. 720, C.A.; *Betty's Cafés Ltd.* v. *Phillips* [1959] A.C. 20; 1958] 2 W.L.R. 513; [1958] 1 All E.R. 607, H.L.; *Reohorn* v. *Barry Corporation* [1956] 1 W.L.R. 845; [1956] 2 All E.R. 742, C.A.; *In re St. Martin's Theatre* [1959] 1 W.L.R. 872; [1959] 3 All E.R. 293 considered.

[1] Landlord and Tenant Act, 1954, s. 30: "(1) The grounds on which a landlord may oppose an application under subsection (1) of section 24 of this Act are such of the following grounds as may be stated in the landlord's notice under section 25 of this Act or, as the case may be, under subsection (6) of section 26 thereof, that is to say— . . . (*f*) that on the termination of the current tenancy the landlord intends to demolish or reconstruct the premises comprised in the holding or a substantial part of those premises or to carry out substantial work of construction on the holding or part thereof and that he could not reasonably do so without obtaining possession of the holding; . . ."

1960

Wine Shippers (London) Ltd. v. Bath House Syndicate Ltd.

Procedure summons.

On September 28, 1959, landlords, Bath House Syndicate Ltd., gave notice under section 30 of the Landlord and Tenant Act, 1954, to tenants, Wine Shippers (London) Ltd., determining their tenancy of premises known as 83, Piccadilly, London, W.1, on March 31, 1960: the notice stated that the landlords would oppose an application to the court under Part II of the Act for a new tenancy on the ground open to them under section 30 (1) (*f*), that, on the termination of the current tenancy, they intended to demolish or reconstruct the whole of the premises, and that they could not reasonably do so without obtaining possession of the premises.

On November 24, 1959, the tenants served a counter-notice under the Act, stating that they were unwilling to give up possession of the premises on March 31, 1960, and on January 27, 1960, they applied by originating summons under the Act for the grant of a new tenancy. In their affidavit in support of the originating summons they set out proposals for the new lease.

The landlords filed an affidavit by one Maurice Wohl, stating that the landlord company was entitled to the reversion immediately expectant on the applicant tenants' lease, and was entitled also to the reversion of the adjoining premises, Nos. 82 and 84, Piccadilly; that the landlord company was formed with the intention and for the purpose of carrying out the redevelopment of the properties facing Piccadilly between Bolton Street and Clarges Street; that they had instructed architects to prepare plans and act on their behalf in obtaining all necessary permissions to enable the proposed redevelopment to be carried out, and that application had been made to the London County Council for town planning permission, and the permission obtained from the council was exhibited to the affidavit. That permission was for the erection of an office, showroom and residental building on the site of 82, 83 and 84, Piccadilly, subject to certain conditions: the first condition was: "The submission to, and approval by, the council "before any building work is commenced, of details of the "external facing materials to be used on the infilling panels "between the windows, and the type of rendering proposed for "the roof structure on the Bolton Street block," and the second condition was: "No works (including works of demolition) being "commenced (*sic*) unless and until the developers have acquired "and are to the satisfaction of the council in possession of the "necessary interests in 83 and 84, Piccadilly to ensure that they "are able to proceed with the entire development and that no "part of Bath House"—Bath House was the same as 82, Piccadilly—"shall be demolished until the aforementioned proper-"ties have been demolished." The reasons given for imposing these conditions include: "To ensure that the whole of the site, "particularly the frontage to Piccadilly between Clarges Street "and Bolton Street, shall be treated comprehensively and in such "a way as may justify the demolition of Bath House."

The deponent further stated that the architects had proceeded with preparing the necessary agreements for the demolition of No. 83, and there was exhibited a letter from the architects to the landlord company setting out the steps which were being taken to procure the carrying out of the demolition and eventual reconstruction of No. 83. Owing, however, to the interposition of the proceedings by originating summons the programme originally contemplated was already running a little behind time.

The tenants, in answer, put in evidence an affidavit in which they stated, among other things: "The applicant company does "not admit that the respondent company has the requisite inten-"tion to demolish or reconstruct the said premises on the "termination of the applicant company's current tenancy." The master adjourned the originating summons into court to be tried on cross-examination of the deponents on their affidavits and on oral evidence in chief and cross-examination.

On April 12, 1960, the tenants applied by summons that the following further directions be given in the proceedings by originating summons: 1. That the landlords within 14 days file an affidavit of the documents which were or had been in their possession or power relating to the following matters: (a) Planning permissions, building and by-law consents for the proposed demolition and/or the proposed reconstruction of the three properties, Nos. 82, 83 and 84, Piccadilly, and each of them in force or in respect of which application was being made or was required or was required by the appropriate authority to be made together with all correspondence in connection with any such application; (b) agreements or contracts for the proposed demolition and/or tenders, agreements or contracts for the proposed reconstruction of the three properties, and each of them together with all correspondence in connection with any proposed agreement or contract for any such purposes; (c) the financial position of the landlords to meet the expenditure involved in the proposed demolition and the proposed reconstruction, being balance-sheets and profit and loss accounts for the last two accounting years of the landlords for which accounts had been completed, together with any agreements entered into between the landlords and any other party for the provision of finance in connection with the proposed demolition or reconstruction; and (d) (i) the respective interests of the various occupiers of No. 84, Piccadilly and (ii) the steps taken by the landlords to determine each such interest together with all correspondence in connection therewith. 2. That there be inspection of documents by the tenants within 14 days of the filing of that affidavit. 3. That such further or other directions be given as the court might deem to be fit and proper in the circumstances. In support of the application the tenants filed a further affidavit drawing attention to a number of matters as to which they said they had no knowledge, and in relation to which they sought discovery.

1960

Wine Shippers (London) Ltd. v. Bath House Syndicate Ltd.

T. J. Sophian for the applicant tenants.
Jeremiah Harman for the respondent landlords.

The following cases, referred to in argument, were not cited in the judgment: *Donegal Tweed Co. Ltd.* v. *Stephenson*[2]; *In re Press Caps Ltd.*[3]; *Bolton's (House Furnishers) Ltd.* v. *Oppenheim.*[4]

Buckley J. stated the facts, observed that the second condition attached to the planning permission was the important condition for the purposes of the case, and continued: It is, of course, unusual in proceedings commenced by originating summons for there to be any discovery of documents. That question was discussed by the Court of Appeal in *In re Borthwick*,[1] a case under the Inheritance (Family Provision) Act, 1938, in which the argument to some extent turned on the particular rules governing the procedure under that Act: Ord. 54F, *r.* 3 (2) (*a*) and rr. 9 and 14. Lord Greene M.R. said[2]: "Roxburgh J. took the "view that the ordinary practice and rules in the Chancery "Division referred to in rule 14"—that is to say, of Order 54F—"meant the ordinary practice and rules in that Division in relation "to procedure by originating summons. That is the form of "procedure which under Order 54F is required in these cases. "I see no reason at all for differing from that view of the learned "judge. In the procedure by originating summons where the "issues are not defined in the way in which they are defined in "pleadings, where there are in general affidavits in which the "relevant evidence appears, affidavits which can, if necessary, be "cross-examined to, there is really no room for the application "of the ordinary rather strict rules relating to discovery which "takes place in ordinary actions conducted with pleadings. The "view that Roxburgh J. took, and, I think, rightly took, was that "discovery in proceedings in the Chancery Division by originating "summons ought only to be ordered in very special cases where "the facts are such as to justify such an order being made." Of course, I loyally accept that statement.

I have to consider whether the present case is of such a special nature, because the facts are such as to justify an order for discovery being made. But I would point out that Lord Greene M.R., in dealing with the normal practice in the Chancery Division, was there referring to proceedings in which the issues, though not defined in pleadings, had been shown in general affidavits in which the relevant evidence appeared, affidavits which could, if necessary, be cross-examined to.

What happened in this case was that the evidence (which is

[2] (1929) 45 T.L.R. 503, D.C.
[3] [1949] Ch. 434; [1949] 1 All E.R. 1013, C.A.
[4] [1959] 1 W.L.R. 913; [1959] 3 All E.R. 90, C.A.

[1] [1948] Ch. 645; 64 T.L.R. 471; [1948] 2 All E.R. 635, C.A.
[2] [1948] Ch. 645, 649.

of a very short, simple and I might almost say elemenentary character) having been filed, the master thought it would be a convenient course to adjourn the originating summons into court to be tried on oral evidence, not merely on cross-examination of the deponents on their affidavits, but on evidence to be given orally in chief and, of course, cross-examined to in the ordinary way, in which evidence would be given in an action. The present case is not, therefore, in my view, the sort of case which Lord Greene M.R. had in mind when he made the observations in *In re Borthwick* [3]: which I have read.

The issue in relation to which I have to consider whether it is proper that there should be discovery or not is the issue whether or not the landlord company intends, on the termination of the current tenancy of the applicants, to demolish or reconstruct the premises comprised in the holding or a substantial part thereof.

It has been pointed out in a number of cases that the character of a party's intention, and the quality of that intention, must be considered in the light of the surrounding circumstances, so far as they affect his power to implement that intention. In *Cunliffe* v. *Goodman* [4] the question arose under section 18 of the Landlord and Tenant Act, 1927, which provided that no damage should be recovered for a breach of covenant to leave or put premises in repair at the end of a lease if it was shown that the premises would at or shortly after the end of the lease be pulled down or altered in such a way as to render valueless the repairs covered by the covenant. In that case the tenant was seeking to establish that his landlord in fact intended to demolish the premises. Asquith L.J. stated [5] that the word "intention" connoted a state of affairs in which the party said to hold that intention did more than merely contemplate carrying out the proposal; the word "intention" connoted a state of affairs in which that party decided, so far as in him lay, to bring about the proposed result, the proposed result being one which, in point of possibility, he had a reasonable prospect of being able to bring about by his own act of volition. He pointed out that if there were formidable conditions or obstacles to be complied with or overcome before the proposed result could be achieved, it might well be unmeaning to say that the party intended that result; and he also pointed out that it would be inappropriate to say that the party held the intention if at the material date he was in effect not deciding to proceed, but feeling his way and reserving his decision until he should be in possession of financial data sufficient to enable him to determine whether the project would be commercially worth while. Those observations of Asquith L.J. were mentioned with approval in the House of Lords in *Betty's Cafés Ltd.* v. *Phillips*.[6]

[3] [1948] Ch. 645, 649.

[4] [1950] 2 K.B. 237; 66 T.L.R. 109; [1950] 1 All E.R. 720, C.A.

[5] [1950] 2 K.B. 237, 253.

[6] [1958] 2 W.L.R. 513; [1958] 1 All E.R. 607.

1960

Wine Shippers (London) Ltd. v. Bath House Syndicate Ltd.

Buckley J.

In *Reohorn* v. *Barry Corporation*,[7] a similar problem was considered by the Court of Appeal. That was a case under the section, subsection and paragraph with which I am concerned in the present case. The applicants there were tenants. The landlords gave notice determining their tenancy, and when the applicants applied for a new tenancy under the Act, the landlords opposed the application on the ground that they intended to develop the site, together with adjoining land, as part of a comprehensive scheme.

Denning L.J. said[8]: "Such being the facts, the question is "whether the intention required by the Act is satisfied. In the "recent case of *Fisher* v. *Taylors Furnishing Stores Ltd.*[9] I pointed "out that the intention must be '. . . a firm and settled intention, "'not likely to be changed . . . It must be remembered that, if the "'landlord, having got possession, honestly changes his mind and "'does not do any work of reconstruction, the tenant has no "'remedy.' In considering whether the court should be satisfied "of the landlord's intention, I think that it may readily be satisfied "when the premises are old and worn out or are ripe for develop-"ment, the proposed work is obviously desirable, plans and "arrangements are well in hand, and the landlord has the present "means and ability to carry out the work. Such was the position "in *Fisher's* case,[9] and in several other cases which have come "before this court. But the court will not be so readily satisfied "when the premises are comparatively new, or the desirability of "the project is open to doubt, when there are many difficulties "still to be surmounted, such as the preparation and approval of "plans or the obtaining of finance, or when the landlord has in the "past fluctuated in his mind as to what to do with the premises. "In those circumstances, even though he should assert at the "hearing that he has a firm and settled intention, the court is not "bound to accept it because of the likelihood that he may change "his mind once he gets possession. Such was the position in "*Herbert* v. *Blakey* (*Bradford*) *Ltd.*[10] (a case under section 30 (1) "(*g*)). In the present case, the premises are ripe for develop-"ment and and the proposed work is obviously desirable; but the "difficulty is to be satisfied that the corporation have the present "means and ability to carry out the work. 'Intention' connotes "an ability to carry it into effect. A man cannot properly be said "to 'intend' to do a work of reconstruction when he has not the "means to carry it out. He may hope to do so: he will not have "the intention to do so." Later in his judgment Denning L.J. referred to the observations of Asquith L.J. in *Cunliffe* v. *Goodman*,[12] to which I have referred.

Those are the matters which the court will have to consider

[7] [1956] 1 W.L.R. 845; [1956] 2 All E.R. 742, C.A.

[8] [1956] 1 W.L.R. 845, 849.

[9] [1956] 2 W.L.R. 985; [1956] 2 All E.R. 78.

[10] (Unreported.) January 11, 1956. Court of Appeal.

[12] [1950] 2 K.B. 237, 253.

and adjudicate on when the substantive application in this case comes on for hearing. The question which I have to determine today is whether, for the proper disposing of those questions, it is right for me to order the landlord company to make discovery of any documents in their possession which may relate to their ability to carry out their proposal, both from the point of view of having complied with any necessary conditions attaching to their planning consent, and matters of that nature, and with regard to their own ability, financial or otherwise, to make a profitable use of this property if and when they obtain possession of it.

I ought, I think, to make reference to one other authority, *In re St. Martin's Theatre*,[13] decided by Danckwerts J. That, again, was a case under the Landlord and Tenant Act, 1954, in which the landlords were resisting the grant of a new lease, on the grounds open to them under section 30 (1) (*a*), (*c*) and (*g*). They had at one time proposed to resist the application under paragraph (*f*), the paragraph relevant to the present case, but they had abandoned that ground of opposition. There was evidence that considerable dilapidations had accrued under the lease, the liability of the tenant in respect of which amounted to £16,000. Cross-applications for discovery were made, the tenant asking for discovery and inspection of the landlord's income tax returns and pass sheets over three years, on the ground that they were relevant to the question whether the landlord could carry on a theatrical business himself. The landlord, on the other hand, asked for discovery and inspection of the tenant's balance-sheets and profit and loss accounts during the period of the tenancy. Danckwerts J. thought it proper to order discovery by the tenant, because discovery of the tenant's financial position was relevant to the tenant's ability to fulfil his obligations under the covenants in the lease, but he thought it inappropriate to order discovery by the landlord because the landlord was proposing to occupy the property himself, it was his own property, and the judge did not think that his financial position was, prima facie, a relevant matter. I refer to that case because it is a case in which, in proceedings under this Act, discovery has been ordered.

It is not contended by Mr. Harman, who appears for the respondent company, that the court has not power to order discovery if there are special circumstances justifying such an order, but he does say that on an originating summons the right to discovery is a very restricted right, and that discovery will only be ordered if there are circumstances which, in the particular type of proceedings before the court, are special circumstances. I think I correctly state the effect of his submission when I say that he means that the nature of the proceedings themselves cannot be special circumstances, but there must be some circumstances peculiar to the particular case.

Where the issues between parties have been particularised and

[13] [1959] 1 W.L.R. 872.

1960

Wine Shippers (London) Ltd. v. Bath House Syndicate Ltd.

Buckley J.

defined in pleadings, but no evidence has been put on affidavit, as would be the normal course in proceedings in an action commenced by writ, there is, of course, an almost invariable right for a party to have discovery against his opponent of any documents in his opponent's possession or control which relate to matters in question in the proceedings. On the other hand, there are the kind of proceedings referred to by Lord Greene in *In re Borthwick* [14] which are brought by originating summons, in which the issues are not defined in the way in which they are defined in pleadings, but appear from evidence-in-chief given on affidavits, in which, in the normal case, all the evidence-in-chief is to be found.

The present case falls between the two. The issues have not been defined in pleadings, and although they may be capable of being inferred from the affidavits which have been filed, I do not think that it would be right to say that they have been defined by those affidavits. On the other hand, the evidence so far filed is not anything like the whole evidence which it will be necessary for the parties to adduce at the trial.

The onus of proving the appropriate intention under section 30 (1) (*f*) of the Act of 1957 will, of course, rest on Mr. Harman's clients. It will be for them to prove that they in fact have a settled intention to carry out their project. Their project is, in my view, a project not only for demolition but for redevelopment, and I think that their intention to demolish prima facie depends on their being able to redevelop satisfactorily from their own point of view. Consequently, one has not only to look at the demolition stage. I think, on the facts as at present known to the court, that the intention to demolish is one which is tied up with the possibility of the landlord company's developing the property advantageously when it obtains possession. Mr. Harman quite rightly says that it will be for him to prove circumstances supporting the view that the landlords have a firm and settled intention to carry out the project, and that he proposes to call evidence which will prove that. But the evidence before the court ought in my view, to be properly tested, and in order to enable it to be properly tested I think it is right that the applicants should have an opportunity of arming themselves to cross-examine.

When on proceedings by originating summons the affidavits contain all the evidence-in-chief, the other side, of course, knows what the material is in respect of which they have got to cross-examine, and even in such a case, if they think that they need discovery and can make out a special case for it, I think that, on the authorities, the court would order discovery before the trial; but in the present case the evidence-in-chief is not in on affidavit evidence, the applicants do not know what it will be, and in order to put themselves in a position properly to cross-examine it seems

[14] [1948] Ch. 645.

to me that they ought to have discovery, as they would in an action between parties commenced by writ.

It therefore seems to me right that I should order discovery of such documents as may be proper for the landlord company to discover bearing on the question of whether or not they have a firm and settled intention within the meaning of the authorities to carry out their project with regard to these premises in Piccadilly. I propose, therefore, to order discovery, but I shall want the assistance of counsel to consider what the extent of that discovery should be, because at the present time I am rather impressed with the suggestion made by Mr. Harman that the present application is too wide in its scope, and I think that it is reasonable and right that the discovery should be restricted within suitable limits.

May 5. An agreed form of order in the terms of the summons was approved by the court.

Order accordingly.

Solicitors: *Evans, Baker & Co.; Samuel Sebba.*

K. R. A. H.

[HOUSE OF LORDS.]

H. L. (E.)†
1960
May 16.

* OSTIME (INSPECTOR OF TAXES) . . PETITIONER;
AND
DUPLE MOTOR BODIES LTD. . . . RESPONDENTS

INLAND REVENUE COMMISSIONERS . PETITIONERS;
AND
DUPLE MOTOR BODIES LTD. . . . RESPONDENTS.

PETITIONS for leave to appeal to the House of Lords from the decision of the Court of Appeal in *Duple Motor Bodies Ltd.* v. *Inland Revenue Commissioners.*[1]

The Appeal Committee granted the petitions.

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† *Present*: LORD COHEN, LORD KEITH OF AVONHOLM and LORD DENNING.

[1] [1960] 1 W.L.R. 510; [1960] 2 All E.R. 110, C.A.

[QUEEN'S BENCH DIVISION.]

1960
May 16.

Lord Parker C.J., Donovan and Davies JJ.

* VAUGHAN *v.* BIGGS.

Public Health—Litter—Leaving—Whether depositing and leaving litter continuing offence—Litter Act, 1958 (6 *&* 7 *Eliz.* 2, *c.* 34), *s.* 1 (1). *Limitation of Action—Crime—Continuing offence—Litter depositing—Magistrates' Courts Act,* 1952 (15 *&* 16 *Geo.* 6 *&* 1 *Eliz.* 2, *c.* 55), *s.* 104.

Litter Act, 1958, s. 1 (1) provides: "If any person throws down, "drops or otherwise deposits in . . . any place in the open air to "which the public are entitled . . . to have access without payment, "and leaves, any thing whatsoever in such circumstances as to "cause . . . the defacement by litter of any place in the open air, "then, unless that depositing and leaving was authorised . . . he "shall be guilty of an offence."

An offence under section 1 of the Litter Act, 1958, is not a continuing offence but one fixed in point of time.

The defendant was charged with depositing and leaving a derelict motor-car on a public open space on or before April 2, 1959, contrary to section 1 of the Litter Act, 1958. The magistrates found that a derelict motor-car constituting litter was deposited on a public open space by the defendant without lawful authority. The date on which the car was deposited was not proved. It was contended by the defendant that the information was not proved to have been laid within six months of the alleged offence as required by section 104 of the Magistrates' Courts Act, 1952. It was contended by the prosecutor that the offence charged was a continuing offence, and that the information was laid within the requisite period. The magistrates found the offence proved. The defendant appealed:—

Held, that there were two ingredients to the offence under section 1, namely, the depositing and the leaving, and the offence was not committed unless both depositing and leaving occurred; depositing was an act fixed in point of time and not a continuing one; accordingly, it was not proved that the offence was committed within six months, and since, therefore, it was not proved that the magistrates had jurisdiction, the conviction had to be quashed.

Case stated by Pembroke magistrates sitting at Fishguard.

On July 3, 1959, an information was preferred by the prosecutor, Henry Seymour Biggs, against the defendant, David Richard Vaughan, alleging that he did deposit and leave a derelict motor-car on a public open space known as Blaen-y-delyn Quarry, Fishguard, Pembroke, on or before April 2, 1959, contrary to section 1 of the Litter Act, 1958.[1]

[1] Litter Act, 1958, s. 1 (1): "If "any person throws down, drops or "otherwise deposits in, into or from "any place in the open air to which "the public are entitled or permitted "to have access without payment, and "leaves, any thing whatsoever in such "circumstances as to cause . . . the "defacement by litter of any place in "the open air, then, unless that "depositing and leaving was autho-"rised by law or was done with "the consent of the owner, occu-"pier or other person or authority "having the control of the place in or "into which that thing was deposited, "he shall be guilty of an offence."

The magistrates found the following facts: On April 2, 1959, there was a derelict motor-car on the quarry. The quarry was a public open space, and the motor-car was deposited thereon by the defendant without lawful authority. The date on which the car was deposited was not proved. The car constituted litter.

It was contended by the defendant that the information was not proved to have been laid within six months of the date of the alleged offence as required by section 104 of the Magistrates' Courts Act, 1952.

It was contended on behalf of the prosecutor that the offence charged was a continuing offence, and that the information was laid within the requisite period.

The magistrates were of opinion that the case was proved on the ground that the information was laid within the requisite period, and, accordingly, they fined the defendant £5.

The defendant appealed.

Donald Farquharson for the defendant.

The prosecutor did not appear and was not represented.

No cases were cited in argument.

LORD PARKER C.J. This is an appeal by way of case stated by magistrates for the County of Pembroke, sitting at Fishguard, before whom an information was preferred by the prosecutor against the defendant, "that he did deposit and leave a derelict motor-car "on a public open space" at a quarry in Fishguard "on or before "April 2, 1959, contrary to section 1 of the Litter Act, 1958."

The magistrates heard the evidence. They were satisfied that the quarry was an open space, that the car constituted litter, that it had been deposited there by the defendant and that the defendant had no authority so to deposit it. It was then submitted by the defendant that the information was not shown to have been laid within six months of the date of the offence as required by the Magistrates' Courts Act, 1952, s. 104. That section provides, so far as it is material, "Except as otherwise expressly provided "by any enactment, a magistrates' court shall not try an informa-"tion or hear a complaint unless the information was laid, or the "complaint made, within six months from the time when the "offence was committed." Here, all that was proved was that the defendant had left the motor-car in the quarry on or before April 2, 1959; in other words, he might have so left it more than six months before the information, which was laid on July 3, 1959. It was contended by the prosecutor that notwithstanding that, the magistrates were entitled to convict in that what was charged was a continuing offence. That argument appealed to the magistrates; they found the information proved and fined the defendant £5.

Whether the offence in question is a continuing offence or not depends on the words of section 1 (1) of the Litter Act, 1958,

1960

VAUGHAN v. BIGGS.

Lord Parker C.J.

itself. [His Lordship read the material words of section 1 (1) and continued:] Observe that there are two ingredients there, the throwing down, dropping or otherwise depositing and the leaving. It is quite clear that not only the depositing but the leaving is necessary, because it was not intended that an offence should be committed if somebody deposited litter and immediately cleared it up. Accordingly, although the act constituting the offence consists of throwing down, dropping or otherwise depositing, it is only an offence if it is not removed. Accordingly, it seems to me here that it is really unarguable, but that the offence is not committed unless both of these things occur, the depositing and leaving. Depositing is an act fixed in point of time and not a continuing matter, and accordingly, I am quite satisfied that this cannot be treated as a continuing offence, and it was not shown that the magistrates had any jurisdiction to deal with it. Accordingly, I would allow this appeal.

DONOVAN J. I agree.

DAVIES J. I agree.

Appeal allowed.

Solicitors: *Denton, Hall & Burgin for Walter L. Williams & Sons, Fishguard.*

C. J. E.

[COURT OF APPEAL.]

C. A.

1960
May 9, 10.

Sellers, Willmer and Harman L.JJ.

* WILLAN *v.* WILLAN.

[W. 1958 (D) No. 369.]

Husband and Wife—Condonation—Cruelty—Cruel conduct by wife to induce sexual intercourse—Act of intercourse by husband.

A husband petitioned for divorce on the ground of his wife's cruelty. He complained in particular of her conduct—pulling his hair and ears and troubling him far into the night to deprive him of rest—in order to induce him to have unwilling intercourse with her. After a final night of such conduct culminating in an act of intercourse he had left the matrimonial home.

The commissioner found the charge of cruelty established, but held that it had been condoned by the husband's voluntary act of intercourse on the last night. On appeal by the husband:—

Held, dismissing the appeal, that though the wife's conduct inducing the act of intercourse might amount to cruelty, the actual act, being of its nature a voluntary act performed without duress by the husband, was distinct from and not a part of such cruelty, and, accordingly, fell within the general rule that an act of intercourse by a husband constituted condonation of a wife's previous

matrimonial misconduct. If a man, through whatever blandishment or irritation, decides to have sexual intercourse, his act must be a voluntary act, and, in the absence of fraud by the wife, constitutes condonation.

Henderson v. *Henderson* [1944] A.C. 49, 52–53; 60 T.L.R. 113; [1944] 1 All E.R. 44, H.L. applied.

APPEAL from Mr. Commissioner Constantine Gallop Q.C., sitting as special commissioner in divorce, Sussex Assizes.

The facts as stated in the judgment of Willmer L.J. were as follows: A husband petitioned for the dissolution of his marriage on the grounds of his wife's alleged cruelty. The parties had been married in June, 1935, and there were two children of the marriage, one born shortly after the marriage and the other after the war in 1946. The husband was away on military service during the war, but cohabitation was resumed on his demobilisation, and he continued to live with his wife until the morning of September 29, 1958, when he left the matrimonial home and did not return to it.

The cruelty alleged in the petition and at the hearing was, inter alia, that throughout the marriage, and more particularly in the latter part of it, the wife frequently and persistently assaulted him and showed violence to him; that she was immensely jealous of his relations with other women; and that she habitually used offensive and obscene language, calling him by horrible names and so forth. It was also alleged that she frequently demanded sexual intercourse with him at times when he did not wish to have it, obliging him to conform to her wishes by indulging in various types of violence in order to bend his will to hers. In particular, it was said that she would pull his hair, catch hold of him by the ears, and shake his head violently to and fro; and, at any rate on one occasion, it was said that she kicked him on his injured leg, causing him great pain. She would also pester him far into the night to have sexual intercourse, so that eventually he was compelled to comply as the only means of getting his rest.

For some time before the final separation the parties were on bad terms, although sexual intercourse was continuing in the circumstances described. The husband at least was for some time in the hands of solicitors, and on or about August 13, 1958, the solicitors wrote on his behalf to his wife, complaining of her cruel conduct and informing her that the husband would be obliged to leave her. Even after that life went on very much as before, the husband continuing to reside in the matrimonial home with his wife, and continuing to share the same bed with her. He said in evidence at the hearing of his petition that two or three weeks before the final separation he voluntarily and willingly had intercourse with his wife. A distinction was drawn in the evidence between that occasion and certain others when he had intercourse with his wife, not because he wanted to, but for the sake of peace, in the circumstances described.

On the night of September 28/29—the night before the

C. A.
1960
WILLAN
v.
WILLAN.

husband left for the last time—an act of sexual intercourse took place between the parties. The husband said that that act, like many other acts previously, was induced by the wife pestering him far into the night, showing some degree of violence to him, pulling his hair and so forth and, finally, rolling on top of him, so that eventually, towards the small hours of the morning, and for the sake of peace, he did have intercourse with her. Thereafter, the parties appeared to have gone straight to sleep, and the next thing that happened was the alarm clock going off at a quarter to six in the morning. The husband promptly got up, dressed and left the house at six o'clock in order to go to work. He kissed his wife and said good-bye, all in accordance with his usual procedure, the wife saying good-bye to him.

The husband did not return to the matrimonial home but presented his petition for the dissolution of the marriage.

The commissioner, on October 14, 1959, found in his judgment that cruelty by the wife had been established, and in particular found the cruelty in relation to pulling his hair, gripping his ears and rocking his head to and fro, kicking his leg and so on; but he held that by the act of sexual intercourse on the final night the husband had condoned that cruelty since the act of intercourse on that occasion was a voluntary act; and he dismissed the petition.

The husband appealed. There was no cross-notice filed on behalf of the wife. During the hearing leave was sought to amend the notice of appeal by setting out as grounds of appeal: "(1) that "the commissioner had misdirected himself in law in that the last "act of intercourse between the parties on the night of Septem- "ber 28, 1958, could not have constituted condonation by reason "of the fact that it constituted an important element of the "cruelty complained of, and/or by reason of the fact that it took "place when the petitioner was under duress and/or was not a "free agent," and "(2) that on the facts found by the commis- "sioner he ought to have found that even if the cruelty "complained of had been condoned it was revived by the subse- "quent conduct of the respondent." The Court of Appeal allowed the amendment under (1) but refused leave to amend ground of appeal (2).

Lord Dunboyne for the husband.
William Kee for the wife.

The following cases were referred to in the course of argument, in addition to those cited in the judgments of the court: *Roberts* v. *Roberts* [1]; *Hare* v. *Hare and Davidson* [2]; *Tilley* v. *Tilley*.[3]

WILLMER L.J., giving the first judgment, said that as there was no cross-notice on behalf of the wife it must be taken

[1] (1917) 33 T.L.R. 333.
[2] (1920) 36 T.L.R. 331.
[3] [1949] P. 240; 65 T.L.R. 211; [1948] 2 All E.R. 1113, C.A.

that there was now no dispute as to the fact of the wife having been cruel to the husband. The gravamen of the husband's charge of cruelty was that in relation to the wife's demand for sexual intercourse and her conduct in that connection. His Lordship stated the facts and the evidence on that matter and continued: I have referred to the details of it because, and only because, the alleged act of condonation is very largely bound up with the kind of conduct which is complained of by the husband as cruelty on the part of his wife.

[His Lordship continued his statement of the facts, saying that it was not without significance that even after the solicitor's letter of August 13, 1958, the husband was still found to be willingly and voluntarily having intercourse with his wife. He concluded his statement of the facts relating to the night of September 28/29 and the circumstances in which the husband left the matrimonial home, and continued:] I mention those facts as to what took place after the last act of intercourse because it was at one time suggested that, if that act of intercourse did amount to condonation, conduct subsequent thereto on the part of the wife was sufficient to bring about a revival. Clearly, however, on the evidence there never could have been any merit in that suggestion. The only question is whether or not the husband, by having intercourse with his wife in the circumstances which I have described on the night of September 28/29, must be held to have condoned the prior cruelty found against the wife.

When the case came on ultimately in this court, it was pointed out that the notice of appeal was defective in that it did not, as required by R.S.C., Ord. 58, r. 3, state what the grounds of appeal were. Counsel accordingly asked for leave to amend the notice of appeal, and an amended notice was put before us which alleges two grounds. The second ground referred to that which I have already dealt with, namely, the question of revival, and alleged that if there was condonation, the cruelty was revived by the wife's subsequent conduct. As it did not appear that that had ever been pleaded or argued below we did not give leave to amend; we did, however, give leave to amend as to the first ground, which was in the following terms: "That the commissioner misdirected himself in law in that the last act of intercourse which occurred between the parties on the night of September 28, 1958, could not have constituted condonation by reason of the fact that it constituted an important element of the cruelty complained of, and/or by reason of the fact that it took place when the petitioner was under duress and/or was not a free agent."

It must be observed that, so stated, that ground of appeal runs two or three arguments together, and I will do my best to keep them separate. In the first place, it is said that this act of intercourse on the part of the husband could not be held to amount to condonation, because it was one and the same with

C. A.
1960
Willan
v.
Willan.
Willmer L.J.

an act which was of itself relied on as part of the cruelty alleged. It was contended that an act which the husband relied on as an act of cruelty cannot be said at one and the same time to be an act of condonation. I do not think, so far as we have looked at the evidence, that that point was ever made in the evidence given before the commissioner. Certainly there is no finding by the commissioner that the last act of intercourse relied on as condonation was one with the cruelty alleged by the husband against the wife. Furthermore, as it seems to me, and as I indicated during the argument, the contention is really the result of muddled thinking, because it confuses the actual act of sexual intercourse, which constitutes the evidence of condonation, with the prior conduct complained of on the part of the wife, whereby she induced the act of intercourse. I can well understand that pestering in such circumstances on the part of the wife, in such a way as to deny the husband sleep, more particularly if accompanied by the pulling of his hair, might very well be capable of amounting to cruelty. But, whether that be so or not, I find it impossible to say that the subsequent action of the wife in submitting herself to an act of sexual intercourse could in any circumstances amount to an act of cruelty against the husband. Therefore, I do not think it is possible to accept the argument that that which was relied on as condonation was itself one and the same with conduct alleged to amount to cruelty.

Then it was said that this act of intercourse was induced by duress on the part of the wife, and that the husband was not to be regarded as a free agent. It is well established that, whatever may be the position of a wife, in the case of a husband the fact of having intercourse with the wife, with full knowledge of the matrimonial offence of which complaint is made, is conclusive evidence of condonation by the husband of the wife. It is conclusive evidence because it is the best possible way of showing that the wife has been reinstated as a wife. Only one exception to that rule was accepted by the House of Lords in *Henderson* v. *Henderson*,[1] and that is where the act of intercourse is induced by fraud on the part of the wife. Subject to that, however, as I read the speech of Lord Simon, he was accepting the view expressed by McCardie J. in *Cramp* v. *Cramp and Freeman*,[2] where the judge reviewed the authorities very fully, that intercourse by a husband with his wife after knowledge of the matters complained of is conclusive evidence of condonation.

It is sought to say, however, that some other exception to the rule ought to be accepted, which would cover facts such as have arisen in the present case. The difficulty, as I see it, in the way of the husband is that the facts found by the commissioner will not support the argument which has been put before us. The commissioner towards the end of his judgment said: "But, having

[1] [1944] A.C. 49, 32–33; 60 T.L.R. 113; [1944] 1 All E.R. 44, H.L.

[2] [1920] P. 158, 170; 36 T.L.R. 333.

"seen the two parties concerned in this case, and the husband "not saying that he acted under fear or apprehension for his "safety and had no alternative, I cannot help thinking that the "reason why he had intercourse with her on that particular "occasion was that he was so tired and exhausted and knew that "his prospect of rest and sleep was very small, if it existed at all, "until he had done that which his wife required of him." Later the commissioner expressed this view: "Leaving aside questions "of hysteria or hypnotism, or other such matters, if a man, "through whatever blandishment or irritation, decides to have "sexual intercourse, that must be a voluntary act, and I must "hold that the act of intercourse in this case was a voluntary "act." I agree with the commissioner, and I doubt whether the matter can be better stated than in the commissioner's own words.

All that has been proved in this case is that the wife used means, to which exception may well be taken, for the purpose of persuading her husband to have intercourse with her. He was free to submit or to resist. He was free, I suppose, to have run away; but in the end he decided that the best course to take was to submit to her wishes. I daresay he did show unwillingness, but to say that he showed unwillingness is not to say that he acted involuntarily. It might be otherwise in the case of a wife; but in the case of a husband who has sexual intercourse it can only be said of him that what he does he does on purpose, and that sexual intercourse with his wife must be a voluntary act on his part.

In those circumstances, it seems to me that, for the reasons given by the commissioner, we cannot do other than agree with his conclusion. However much the husband disliked what he was doing, he did in fact voluntarily have intercourse with his wife on this occasion of the last night, and by doing so he must be conclusively held to have condoned the cruelty of which complaint is made. In the absence of any evidence of revival afterwards, a matter to which I have already referred, that is an end of the case.

It follows, therefore, that in my judgment this appeal, which was always a difficult appeal, fails and must be dismissed.

HARMAN L.J. I agree. It seems to me to dispose of this appeal that the arguments put before us here today were not really agitated before the commissioner at all. In the court below the point taken as to the events of the night before the husband left was that he was under duress, but that plea, which was debated to some extent before us, was, in my view, perfectly hopeless. Duress means a degree of fear which operates on the mind to such an extent that a person who is under it is not a free agent. This husband never was in anything like that condition. No doubt he was badgered into having intercourse with his wife; no doubt he submitted to it in the end as the easiest issue out of all his afflictions, for all of which one cannot have anything but

C. A.
1960
WILLAN v. WILLAN.
Harman L.J.

sympathy. But the rule that an act of intercourse on the part of the husband will operate as a reinstatement of the wife, and therefore will be a condonation of her previous misconduct, is so well established that we could not possibly go behind it.

There being no fraud alleged here, and there being no duress proved, the statement of Lord Simon in *Henderson* v. *Henderson*[3] seems to me to be conclusive. After saying that it might possibly not be a bar to a wife's suit, he proceeded[3]: "But "I know of nothing in the earlier decisions, either in the "ecclesiastical courts or in the Divorce Court of this country, which "supports the view that a husband who has intercourse which is "not induced by the fraud of the wife, . . . should not thereby be "regarded as condoning his wife's misconduct."

In my view, this appeal was doomed to failure from the first and must be dismissed.

SELLERS L.J. I, too, would dismiss this appeal. As long ago as 1842 Dr. Lushington, sitting in the Divorce Court of those days, said [in *Snow* v. *Snow*[4]] that there was danger in abandoning the general rule. The general rule here is clear, and on the way this case was conducted in the court below and on the findings which the commissioner reached, to which reference has been made in the judgments which my Lords have delivered, I think that there is not sufficient justification for abandoning the general rule and acting on any special circumstances which would enable the husband to succeed in this case.

Appeal dismissed with costs.
Leave to appeal to the House of Lords refused.

Solicitors: *Wheeler & Co., Brighton; Miller, Parris & Cornwall, Croydon.*

M. M. H.

[3] [1944] A.C. 49, 53.

[4] (1842) 2 Notes of Cases, Supp. 1.

[QUEEN'S BENCH DIVISION.]

1960
May 17, 18.
Lord Parker C.J., Donovan and Davies JJ.

* DIRECTOR OF PUBLIC PROSECUTIONS *v.* MILBANKE TOURS LTD.

Aircraft — Carriage by air — Nationalisation — Private aircraft company—Flights organised by association for own members—Public becoming members of association to participate in tours—"Scheduled "journey"—Meaning—Air Corporations Act, 1949 (12, 13 & 14 *Geo.* 6, *c.* 91), *s.* 24.

The Air Corporations Act, 1949, provides by section 24 (1) that it shall be an offence for any person, other than the corporations or

their associates, "to carry passengers or goods by air for hire or "reward upon any scheduled journey between two places of which "at least one is in the United Kingdom." By subsection (2) "scheduled journey" is defined as "one of a series of journeys "which are undertaken between the same two places and which "together amount to a systematic service operated in such a manner "that the benefits thereof are available to members of the public "from time to time seeking to take advantage of it."

The defendants, travel agents, were agents for the International English Language Association, whose objects were the advancement of a greater knowledge of the English language. Any member of the public willing to declare his support for the objects and aims of I.E.L.A. was eligible for membership on payment of an annual subscription of one guinea. I.E.L.A. chartered aircraft from a private company to take their own members on foreign tours which they were legally entitled to do. The defendants advertised and took bookings for their own "Flair Tours." The defendants required permission from the Minister under section 24 (3) (*c*) of the Act of 1949 to transport their clients by aeroplane. Their applications for permission were refused, but they did not so inform their clients. Shortly before the clients were due to commence their journeys they were informed that they could not travel as arranged, but if they would join I.E.L.A. they could go on the association's tours which were on the same dates and to the same places as Flair Tours. The defendants' clients joined I.E.L.A. and departed on their journeys as arranged. Informations were preferred against the defendants charging that they, not being one of the corporations or associates under the Act of 1949, carried passengers for reward on a scheduled journey contrary to section 24. The magistrates were of opinion that all the persons who travelled on the occasions referred to in the informations were bona fide members of I.E.L.A. and dismissed the informations:—

Held, that on the true construction of section 24 (2) the subsection had to be read as if the words "as such" were inserted after "members of the public"; and that, as all passengers were found to be bona fide members of the I.E.L.A., they were not members of the public as such and, therefore, no offences had been committed.

CASE STATED by Middlesex justices, sitting at Feltham.

Sixteen informations were preferred by the Director of Public Prosecutions against the defendants, Milbanke Tours Ltd., that they, not being one of the corporations or associates under the Air Corporations Act, 1949, carried passengers for reward upon a scheduled journey contrary to section 24 [1] of the Act. Seven

[1] Air Corporations Act, 1949, s. 24: "(1) Subject to the provisions of this "section, it shall not be lawful for "any person, other than the corpora-"tions, their associates, and the ser-"vants and agents of the corporations "and their associates, to carry pas-"sengers or goods by air for hire or "reward upon any scheduled journey "between two places of which at least "one is in the United Kingdom. "(2) In this Act the expression "'scheduled journey' means one of "a series of journeys which are under-"taken between the same two places "and which together amount to a "systematic service operated in such "a manner that the benefits thereof "are available to members of the "public from time to time seeking to "take advantage of it. (3) Nothing "in this section shall restrict the "right of any person— . . . (*c*) in "accordance with arrangements for "the time being approved by the "Minister as being in the public in-"terest, to carry a party of pas-"sengers and their baggage (if any)

1960

DIRECTOR OF PUBLIC PROSECUTIONS v. MILBANKE TOURS LTD.

informations related to flights between London Airport and Palma on August 15, 22, 29, September 19, 26, and October 10 and 17, 1958, respectively; six informations related to flights between London Airport and Nice on August 17, 24, 31, and September 7, 14 and 21 respectively; three informations related to flights between London Airport and Perpignan on August 10, 24, and September 7 respectively.

The following facts were stated by the magistrates: The defendants carried on the business of a travel agency. Hunting Clan Air Transport Ltd. (referred to as Hunting Clan) owned and operated aircraft and carried on the business of passenger and goods air transport carriers. They were not an associate, servant or agents of the corporations within the meaning of sections 15 (3) and 24 of the Act of 1949. International English Language Association (referred to as I.E.L.A.) was an association formed in 1954 and having as its objects, inter alia, the advancement throughout the world of a greater knowledge of the English language. It published a journal every two months. Any member of the public who was willing to declare his support for the objects and aims of I.E.L.A. and to pay an annual subscription of one guinea was eligible for election to membership. Applications for membership were made by completing a printed form. To obtain the approval of the Minister of Civil Aviation to arrangements to carry parties of passengers on a series of journeys organised as a tour under section 24 (3) (*c*) of the Act of 1949, application was made to the Air Transport Advisory Council, which council advised the Minister, and the Minister generally granted or refused the application in accordance with that advice. Applications were usually granted if the proposed journeys did not interfere with British European Airways Corporation services.

For the 1958 holiday season the defendants advertised as "Flair Holidays" arrangements for holiday accommodation at certain hotels in Majorca, the Italian Riviera and Spain together with air transport at inclusive prices. For the purpose of providing this air transport Hunting Clan, at the request and on behalf of the defendants, made applications for the Minister's approval of arrangements under section 24 to carry parties on a series of journeys between London Airport and Palma, Nice and Perpignan. Those applications were made in May, 1957, September, 1957, and February, 1958, and each was refused. The defendants were notified of those refusals, notification in respect of the refusal of the last application being made to them on or about May 12, 1958. I.E.L.A. also advertised as available to its members holiday accommodation and air transport, and in connection therewith the defendants acted as agents for I.E.L.A. The hotels so advertised were the same hotels as those advertised by the defendants for its Flair Tours. Particulars of the holiday

"upon a series of three or more "journeys organised as a tour for the "common enjoyment of those passengers."

accommodation and air transport which I.E.L.A. advertised as available to its members were set out in its journal for January–February, 1958. For the purpose of providing air transport for its members I.E.L.A. chartered aircraft from Hunting Clan. Hunting Clan had no knowledge of the fact, if it were the fact, that any persons other than bona fide members of I.E.L.A. were carried by Hunting Clan on the aircraft chartered by I.E.L.A. There were other groups or organisations in the habit of chartering aircraft for carrying their members, which included the Royal Automobile Club and the Ski Club of Great Britain. Between October, 1957, and September, 1958, the defendants accepted bookings for Flair Tours from persons who at the date of booking were members of the public. Sixteen witnesses who had booked for themselves and others a total of 32 Flair Tours were called by the prosecutor, and the evidence which each gave was set out in the case stated. That evidence showed that all except two of the witnesses had paid deposits; that a short time before they were due to depart on their holidays (in many cases after the balance of the fares had been paid) they were informed of the cancellation of Flair Tours. At the same time they were informed of the existence of I.E.L.A. The majority of the witnesses stated specifically that they only joined I.E.L.A. in order to be able to go on their holidays as arranged. They all departed on the same dates and to the same destinations as they had originally booked.

At the close of the prosecution's case a submission was made on behalf of the defendants that on the evidence called by the prosecution there was no case in law to answer and, alternatively, that the evidence was not sufficient to prove beyond reasonable doubt that the offences charged, or any of them, had been committed.

It was contended on behalf of the prosecution that the flights of aircraft constituted scheduled journeys within the meaning of section 24 (2) of the Act of 1949, and that the evidence disclosed that the defendants had committed the offences charged either as principals acting through innocent agents, or as aiders and abettors of Hunting Clan or I.E.L.A.

It was contended on behalf of the defendants that (a) as I.E.L.A. had a bona fide organisation in which all the persons who travelled on the occasions referred to had either applied for or accepted membership, and as travelling on such occasions had been confined to members of I.E.L.A. the prosecution had not proved that the benefit of such systematic service (if any) as there was had been made available to members of the public from time to time seeking to take advantage of it; (b) as the allegation made against the defendants in each case was that they had carried passengers for reward on scheduled journeys, it was necessary for the prosecution to prove that the defendants had in fact carried passengers. That the prosecution had failed to do, as it was manifest from the charter agreements between Hunting Clan and I.E.L.A. that Hunting Clan had carried the passengers, not

1960

DIRECTOR OF PUBLIC PROSECUTIONS v. MILBANKE TOURS LTD.

the defendants or I.E.L.A. Further, the prosecution could not get round that difficulty by submitting that, although the defendants were charged as principals, they could be convicted for having aided and abetted someone else to commit the offences charged, since the only other persons who could have committed the offences were Hunting Clan, and the evidence relating to them was that they had no knowledge of the fact (if it were the fact) that any persons other than bona fide members of I.E.L.A. had travelled on aircraft chartered by that association.

The magistrates were referred to *Ackroyd Air Travel Ltd.* v. *Director of Public Prosecutions.*[2]

The magistrates were of opinion that (1) all the persons who travelled on the occasions referred to in the informations were bona fide members of I.E.L.A.; (2) Hunting Clan were entitled to carry such persons as passengers for reward on scheduled journeys; (3) the defendants were not such carriers, and they dismissed the informations without calling on the defendants to call evidence, and ordered the prosecutor to pay five guineas costs on each summons.

Mervyn Griffith-Jones for the prosecutor.
F. H. Lawton Q.C. and *Charles Lawson* for the defendants.

Ackroyd Air Travel Ltd. v. *Director of Public Prosecutions*[2] was referred to in argument.

LORD PARKER C.J. This is an appeal by way of case stated by justices of the County of Middlesex sitting at Feltham, before whom 16 informations were preferred by the prosecutor against the defendants for that the defendants, not being one of the corporations or associates dealt with by the Air Corporations Act, 1949, carried passengers for reward on a scheduled journey, contrary to section 24 of the Act.

At the end of the case for the prosecution a submission was made that there was no case in law to answer, or, alternatively, that the evidence was not sufficient to prove beyond reasonable doubt that the offences charged had been committed. The magistrates upheld that submission and, without calling on the defendants, dismissed the informations.

Before dealing with the facts it is convenient, I think, to refer to the Air Corporations Act, 1949. By section 24 it is provided that, except as therein set out, the corporations and their associates shall in effect have a monopoly. [His Lordship read section 24 (1), (2) and (3) (*c*), and continued:] By subsection (5), "A person "who carries a passenger, or carries any goods, in contravention "of the provisions" shall be guilty of an offence.

The facts, quite shortly, are these: The defendants, Milbanke Tours Ltd., carry on business as a travel agency at 164, Piccadilly.

[2] [1950] 1 All E.R. 933, D.C.

They were also, in that capacity, agents for a body known as the International English Language Association (referred to throughout as I.E.L.A.), whose objects were the advancement throughout the world of a greater knowledge of the English language. It issued a journal every two months, and any member of the public who was willing to declare his support for the objects and aims of I.E.L.A. was eligible for membership on payment of an annual subscription of a guinea.

I.E.L.A. ran tours, and for that purpose they had entered into charters with Hunting Clan Air Transport Ltd., which was an operating company and was not an associate, servant or agent of the corporations. There is no doubt that in their journal they advertised tours, and tours which would amount to a systematic service within subsection (2) of section 24 of the Act, but so long as it was confined to members no consent of the Minister was required.

As I have already said, the defendants acted as travel agents for I.E.L.A. The material tours with which we are concerned were to take place in August, September and October of 1958. The defendants, in the meanwhile, on their own behalf, advertised tours, and it is significant that the tours which they advertised, and which are referred to as Flair Tours, were tours on the same dates and to the same places as the tours advertised by I.E.L.A. In due course they took a number of bookings for these Flair Tours. Those bookings were arranged as early as January and February of 1958, at a time when they had not, as yet, received the permission which they would have to have under section 24 (3) (*c*) from the Minister to carry parties on those journeys. Whether that is an advisable practice or not I do not know, but they certainly were advertising these tours without having got permission. Hunting Clan Ltd., on their behalf, applied for permission, and, indeed, applications had been made in May and September, 1957, and had been refused; and in February, 1958, at the time when these bookings were being made, Hunting Clan again approached the Minister for his consent under subsection (3) (*c*). On May 12, 1958, that was refused, yet the defendants did not then inform the unfortunate people who had booked Flair Tours of what had happened. The bookings were in January and February. May passed, June and July. In some cases, beginning in July, the persons who had booked these tours paid the balance of their money, still not realising that it was impossible for them to be carried as arranged.

Then—whether it was the object all along or not—the idea was conceived of transferring these bookings in effect to I.E.L.A. Thereupon, at the last moment, letters were sent, either by I.E.L.A. or, more often, I think, by the defendants, to the people who had booked, saying in effect: "If you will pay a guinea and "join I.E.L.A. you can have exactly the holiday that you had "planned because I.E.L.A.'s tours were on the same dates and "at the same places as the advertised Flair Tours." Thereupon

1960

DIRECTOR OF PUBLIC PROSECUTIONS v. MILBANKE TOURS LTD.

Lord Parker C.J.

the 16 people in respect of which these 16 informations were preferred felt that they either had to sacrifice their holidays, because it was too late to make other arrangements, or pay their guinea and join I.E.L.A. They all did join; they received their membership cards; and they went off on the I.E.L.A. tour.

It is perhaps of significance that the price charged, or that was to be charged, by the defendants for their Flair Tours was one guinea more than the corresponding tours of I.E.L.A., so that when the guinea was added to the fare charged by I.E.L.A. it was exactly the same as the price charged by the defendants.

Whether or not that is (and I think it is) highly reprehensible conduct on the part of travel agents—booking tours without knowing whether they can carry them out, then when they hear it cannot be carried out still telling the unfortunate people who have booked nothing about it, and then, at the end, saying: "Well, you either sacrifice your holiday or you join I.E.L.A."—is really not a matter for this court. The sole question is: "Has "it been shown that they are guilty of an offence against "section 24?"

On that a number of matters arise. First of all, was there a systematic service? As to that, Mr. Lawson, for the defendants, admits that there was, and from the table that has been put in I should have thought there plainly was.

The second question is, if there was a systematic service, was it operated in such a manner that the benefits thereof were available to members of the public from time to time seeking to take advantage of it?

Finally, the third question is, did the defendants carry persons on such a scheduled journey or, if they did not, who did, and can they be held guilty of aiding and abetting?

I find it only necessary to consider what I call the second question: Was this a service operated in such a manner that the benefits thereof were available to members of the public from time to time seeking to take advantage of it? The magistrates stated that they found that all the persons who travelled on the occasions referred to in the informations were bona fide members of I.E.L.A. It is, I think, perfectly clear that I.E.L.A.—and nobody suggests to the contrary—was a perfectly genuine, reputable association. There was clearly evidence on which the magistrates could find that all those who travelled were in fact bona fide members of I.E.L.A. Can it then be said, nevertheless, that this service was available to members of the public? I find it very difficult to say that it was available to members of the public. Of course it was available to members of the public in the same sense as when any reputable organisation advertises tours and indicates as one of the inducements to join the association that if the member of the public pays his guinea, or two guineas, or whatever it may be, he could have the advantage of cheap tours. To that extent the service would be operated for the benefit of members of the public, namely, such members of

the public as took advantage of their offer and joined the organisation.

I think it is clear that in the provision in section 24 (2) one must read in some such words as "as such" after "public," so that it would read: "a systematic service operated in such a "manner that the benefits thereof are available to members of the "public *as such* from time to time seeking to take advantage of "it."

Here it was not available to members of the public as such, but only available to such members of the public as joined the organisation—in this case joined I.E.L.A.

One can imagine cases where it could be said that the whole thing was a sham, where, in effect, there was no proper organisation, but where the price of the tour was split up, that is to say, as to £49 fare and £1 fee to join some bogus organisation in an attempt to get round the section. But there is no suggestion of that here, and I cannot see that the magistrates could have held otherwise than they did, namely, that those who travelled were bona fide members of I.E.L.A.; and I would add, although they have not found it, that the only way in which it could be said that it was available to members of the public was that the net was cast pretty wide, and it was made clear that any member of the public who paid his guinea was eligible, and for that guinea he would have the advantage of this holiday.

Reprehensible as the conduct of these defendants may have been, I agree with the magistrates that no prima facie case was made out, and, accordingly, I would dismiss this appeal.

I would only add that in these circumstances I find it unnecessary to consider the further question as to who were the carriers in this case, and whether it can be said that the defendants, if they were not the carriers, were aiders and abettors.

DONOVAN J. I agree, and I add a few words only because of the importance of the case. It is easy to understand the annoyance felt by the prosecutor in this matter because the arrangements made for side-stepping the Act were, as my Lord has said, blatant, but they may nonetheless be effective.

The crucial question is whether the benefits of these services were available to members of the public. They were, says the prosecutor, because anyone can join this association, and the persons here concerned, namely, the passengers, joined simply to get their holiday and, in some cases, as a matter almost of coercion. That may well be true, but the fact that anyone can join an association, and does so not because he wants to further the association's objects but for purely selfish reasons of his own, does not prevent him from being a member once he has joined. The case here finds that the passengers in question travelled as bona fide members of the association.

The contrast which section 24 (2) of the Air Corporations Act, 1949, draws is, in my opinion, a contrast between members of the

1960

DIRECTOR OF PUBLIC PROSECUTIONS v. MILBANKE TOURS LTD.

Donovan J.

public as such and persons who can benefit from a service not available to members of the public as such. Here these services were available only to members of the association, and nonetheless so because, as members of the public, they could join the association with ease.

There are, as my Lord pointed out during the course of the argument, a number of perfectly reputable and genuine associations, other than I.E.L.A., who, no doubt, number among their members persons who have joined solely, or principally, for the benefit of the incidental advantages which membership confers—among them, perhaps, cheap travel—and the proposition for which the prosecutor here contends will look very different when it is applied to such associations. Ease of membership and the motive of joining are really, in my view, irrelevant considerations, and in a case like this I think the prosecutor must go the whole length of saying that the association or the membership—either, I think, will do—is a sham or, as has been said in some cases, a mere simulacrum or cloak. That is not being contended here and, indeed, it is expressly found that the passengers were bona fide members, which involves also that the association was a bona fide association.

In these circumstances I also agree that the appeal must be dismissed, and I, too, find it unnecessary to say who in law was the carrier or were the carriers here.

DAVIES J. I agree. In my opinion the magistrates were entitled on the evidence given by the prosecution to make their first finding that all the persons who travelled on the occasions referred to in the informations were bona fide members of I.E.L.A. Applying that to the Act, it seems to me to mean this, that, on the date of each of the 16 carriages, which were the subject of these 16 informations, the benefits of the service were not available to members of the public as such, and therefore the offences charged were not proved.

I also agree that it is unnecessary to consider, and I do not consider, whether the magistrates were right in the opinions they expressed as to whether or not the defendants were the actual carriers.

Appeal dismissed with costs.

Solicitors: *Director of Public Prosecutions; Forsyte, Kerman & Phillips.*

C. J. E.

[COURT OF APPEAL.]

* HARRY FERGUSON RESEARCH LTD. *v.* DAWKINS (VALUATION OFFICER).

[LVC/116/1958.]

SAME *v.* WARWICKSHIRE COUNTY COUNCIL.

[LVC/1283/1958.]

C. A.

1960
April 8, 11.

Hodson, Willmer and Devlin L.JJ.

Rating—Industrial hereditament—Research establishment—Hereditament owned by subsidiary of commercial concern—Used for construction and testing of prototypes—Whether industrial hereditament—Whether used for factory purposes—Primary purpose—Factory and Workshop Act, 1901 (1 *Edw.* 7, *c.* 22), *s.* 149 (1) (*a*) (i), *Sch. VI—Rating and Valuation* (*Apportionment*) *Act,* 1928 (18 *&* 19 *Geo.* 5, *c.* 44), *s.* 3 (1).

Premises were used by a company for the construction and testing of prototype vehicles and parts therefor with a view to the development of a new type of transport vehicle; the company was a subsidiary wholly subsidised by the parent company and nothing constructed on the premises was sold. The company contended that it was an industrial hereditament entitled to the benefit of industrial derating. The rating authority conceded that it was a factory within the definition in section 149 (1) (*a*) [1] of the Factory and Workshop Act, 1901, but contended that it was not used for factory purposes within the meaning of the proviso to section 3 (1) of the Rating and Valuation Act, 1928.[2]

The Lands Tribunal accepted the evidence of the secretary of the company "that the object of the work done is the construction of "prototypes and parts and the testing of them for the purposes of

[1] Factory and Workshop Act, 1901, s. 149 (1): "Subject to the provisions "of this section, the following expres-"sions have in this Act the meanings "hereby assigned to them; that is to "say: . . . The expression 'non-"'textile factory' means—(*a*) any "works, warehouses, furnaces, mills, "foundries, or places named in Part I "of the Sixth Schedule to this Act ". . . (*c*) any premises wherein or "within the close or curtilage or pre-"cincts of which any manual labour "is exercised by way of trade or for "purposes of gain in or incidental to "any of the following purposes, "namely—(i) the making of any "article or part of any article . . ."

Sch. VI, para. 13: "'Metal and "'india-rubber works,' that is to say, "any premises in which steam, water, "or other mechanical power is used for "moving machinery employed in the "manufacture of machinery, or in "the manufacture of any article of "metal not being machinery, or in "the manufacture of india-rubber or "gutta-percha, or of articles made "wholly or partially of india-rubber or "gutta-percha."

[2] Rating and Valuation (Apportionment) Act, 1928, s. 3: "(1) In "this Act the expression 'industrial "'hereditament' means a heredita-"ment . . . occupied and used . . . "subject as hereinafter provided, as a "factory: . . . Provided that the "expression 'industrial hereditament' "does not include a hereditament "occupied and used as a factory or "workshop if it is primarily occupied "and used for the following pur-"poses . . . (*f*) any other purposes, "whether or not similar to any of "the foregoing, which are not those of "a factory or workshop. (2) For the "purposes of this Act . . . the expres-"sions 'factory' and 'workshop' "have respectively the same meanings "as in the Factory and Workshop "Acts, 1901 to 1920. . . ."

C. A.

1960

HARRY FERGUSON RESEARCH LTD. v. DAWKINS.

"finding out whether an idea is good and practical, and the only "product of the premises is a prototype and parts therefor":—

Held, (1) that on the evidence the primary purpose was to find out whether an idea was good or practical, and by necessary inference the construction of machines was subsidiary and incidental to that main purpose: the premises were not therefore used for factory purposes and were not an industrial hereditament entitled to the benefit of industrial derating.

Grove v. *Lloyds British Testing Co. Ltd.* [1931] A.C. 450; 47 T.L.R. 308 (H.L.) applied.

(2) That in determining whether the premises fell within the proviso to section 3 (1) of the Act of 1928, it was of no materiality to consider whether or not the work done on the premises was done by way of trade or for purposes of gain.

APPEAL from the Lands Tribunal (Mr. H. P. Hobbs).

By a decision dated October 30, 1959, the Lands Tribunal, on a reference to arbitration in respect of two proposals concerning an assessment of a hereditament described as offices, research establishment and premises at Approach Road, Bagington, Warwickshire, owned by Harry Ferguson Research Ltd. (a subsidiary of Harry Ferguson Holdings Ltd.), held that the hereditament in question was an industrial hereditament.

The following statement of facts is taken from the judgment of Hodson L.J.: The hereditament was a factory building taken by the company in June, 1956, and used by them for the purpose of developing a revolutionary type of transport vehicle. The following facts were proved: "At the date of the first proposal the "hereditament consisted of a machine shop, main workshop, "engine test house, drawing office and other offices and ancillary "buildings together with a car park. By the date of the second "proposal, a new office block had been erected enabling the main "workshop area to be enlarged. The type of work done on the "hereditament consists of the construction and testing of proto-"type vehicles and of the making and testing of parts to go into "those vehicles. This work is in connection with the develop-"ment of a new type of transport vehicle, the ideas for which "originated in the main with the chairman of the company, and "embody patents which were acquired in 1950 . . . The vehicle "is still in the process of research and development and is not "yet available to the public." Further facts proved were: "(a) The work done by the company at this hereditament "embraced most elements of a vehicle but especially the suspen-"sion, transmission, braking and driving. (b) At the date of the "hearing four prototype vehicles had been constructed. These "were all in existence but had not yet reached finality. (c) The "prototype can be used for the purpose of practical demonstra-"tion. (d) For manufacture in bulk outside the hereditament "complete sets of blue prints would be supplied. (e) The "development of the ideas tested in the prototype and the "necessary work of design and drawing took place on the "hereditament."

The member of the Lands Tribunal made an inspection of the hereditament on December 15, 1959, when he saw the drawing office as well as the various workshops mentioned in the decision. The process involved that the inventor's conception had to be expressed in blue prints and the design had to be tested to see whether it worked in practice. It was to this end that prototypes were required. His Lordship found that in those operations something was made which gave the premises a factory flavour.

It was conceded that the premises were a factory within the definition in section 149 (1) of the Factory and Workshop Act, 1901, and the remaining question was whether they were precluded from being an industrial hereditament by the proviso to section 3 (1) of the Rating and Valuation (Apportionment) Act, 1928.

The Lands Tribunal found the following facts: "I [the "member of the tribunal] accept the evidence of Mr. J. R. "Peacock, the secretary of Harry Ferguson Research Ltd., Harry "Ferguson Holdings Ltd. and H. F. Holdings Ltd., that the "object of the work done here is the construction of prototypes "and parts and the testing of them for the purpose of finding out "whether an idea is good and practical, and the only product of "the premises is a prototype and parts therefor." The Lands Tribunal also accepted the evidence of the company's witness when he said: "that the prototype was one of the most important "articles in the business as it was relied upon for the purpose of "demonstrating principles. This is a relatively small works and "is not adapted for manufacture of cars for sale to the public; "as I have said the final product is the completed prototype or "perfected parts; manufacture in bulk cannot be undertaken in "the premises as they now are."

The Lands Tribunal came to the conclusion that the hereditament was an industrial hereditament and the rating authority appealed from that decision.

J. P. Widgery Q.C. and *Alan Orr* for the valuation officer and Warwick Rural District Council.

David Widdicombe for Harry Ferguson Research Ltd.

The following cases, in addition to those cited in the judgment, were referred to in argument: *Crowe (Valuation Officer)* v. *Lloyds British Testing Co. Ltd.*[3]; *Standen (Valuation Officer)* v. *British Electrical and Allied Industries Research Association*[4]; *Potteries Electric Traction Co. Ltd.* v. *Bailey*[5]; *Parsons and Marine Engineering Turbine Research Development Association* v. *Northumberland (South) Assessment Committee.*[6]

HODSON L.J. having stated the facts continued: The Lands Tribunal, having found the facts, answered the question posed

[3] [1960] 2 W.L.R. 227; [1960] 1 All E.R. 411, C.A.
[4] (1954) 47 R. & I.T. 387.
[5] [1931] A.C. 151; 47 T.L.R. 154, H.L.
[6] (1949) 43 R. & I.T. 27.

C. A.
1960
HARRY FERGUSON RESEARCH LTD. v. DAWKINS.
Hodson L.J.

by saying that he found that the hereditament was an industrial hereditament and not within the proviso. Immediately before the conclusion, as if it were the basis of that conclusion, he said this: "The receipts of the appellants [the company] arise almost "wholly from payments made by the parent company, and I think "that these payments are made not to finance research as such, "but to enable research to be carried out with the object of "placing either a new type of vehicle or new type components or "parts of vehicles on the market, and it seems to me that the "work done by the appellants is by way of trade or for the pur-"poses of gain, though these are indirect and nothing comes out "of the factory which is immediately saleable to the general "public."

With all respect to the Lands Tribunal, I do not think that the question of ultimate gain is relevant to the question under consideration, although, of course, it would be relevant had the question been, are the premises a factory within the definition contained in the subsection which I have read, section 149 (1) (*c*) of the Act of 1901? It has not been suggested that the activities of the company are altruistic: but the contention before the Lands Tribunal and in this court was that the primary purposes of the factory are not factory purposes but research purposes, the work being of an experimental nature involving the making and perfecting of a design, and it is contended that the purpose of the operation is to produce a design, the end product being a blue print which can be used elsewhere in practice.

Reliance was placed on a decision of the House of Lords in *Grove* v. *Lloyds British Testing Co. Ltd.*[1] In that case, there was a conflict of judicial opinion in the lower courts on the question of whether the hereditament was a factory; but the matter relevant to this case appears in the speech of Lord Dunedin. The factory in question, a cable testing station occupied by Lloyds British Testing Co. Ltd., was engaged in testing cables and anchors, and it was used for forging links to join up chains which had been severed in the process of testing. When the admission was made that the premises were a factory, the argument turned on the question whether or not the primary purpose was a factory purpose. Lord Dunedin said[2]: "Undoubtedly, there is in the "works the forging of links to join up the chains which have been "severed, and that forging gives to the premises the character "of a factory. The Attorney-General admits this in his case, "but then he says: 'True, it becomes a factory, but it is not an "'industrial hereditament because it is struck at by clause (*f*) "'of section 3 (1), namely, being primarily occupied and used for "'other purposes which are not those of a factory or workshop.' "Now, the question, put in this way, was, as I have said, not "dealt with in the courts below. In answer to the argument of "the Attorney-General, Mr. Comyns Carr presented an argument

[1] [1931] A.C. 450; 47 T.L.R. 308, H.L.
[2] [1931] A.C. 468.

"to this effect: 'This is,' he said, 'admittedly a factory, but this "'factory has only one purpose, to wit, testing. Therefore, it "'cannot be said that it is mainly used for a purpose which is "'not a factory purpose.' This argument is very ingenious, and "seems, at first sight, difficult to answer, but, on consideration, "I am satisfied that it is unsound. One must begin by remem-"bering that, in considering this argument, testing alone is, ex "hypothesi, not a factory purpose. The purpose of a particular "factory must be gathered from that which makes it a factory. "If it was made a factory because it fell within an actual descrip-"tion in Part I of the Schedule, you must gather the purpose "from that description. Here the hereditament is made a factory "because of the manufacture of articles of metal. Therefore, "so far as this hereditament is a factory, its purpose is the manu-"facture of metal. But the hereditament is, without doubt, "primarily occupied and used for the purposes of testing opera-"tions, and such operations are, ex hypothesi, not factory "purposes, consequently the case falls within the words of the "exception, and the hereditament, although a factory, is not an "industrial hereditament."

It is submitted by the valuation officer, upon whom is the burden of showing what the primary purpose is, that research, like testing, is not a factory purpose, and he emphasises that the word "research" does not appear in any of the definitions of a factory. If testing is a primary purpose it matters not that articles are made, such as prototypes. The work carried on prior to manufacture is no more a factory purpose than, say, the testing in the *Grove* case.[3] Making the article is an incidental part of the research process, and, as it were, the middle part of the operation.

Mr. Widdicombe, on behalf of the company, seeks to distinguish the *Grove* case[3] on the facts by emphasising that the Lands Tribunal has inspected the factory and has come to the conclusion that, whatever may be the position of the testing of anchor chains, where admittedly factory operations were carried out, the manufacture of the prototype is truly a primary purpose of this factory.

In my view of the evidence, which was accepted by the Lands Tribunal, which I have read, that is to say, the evidence of Mr. Peacock, the question has, I think, been answered in favour of the rating authority by the finding that the object of the work being done was the primary purpose, or, as it is put in the finding of fact, "the purpose is to find out whether an idea is good or "practical." This is entirely different from saying that the construction of the prototype is the primary object of the factory. In my judgment, the conclusion which the Lands Tribunal finally reached is inconsistent with the conclusion which was foreshadowed by an acceptance of the evidence of Mr. Peacock, and, accordingly, I would allow the appeal.

[3] [1931] A.C. 450.

C. A.
1960
HARRY FERGUSON RESEARCH LTD. v. DAWKINS.

WILLMER L.J. I agree that this appeal must be allowed. The sole question raised by the case is whether the tribunal came to a correct decision in law in finding that this hereditament is an industrial hereditament within section 3 (1) of the Rating and Valuation (Apportionment) Act, 1928. By that section an industrial hereditament is defined as a hereditament occupied and used as a factory, subject to the proviso that the expression does not include a hereditament occupied and used as a factory if it is primarily occupied and used for any of a number of defined purposes, including purposes which are not those of a factory. By subsection (2) the expression "factory" is given "the same "meaning as in the Factory and Workshop Acts, 1901 to 1920."

It is admitted by the rating authority that the company's hereditament is a factory within section 149 (1) (*a*) of the Act of 1901, in that it comes within the description contained in paragraph (13) of Part I of the Sixth Schedule, as consisting of premises in which mechanical power is used for moving machinery employed in the manufacture of machinery or articles of metal. Mr. Widgery did not admit, though he was not concerned to deny, that the hereditament might also be a factory within paragraph (*c*) of the same section, in that it comprises premises wherein manual labour is exercised by way of trade, or for purposes of gain in or incidental to the purpose of making any article or part of an article. He contended, however, that this is not a relevant question; for once it is admitted that the hereditament is a factory under paragraph (*a*) it matters not whether it is also a factory under paragraph (*c*). The only relevant question, he contended, is whether the hereditament, assuming it to be a factory under one paragraph or the other, falls within the proviso to section 3 (1) of the Act of 1928, so as to be excluded from the definition of industrial hereditament.

It appears that a good deal of the argument before the tribunal was directed to the question whether the work done in the company's hereditament was done by way of trade or for purposes of gain. I agree with Mr. Widgery's submission that this question, while directly relevant in considering whether the hereditament be a factory, is of no materiality in determining whether it falls within the proviso to section 3 (1) of the Act of 1928. The member of the tribunal, however, having found that the work done is by way of trade or for the purposes of gain, went on to find that for that reason the hereditament is an industrial hereditament. This appears to me to be a complete non sequitur, for the question whether a factory is an industrial hereditament within the Act of 1928 does not depend on whether the work done there is by way of trade or for the purposes of gain.

Let it be assumed that the company exercises labour by way of trade and for the purposes of gain (albeit indirectly) in the making of articles, such as the prototypes and parts thereof, in their hereditament. Let it be assumed that this supplies an additional reason for concluding that the hereditament is a factory

within the meaning of the Act of 1901. The question still remains whether, being a factory for the purposes of that Act, it is primarily occupied and used for purposes other than factory purposes. Following the dictum of Lord Dunedin in *Moon* v. *London County Council*,[4] I construe "primarily" as meaning "mainly." The question which then has to be answered is, what is the main purpose for which the hereditament is occupied or used? I venture to draw attention to the use by the draftsman of the word "purpose." This, to my mind, connotes the subjective intention of the person occupying or using the hereditament. The question has to be solved by considering the purposes of the occupiers. If their main purpose is to make articles, then, without question, that is a factory purpose, the proviso to section 3 (1) of the Act does not apply, and the hereditament is plainly an industrial hereditament. But if the main purpose is something other than the mere making of articles, different considerations apply.

On this very point there was fortunately direct evidence before the tribunal, namely, that of Mr. Peacock, which was specifically accepted. Accepting this evidence, the tribunal found "that the "object of the work done here is the construction of prototypes "and parts and the testing of them for the purpose of finding out "whether an idea is good and practical." I would venture to italicise the words "for the purpose of finding out whether an idea "is good and practical," because it seems to me that the finding of this purpose is really conclusive in favour of the rating authority. It is a finding which involves, as a necessary inference, that the manufacture of articles, i.e., the prototypes and parts, is subsidiary and incidental to the main or primary purpose. In my judgment, this finding renders the present case indistinguishable in principle from *Grove* v. *Lloyds British Testing Co.*[5] In that case the hereditament in question was admittedly a factory within the meaning of section 149 (1) of the Factory and Workshop Act, 1901, because, in the course of testing the chain cables, articles, namely, additional links, were manufactured. But this work of manufacturing links was found to be merely incidental to the main purpose for which the hereditament was occupied and used, namely, the testing of cables. Since testing of cables was not a factory purpose, it was held by the House of Lords that the hereditament fell within the proviso to section 3 (1) of the Act of 1928, so that it was not an industrial hereditament.

In my judgment, the same result should follow in the present case. As in *Grove's* case,[5] so here, the main or primary purpose for which the hereditament is occupied and used is experimental. Manufacture takes place only for the purpose of aiding, and as incidental to, the work of experiment, which is not a factory purpose. On the finding of the tribunal, which I have already quoted, as to the purpose of the work that is done, only one conclusion is,

[4] [1931] A.C. 151, 166; 47 T.L.R. 154, H.L.

[5] [1931] A.C. 450.

C. A.
1960
HARRY FERGUSON RESEARCH LTD. v. DAWKINS.

in my judgment, open, namely, that this hereditament is primarily occupied and used for a purpose which is not a factory purpose, and, accordingly, it is not an industrial hereditament.

It follows, therefore, that the appeal succeeds.

DEVLIN L.J. Is what is going on in this factory the making of prototypes or the trying out of a new idea? The obvious answer is both. But the Act requires that one of the two should be put first. Are prototypes being made for the purpose of testing the idea, or has the idea been conceived for the purpose of making prototypes? When, as here, all the facts are known, I think this is a question of law, because the answer to it depends on the meaning and intent of the Act. The matter hardly admits of elaboration. There is nothing to be done on a question of this sort except to answer it one way or the other according to the best of one's judgment, and I say that the prototypes are being made for the purpose of testing out the idea. If this be so, it is not disputed that the appeal should be allowed, and I, therefore, agree with the judgments which my Lords have delivered.

Appeal allowed with costs; hereditament to go back to Part I of the Valuation List at the agreed figures.
Leave to appeal to the House of Lords.

Solicitors: *Solicitor, Inland Revenue; R. A. Rotherham & Co.*

I. G. R. M.

[CHANCERY DIVISION.]

1960
April 4, 5.
Buckley J.

* *In re* KENTWOOD CONSTRUCTIONS LTD.

[No. 00338 of 1958.]

PRACTICE NOTE.

Company—Winding up—Appeal from liquidator—Rejection of proof by liquidator—Whether court should consider rights of claimant in light of evidence before liquidator—Whether matter to be considered de novo—Companies (Winding-Up) Rules, 1949 (*S.I.* 1949, *No.* 330 (*L.*4)), *r.* 108.

MOTION.

A petition to wind up a company, Kentwood Constructions Ltd., was presented on April 24, 1958. At about the same time the claimants, Stoy, Haywood & Co., chartered accountants, were employed to investigate the company's affairs. On June 12, 1958, at an informal meeting of creditors, it was resolved that the

company's business should be carried on thereafter under the supervision of Cyril Metliss, a partner in the claimants' firm. On February 2, 1959, the company was ordered to be wound up.

On March 24, 1959, the claimants lodged a proof of debt in the winding up for £525 for professional services rendered to the company during the year 1958 to 1959. The liquidator rejected the proof on August 10, 1959. On August 25, 1959, the claimants issued a summons asking that the decision of the liquidator might be reversed and the proof be ordered to be admitted in full. The claimants filed an affidavit in support of their claim exhibiting three files of documents in connection with the company's affairs. The liquidator filed an affidavit in answer and the claimants a further affidavit in reply. The registrar dismissed the claimants' appeal from the rejection of their proof, and they moved the court to discharge the registrar's order.

This case is reported only as to the functions of the court on an appeal from a rejection of a proof of debt by a liquidator.

Morris Finer for the claimants.

John Bolland for the liquidator, Henry Charles Treby.

No cases were cited in argument.

BUCKLEY J. considered issues in the motion not relevant to this report, and continued: Counsel for the claimants submitted that, in proceedings such as this, the court must decide what amount was proper to be paid on a quantum meruit basis in just the same way as it would in an ordinary action for remuneration based on a quantum meruit. Counsel admitted that the onus initially rested on him to establish that he had done work meriting the amount of remuneration which his clients claimed; but he contended that on the evidence he had discharged that onus, or that, at any rate, he had discharged it to a sufficient extent to shift the onus to the liquidator to show that the amount claimed was in fact excessive and unreasonable. He said that the case which he had come to meet was not that the claim was insufficiently substantiated by evidence but that the amount claimed was excessive, and he argued that the liquidator was not justified in rejecting a proof in whole merely on the ground that the claim was excessive, for, if the liquidator regarded the claim as excessive, he must by implication at least, be bound to admit the claim in part, although he might be entitled to reject the proof because he had not been provided with sufficient evidence to quantify that part. It was argued on behalf of the liquidator that the question before the registrar was simply whether the liquidator was right or wrong, on the evidence available to him at the date when he rejected the proof, in rejecting the proof.

I do not think that is really the function of the court on an appeal from a rejection of a proof. When application is made

1960

KENTWOOD CONSTRUCTIONS LTD., *In re.*

Buckley J.

to the court to reverse a decision of a liquidator in rejecting a proof, evidence is filed which is very commonly much fuller than the evidence available to the liquidator at the time when he decides to reject the proof; and the court is bound to decide the rights of the claimant in the light of the evidence which is before the court, and not merely to express a view as to whether the liquidator was right or wrong in rejecting the proof when he rejected it. It is, perhaps, significant that the Companies (Winding-Up) Rules, 1949, provide by rule 108 that if a creditor or contributory is dissatisfied with the decision of the liquidator in respect of a proof, the court may, on the application of the creditor or contributory, reverse or vary the decision. It is not merely the function of the court to say that a decision is right or wrong; it may vary it in any way it thinks necessary in the light of the evidence before the court. The court must approach the question de novo and determine to what extent the claimants ought to be allowed to rank as a proving creditor.

[His Lordship then reviewed the evidence before the court and held that the claimants were entitled to be admitted as creditors of the company for £525, the full amount claimed.]

Order that the order of the registrar be discharged; that the decision of the liquidator be reversed, and that the proof be admitted in the winding-up for £525. Claimants' costs to be paid out of the assets of the company.

Solicitors: *D. J. Freeman & Fraser; J. E. Baring & Co.*

V. A. M.

[QUEEN'S BENCH DIVISION.]

1960 *May* 27.

Lord Parker C.J., Byrne and Donovan JJ.

* *In re* SCREMBY CORN RENTS. *Ex parte* CHURCH COMMISSIONERS FOR ENGLAND.

Justices—Case stated—Jurisdiction to state case—Quarter sessions—Order varying corn rents under Inclosure Act—No obligation to hear parties—Whether judicial decision—Whether power to state consultative case—Inclosure Act, 1801 (*Scremby*) (41 *Geo.* 3, *c. cxxiv*).

Administrative or judicial act—Quarter sessions—Order varying corn rents under Inclosure Act—No obligation to hear parties—Whether judicial decision—Whether power to state case—Inclosure Act, 1801 (*Scremby*) (41 *Geo.* 3, *c. cxxiv*).

Tithe—Corn rents—Rents payable based on "average price" of wheat—Deficiency payments—No relation between amount of payment and

value of wheat sold—Whether "price" includes deficiency payments —Inclosure Act, 1801 (*Scremby*) (41 *Geo.* 3, *c. cxxiv*)—*Cereals* (*Deficiency Payments*) *Order,* 1955 (*S.I.* 1955, *No.* 962), *regs.* 3, 4.

By an Inclosure Act of 1801, and an award made under it, certain corn rents were vested in the rector of Scremby and his successors, now, by virtue of the Tithe Act, 1925, and the Church Commissioners Measure, 1947, the Church Commissioners. The Act provided that the amount of the rents, inter alia, should be determined by reference to the "average price of good marketable "wheat in the County of Lincoln during the term of 21 years "ending at Michaelmas, 1799," which price was ascertained by the award to be 5 7/10ths shillings per Winchester bushel. The Act further provided that the amount of the rents payable should be varied at intervals of 21 years as declared by an order of quarter sessions if from the report of three arbitrators it appeared that the "average price" of a Winchester bushel of good marketable wheat in the County of Lincoln for the 21 years then last past was more or less by threepence than the average price set out in the award.

The corn rents payable were last varied in July, 1896, when the average price was found to be 4s. 3½d. On March 5, 1959, on the application of the Church Commissioners, quarter sessions appointed three arbitrators to inquire into and ascertain the average price of a Winchester bushel of good marketable wheat for the last 21 years. The arbitrators found that such average price was 10s. 1d., and that, in addition to the sum received from the purchaser, the grower received deficiency payments under the Cereals (Deficiency of Payments) Order, 1955,[1] which for the 21 years ending March 5, 1959, averaged 11d. a Winchester bushel, and they awarded the average price for the 21 years to be 11s. Quarter sessions were of the opinion that the deficiency payments should not be included in the average price, and ordered that the rents be increased in the proportion that 10s. 1d. bears to 5 7/10ths shillings. On a case stated by quarter sessions in which the question for the opinion of the court was whether the deficiency payments ought to have been included as part of the average price and which set out alternative orders:—

Held, (1) that, although the matter might appear to be administrative in that there was no obligation to hear any parties, the fact that Parliament had given the decision to a court which had power to consult the judges, showed that quarter sessions in making the declaration and order were acting judicially and, therefore, had power to state a case.

Dictum of Lord Cairns L.C. in *Overseers of the Poor of Walsall* v. *L. & N. W. Railway Co.* (1878) L.R. 4 App.Cas. 30, 39, 40, H.L. applied.

(2) That the ordinary and natural meaning of the word "price"

[1] Cereals (Deficiency Payments) Order, 1955, reg. 3: "In respect of "each year and in respect of . . . "millable wheat . . . the Ministers "shall—(*a*) in the light of their "conclusions from a review held "under section 2 of the Agriculture "Act, 1947, and with the approval of "the Treasury, specify a standard "price; and (*b*) determine, in such "manner as appears to them proper "in the respective circumstances, an "average realised price. . . ."

Reg. 4 (1): "If in the case of "any year the average realised price "of millable wheat . . . is less than "the standard price thereof . . . the "appropriate Minister may, if he "thinks fit, and subject to such conditions as he may from time to time "with the approval of the Treasury "prescribe, make a payment of an "amount equal to the difference in "respect of every hundredweight of "millable wheat . . . which is shown "to his satisfaction to have been dispatched or delivered during that "year to, or in accordance with the "instructions of, a purchaser thereof."

1960

SCREMBY CORN RENTS, *In re.*

was the consideration which the buyer agreed to give and the seller to accept and that, on the construction of the Act, the scheme of which was not that the land should be revalued, but that the rents should be paid whether or not the owners grew any wheat, there was no reason to extend the meaning of the word to include the deficiency payments which bore no relation to the value of the wheat. The decision of quarter sessions, accordingly, was correct.

Per Donovan J. The ordinary and natural meaning of the word "price" does not include a subsidy which a third person may or may not decide to pay after the transaction is concluded.

CASE STATED by Lincoln, Parts of Lindsey, Quarter Sessions.

On hearing, on July 2 and September 15, 1959, an application by the appellants, the Church Commissioners for England, for an order and declaration that the Scremby Corn Rents, yearly corn rents payable to the Church Commissioners by virtue of an award made pursuant to Act of Parliament, be increased in the proportion that 11s. bears to 5 7/10ths shillings, quarter sessions refused to make the order and declaration, but ordered and declared that the Scremby Corn Rents payable be increased in the proportion that 10s. 1d. bears to 5 7/10ths shillings, subject to the opinion of the Queen's Bench Division of the High Court of Justice on the following case.

By an Act of Parliament passed in 1801 (41 Geo. 3, c. CXXIV), entitled "An Act for dividing, allotting and inclosing the open "common fields, meadows, pastures and other commonable lands "and waste grounds within the parish of Scremby in the County "of Lincoln," and by virtue of the award made under that Act, the Scremby corn rents were vested in the rector of Scremby and his successors for the time being, and by virtue of the provisions of the Tithe Act, 1925, and the Church Commissioners Measure, 1947, were now vested in the Church Commissioners.

It was provided by the Act of 1801 that the amount of the Scremby Corn Rents should, inter alia, be ascertained by reference to the average price of good marketable wheat in the County of Lincoln during the term of 21 years ending at Michaelmas, 1799, and by the award such price was so ascertained to be 5 7/10ths shillings per Winchester bushel. It was further provided by the Act that the amount of Scremby corn rent payable by virtue of such award should be varied at intervals of 21 years as declared by an order of the court at the appropriate general quarter sessions of the peace if from the report of three arbitrators or referees appointed by the court pursuant to the Act, it appeared that the average price of a Winchester bushel of good marketable wheat in the County of Lincoln for the 21 years then last past was more or less by threepence than the average price thereof set out in the award. The Scremby corn rents payable by virtue of the award were previously last varied by an order and declaration of quarter sessions made on July 3, 1896, when the average price of a Winchester bushel of good marketable wheat in the County of Lincoln for the 21 years then last past was found to be 4s. 3½d.

On an application, made on March 5, 1959, to quarter sessions, and on proof that notice had duly been given as required by the Act in the "London Gazette" and in a newspaper usually circulated in the County of Lincoln of the intention to make the application, an order was made appointing three arbitrators or referees to inquire into and ascertain in accordance with the provision of the Act the average price of a Winchester bushel of good marketable wheat in the County of Lincoln for the 21 years then last past. In their report [attached to and forming part of the case] the arbitrators found: "1. The average price of a Win-"chester bushel of good marketable wheat in the County of "Lincoln during the 21 years ended on March 5, 1959 (excluding "payments referred to in the next succeeding paragraph) to be "the sum of 10s. 1d. 2. That in addition to the sum that the "grower receives from the purchaser, the grower receives "deficiency payments under the Cereals Deficiency Payments "Scheme, and that in the 21 years ended March 5, 1959, these "deficiency payments averaged 11d. per Winchester bushel," and they awarded and determined "that the average price of a "Winchester bushel of good marketable wheat in the County of "Lincoln for the 21 years now last past . . . to be the sum of 11s."

The price and the sums of money referred to in paragraphs 1 and 2 of that report were correctly ascertained.

It was contended on behalf of the Church Commissioners that the report of the arbitrators was binding on the court, and the court was bound to accept their purported award and determination, and that, on the true construction of the Act of 1801, the payments made to the growers of wheat under or by virtue of the Cereals (Deficiency Payments) Order were properly included by the arbitrators when ascertaining the average price of a Winchester bushel of good marketable wheat in the County of Lincoln during the 21 years ending on March 5, 1959.

Quarter sessions were of the opinion that they were bound to examine the report of the arbitrators and to decide any questions of law which arose on its face; that the deficiency payments did not form part of the price in that (1) they were made at the discretion of the Minister; (2) they bore no direct relation to the price of wheat in the County of Lincoln; (3) they were a subsidy or bonus; (4) by virtue of regulation 5 (4) of the order the Minister could withhold deficiency payments, and (5) the word "price" in the Act referred to the price at which wheat was in fact sold in the County of Lincoln during the 21 year period, namely, the average realised price and not the standard price fixed by the Minister. They therefore ordered and declared that the Scremby corn rents be increased in the proportion that 10s. 1d. bears to 5 7/10ths shillings.

The question for the opinion of the court was whether that order and declaration of sessions was right, or whether the 11d. received by the grower of good marketable wheat under the

1960

SCREMBY CORN RENTS, *In re.*

Cereals Deficiency Payments Scheme ought to have been included as part of the average price of a Winchester bushel of good marketable wheat in the County of Lincoln for the 21 years ending on March 5, 1959. If the court should be of the opinion that the order and declaration of quarter sessions was right, then it was to be affirmed; if the orders were wrong, and the 11d. ought to have been taken into account, then the order and declaration was to be varied and the Scremby corn rents payable to the Church Commissioners by virtue of the award were to be increased in the proportion that 11s. bears to 5 7/10ths shillings.

Edwin Jowitt for the Church Commissioners.

The following cases were referred to in argument: *In re Oliver*[2]; *Johnston, Fear & Kingham and The Offset Printing Co. Pty. Ltd.* v. *The Commonwealth*[3]; *Overseers of the Poor of Walsall* v. *L. & N. W. Railway Co.*[4]; *Rex* v. *Southampton Licensing Justices, Ex parte Cardy.*[5]

LORD PARKER C.J. This is an appeal by way of case stated by the General Quarter Sessions of the Peace for the County of Lincoln, Parts of Lindsey, who determined the corn rents to be paid for the future in the parish of Scremby. The appeal is by the Church Commissioners and as, by the very nature of the proceedings, there are no respondents, I have had considerable doubt whether quarter sessions had power under the Act of 1801 to state what is, in effect, a consultative case for the opinion of the court. I say that because, on one view of the matter, quarter sessions were acting in an administrative capacity. They did not have to hear anybody, and the matter was largely a matter of discretion. Although under the old common law, which was dealt with by Lord Cairns L.C. in his speech in *Walsall Overseers of the Poor* v. *London & North Western Railway Co.*,[1] quarter sessions always had the power to state a case, I wondered whether, acting in this special jurisdiction, they were really acting judicially at all. However, I have come to the conclusion on the whole that they were, and that Parliament, by giving the duty to the court of quarter sessions, showed clearly that they were giving the decision not to an administrative tribunal but to a court, and a court which then, as was well known, had powers of consulting the judges. Accordingly, I assume for the purposes of this judgment that quarter sessions had power to state the case which they have done.

The matter concerns corn rents payable under an Act of 1801, passed in the 41st year of the reign of King George III, and entitled: "An act for dividing, allotting, and enclosing the open "common fields, meadows, pastures, and other commonable

[2] (1910) 55 S.J. 12.
[3] (1943) 67 C.L.R. 314.
[4] (1878) L.R. 4 App.Cas. 30.
[5] [1906] 1 K.B. 446; 22 T.L.R. 236, D.C.
[1] (1878) L.R. 4 App.Cas. 30, 39, 40.

"lands and waste grounds, within the parish of Scremby, in the "County of Lincoln." Under that Act, commissioners were appointed for a number of different duties as described in the title and, amongst other things, it provided for the abolition of tithes from the lands in the parish. It was enacted: "That the said "commissioners shall, and they are hereby required, . . . to value "all the residue of the said lands and grounds hereby directed to "be divided and enclosed, and also all the old enclosed lands and "other premises aforesaid within the said parish, which at the "time of passing this Act are liable to the payment of tithes." That was the first step the commissioners were to take. Then they were "From the London Gazette, or by such other ways "and means as they shall think proper, inquire and ascertain "what has been the average price of good marketable wheat in "the County of Lincoln during the term of 21 years, ending at "Michaelmas, which was in the year of our Lord One thousand "seven hundred and ninety-nine." That was the second thing they had to do. Thirdly, they "shall in and by their award or "instrument hereinafter directed to be made, ascertain, and "distinctly set forth what quantity of such wheat shall in their "judgment (according to such average price as aforesaid) be equal "in value to one-fifth part of the arable land, one-seventh part "of the meadow land, and one-ninth part of the pasture land "within the said parish of Scremby." Then, when all that had been done as provided by the Act, "there shall be payable to the "said rector and his successors, for the time being, out of the "lands and estates of the several proprietors in the said parish "of Scremby, such sum and sums of money as shall be equal to "the value of the quantity of wheat so to be ascertained by the "said commissioners, and apportioned upon the respective estates "of each proprietor, according to the average price aforesaid."

By their award the commissioners ascertained that the average price of good marketable wheat during the 21 years ending Michaelmas, 1799, was 5 7/10ths. shillings per Winchester bushel The Act then provided: "It shall be lawful for the said rector or "his successors for the time being, or the owner or proprietor, or "owners or proprietors of the lands and hereditaments, out of "which the said rents are to issue, or the greatest part in value, "by writing under their respective hands, to apply at the first "quarter sessions of the peace to be held in and for the Parts of "Lindsey in the said County of Lincoln." There had to be notice of the intended application in the "London Gazette," and the application was to take the form of having "three persons "named or appointed by the justices then and there assembled, "to be arbitrators or referees for inquiring into and ascertaining "by, or from or by means of the London Gazette, or by such "other ways or means as they shall think equitable or proper, the "average price of a Winchester bushel of good marketable wheat "within the said County of Lincoln, for the 21 years then last

1960

SCREMBY CORN RENTS, *In re.*

Lord Parker C.J.

"passed, which said three arbitrators or referees, or the major "part of them, shall, by their report to be made and delivered to "the Court of Quarter Sessions to be held in and for the said "Parts of Lindsey . . . and in case it shall by such report appear "that such average price of a bushel of such wheat is more or "less than the average price thereof set forth in the said award by "the value of threepence, the said respective yearly tithe rents "shall be increased or diminished, as shall be declared by the "order of the said court."

The Church Commissioners are the successors of the rector referred to in the Act. On March 5, 1959, they duly applied to quarter sessions, after the necessary advertisement, to have arbitrators appointed, and three gentlemen were so appointed. In due course they made a report to quarter sessions, and the report, so far as it is material, is in these terms: "We find: 1. The "average price of a Winchester bushel of good marketable wheat "in the County of Lincoln during the 21 years ended on the 5th "day of March, 1959 (excluding the payments referred to in the "next succeeding paragraph) to be the sum of 10s. 1d. 2. That "in addition to the sum that the grower receives from the pur-"chaser the grower receives deficiency payments under the "Cereals Deficiency Payments Scheme, and that in the 21 years "ended the 5th day of March, 1959, these deficiency payments "averaged 11d. per Winchester bushel." They end up: "We "award and determine that the average price of a Winchester "bushel of good marketable wheat in the County of Lincoln for "the 21 years now last past the date of our appointment, namely, "Thursday the 5th day of March, 1959, to be the sum of 11s.," 11s. being the 10s. 1d. which they had found to be the average price between buyer and seller and the 11d. the average of the deficiency payments.

In due course quarter sessions considered that report, both on July 2, 1959, and on September 15, 1959. On the latter date they decided and declared "that the Scremby Corn Rents be increased "in the proportion that 10s. 1d. bears to 5 7/10ths shillings." In their case stated the question for the opinion of the High Court was whether the order of declaration of sessions was right. In other words, quarter sessions took the view that the price which fell to be considered as the average price was the price between buyer and seller, which the arbitrators had found to be 10s. 1d., and that it did not include the average deficiency payment of 11d. The case stated for the opinion of this court is whether, in effect, they were right in taking the 10s. 1d. or whether they should have taken the 11s.

A point was raised before quarter sessions and, indeed, is referred to in the case, whether quarter sessions were not bound to accept the award of the arbitrators, which was for 11s.; bound in the sense that, the arbitrators having reported, all that the court had to do was in effect to give a rubber stamp. That point

has been abandoned and, I think, rightly abandoned, in this court, because it is clear from the passages in the Act which I have read, that once the report of the arbitrators is received, it is for the court to consider the matter and make their own order and that, in doing so, they have a discretion whether they should award the full amount of the increase or not.

The main question, whether they were right in taking 10s. 1d. or ought to have taken 11s. is very much more difficult, and I confess that my mind has wavered from time to time on the matter. Quite shortly, the question is whether "price" referred to in the Act of 1801 in this connection means the price obtained by the grower from the purchaser, or whether it includes all that he obtains in relation to a Winchester bushel not merely from the purchaser but from the Minister under the Cereals Deficiency Payments Scheme.

Before considering that, it is necessary to refresh one's memory as to what the scheme is. Section 1 (1) of the Agriculture Act, 1947, provides: "The following provisions of this Part "of this Act shall have effect for the purpose of promoting and "maintaining, by the provision of guaranteed prices and assured "markets for the produce mentioned in the First Schedule to this "Act, a stable and efficient agricultural industry." By section 4 (1) it is provided, so far as it is relevant, that the Minister may by order provide: "(*b*) for bringing into operation . . . such "provisions as appear to him expedient for providing guaranteed "prices or assured markets." Pursuant to those powers the Cereals (Deficiency Payments) Order, 1955, was passed. That Order deals, amongst other commodities, with millable wheat, and it is apparently conceded that millable wheat as defined in that Order is equivalent to good marketable wheat as the term appears in the Act of 1801. Regulation 3 provides: "In respect of each "year and in respect of each of the following cereals, that is to "say, millable wheat, millable rye, oats and barley, the Ministers "shall (*a*) in the light of their conclusions from a review held under "section 2 of the Agriculture Act, 1947, and with the approval "of the Treasury, specify a standard price; and (*b*) determine, in "such manner as appears to them proper in the respective "circumstances, an average realised price." By regulation 4 (1) it is provided: "If in the case of any year the average realised "price of millable wheat or, as the case may be, millable rye is less "than the standard price thereof, the appropriate Minister may, "if he thinks fit, and subject to such conditions as he may from "time to time with the approval of the Treasury prescribe, make "a payment of an amount equal to the difference in respect of "every hundredweight of millable wheat or, as the case may be, "millable rye which is shown to his satisfaction to have been "dispatched or delivered during that year to, or in accordance "with the instructions of, a purchaser thereof."

It is to be observed, therefore, that under this scheme the

1960

SCREMBY CORN RENTS, *In re.*

Lord Parker C.J.

Minister does not guarantee a standard price, but that he provides that a farmer, whatever price he sells for in the market, will get in addition the difference between the average realised price as determined and the standard price. It really works out in this way, to take hypothetical figures: If the standard price is 12s. and the average realised price is 10s., then the farmer will get from the Minister 2s. If, therefore, he has been lucky enough to get 11s. in the market, which is 1s. over the average realised price of 10s., he will get his 2s. and, therefore, 13s. in all. On the other hand, if he has failed, perhaps because his wheat is not of high quality, to get more than 9s. in the market, which is less than the average realised price, he will still get 2s., and in that event will get a total of 11s.

That is the scheme, and the question is whether the payments that farmers received under it are to be included in the "price "of a Winchester bushel of good marketable wheat" in the Act of 1801. Quarter sessions held that "price" did not include those sums, and they set out a number of their reasons. I do not propose to deal with those reasons seriatim, but my approach to the matter is to consider, first of all, the ordinary meaning of the word "price" to be found in the Act of 1801. Prima facie, in looking at that Act, passed in 1801, at a time when there were no such things as deficiency payments, one would think that the word "price" there had its ordinary meaning of the price obtained as between buyer and seller.

But the matter does not end there, because, as has been pointed out, a possible meaning, and certainly a more possible meaning in 1801 than today, is that "price" means "value" or "worth," and it is said that, read in that sense, "price" in the Act really means the value which the farmer gets from one source or another for each Winchester bushel of wheat, namely, so much from the purchaser and so much under the deficiency scheme. It is also to be observed that in the first instance the corn rents are fixed, in effect, by what the land in question will produce. It is to be equal to the value of one-fifth of the arable land, one-seventh of the meadow land and one-ninth of the pasture land, and, of course, the value there will depend upon what those lands can produce. But the scheme of the Act was a scheme for the future. It is not a scheme under which the land is to be revalued from time to time, but it is a scheme under which, whatever the value of the land becomes in the future, whatever it produces, whether it be still corn or still wheat or potatoes or tulips, or anything else, the rents once fixed in 1801 are to be paid subject to review every 21 years.

In those circumstances, it seems to me that there is no justification for departing from the ordinary meaning of the word "price." Price was to be the yardstick for the future, whatever the value of the land and however it was farmed. The yardstick was the price, which undoubtedly at that time could only mean the price between buyer and seller.

One further point influences me, and that is that on the figures I gave earlier it is quite clear that the deficiency payment is in no sense an increment to the value of the wheat because it bears no relation thereto. In the illustration I gave, the 2s. is a common increment, whether the wheat be wheat which is sold at 11s., or whether it be wheat at 9s. Looked at in that way, it can well be said that the 2s., the deficiency payment, is much more in the nature of an encouragement to a farmer to grow wheat than an increment, in any sense, to the value of the wheat he has sold.

For these reasons I have come to the conclusion, although not without considerable hesitation, that quarter sessions was right, and that this appeal ought to be dismissed.

BYRNE J. I have shared the hesitation to which the Lord Chief Justice has referred, but I have come to the same conclusion and for the same reasons. In those circumstances, I do not desire to add anything.

DONOVAN J. I also confess that my mind has fluctuated in the course of this case. I was impressed by the phraseology of the Agriculture Act, 1947, which, in effect, does describe the totality of what the farmer is to get as "the guaranteed price." It may be, of course, that that is no more than convenient nomenclature. Again, it is not conclusive against the appellants that agricultural subsidies were unknown in 1801, because the language of a statute may be apt to apply not merely to the present but to future circumstances as well, however different they may be. But it is clear that the effect of the Act of 1801 may be, as the Lord Chief Justice has said, to require a landowner to pay rent to the rector even though the landowner may grow no wheat at all. In these circumstances, there seems to me to be good reason for not extending the meaning of the word "price" beyond its ordinary natural meaning, unless the language of the relevant enactments clearly requires that to be done. The ordinary and natural meaning of the word "price" is the consideration which the buyer agrees to give and the seller agrees to accept for his wheat. The ordinary and natural meaning would not include a subsidy which a third person may or may not in his discretion decide to pay after the transaction is concluded. The existence of this discretion, I think, is a legitimate consideration to take into account in determining the meaning of the word "price" in the Act of 1801, notwithstanding that the calculation is looking at what has actually happened in the past. It is still a factor bearing on the true construction of the word, because the question always is: When Parliament used the word "price" in 1801, did it really mean to cover this kind of discretionary payment by a third party? I do not think that the language of the Act of 1801 and the Act of 1947 requires such an extended construction to be put on the word "price," and, in the end, I have come to the same conclusion as that expressed by the

1960

SCREMBY CORN RENTS, *In re.*

other members of the court, and also for the reasons contained in the judgment of the Lord Chief Justice. I therefore agree that the appeal must be dismissed.

Appeal dismissed.

Solicitors: *Taylor, Jelf & Co. for Danby, Eptons & Griffith, Lincoln.*

J. F. L.

1960
May 12.

* PRACTICE DIRECTION (JURY ACTIONS).

[QUEEN'S BENCH DIVISION.]
[PROBATE, ETC., DIVISION.]

Practice—Jury, civil action in—Opening of pleadings by junior counsel —Discontinuance of practice.

Representations have been made to us by the Bar Council that the practice whereby in jury actions the junior counsel for the plaintiff or the petitioner opens the pleadings serves no useful purpose and might with advantage be discontinued. After consulting the judges of our respective divisions, we are in agreement with this view and accordingly direct that henceforth the practice should be discontinued.

PARKER OF WADDINGTON C.J.
MERRIMAN P.

May 12, 1960.

[COURT OF CRIMINAL APPEAL.]

C. C. A.

1960
May 16.

Byrne, Sachs and Winn JJ.

* REGINA *v.* NICHOLLS.

Crime—Indictment—Duplicity—Two separate offences charged in one count—Larceny Act, 1916 (6 *&* 7 *Geo.* 5, *c.* 50), *ss.* 26 (1), 27 (2).

The appellant was charged in a single count of an indictment with warehousebreaking contrary to sections 26 (1) and 27 (2) of the Larceny Act, 1916,[1] the particulars being that he broke and

[1] Larceny Act, 1916, s. 26: "Every person who—(1) breaks and "enters any . . . warehouse . . . and "commits any felony therein . . . shall "be guilty of felony and on convic- "tion thereof liable to penal servitude "for any term not exceeding fourteen "years."

S. 27: "Every person who, with "intent to commit any felony there- "in,— . . . (2) breaks and enters "any . . . warehouse . . . shall be "guilty of felony and on conviction "thereof liable to penal servitude for "any term not exceeding seven years."

entered a warehouse to steal therein and stole therein 22 overcoats. The jury found him guilty of warehousebreaking. On appeal:—

Held, that sections 26 (1) and 27 (2) contained two separate offences and, accordingly, the indictment was bad for duplicity.

APPEAL against conviction.

The appellant, William Nicholls, was convicted at the Central Criminal Court on an indictment charging him with "warehouse-"breaking contrary to sections 26 (1) and 27 (2) of the Larceny "Act, 1916." He was sentenced to three years' imprisonment. He appealed on the ground that the indictment was bad for duplicity.

J. E. Pullinger for the appellant.
H. J. Leonard for the Crown.

The following authorities were cited in argument: *Rex* v. *Surrey Justices, Ex parte Witherick* [2]; *Rex* v. *Wilmot* [3]; *Rex* v. *Disney* [4]; *Rex* v. *Molloy* [5]; *The People* v. *Barry Blogh*.[6]

BYRNE J. The appellant was at the Central Criminal Court charged upon an indictment which was framed in this way: Statement of offence: warehousebreaking contrary to sections 26 (1) and 27 (2) of the Larceny Act, 1916, and the particulars of offence alleged that on January 11, 1960, he broke and entered a warehouse at Bridport Road, Edmonton, to steal therein and stole therein 22 overcoats, the property of the Dunlop Clothing & Waterproof Co. Ltd. The verdict of the jury was taken in this form: "Members of the jury, are you agreed upon your verdict? (The "foreman of the jury): We are. (The clerk of the court): Do "you find the prisoner, William Nicholls, guilty or not guilty of "warehousebreaking on this indictment? (The foreman of the "jury): Guilty." The maximum penalty for breaking and entering and stealing is 14 years; the maximum penalty for breaking and entering with intent to steal is seven years, and thus it would obviously be of great importance to know what the verdict of the jury really meant. It is plain on looking at the record that no one would know whether the jury had in fact convicted the appellant of an offence which earned a maximum punishment of 14 years or an offence which earned a maximum punishment of seven years. Sections 26 (1) and 27 (2) are separate and distinct sections of the Larceny Act, 1916. If the indictment had contained two separate counts, the matter would have been plain, and the verdict returned would have indicated quite plainly what the finding of the jury was, but as it is, these two sections of the statute have been linked together,

[2] [1932] 1 K.B. 450; 48 T.L.R. 67, D.C.
[3] (1933) 49 T.L.R. 427; 24 Cr.App.R. 63, C.C.A.
[4] [1933] 2 K.B. 138; 49 T.L.R. 284, C.C.A.
[5] [1921] 2 K.B. 364; 37 T.L.R. 611, C.C.A.
[6] [1958] I.R. 91.

C. C. A.
1960
REG.
v.
NICHOLLS.

and the appellant was in fact in one count of this indictment charged with two separate offences. In the opinion of this court the indictment was bad for duplicity. The appeal must be allowed and the conviction quashed.

Appeal allowed.

Solicitors: *Registrar, Court of Criminal Appeal; Solicitor, Metropolitan Police.*

J. D. P.

[GLOUCESTER ASSIZES.]

1959
Dec. 21, 22, 23.

Mr. Commissioner Gallop Q.C.

* COLLINS *v.* COLLINS.

[1959 D. No. 36.]

Husband and Wife—Practice—Service of notice of charge on named woman—Allegation by wife of improper association by husband with named woman—No application to intervene—Costs.

Where in a divorce suit a wife makes a charge of an improper association between the husband and a named woman, and notice of that charge is served on the named woman, she must, if she desires to intervene in the suit, obtain leave to do so. If she omits to obtain such leave, costs may not be awarded to her, even though the charge involving her is rejected.

DEFENDED SUIT by the wife for divorce on the ground of cruelty.

The wife's allegations of cruelty included one of an improper association between the husband and Mrs. Irene Davies. The husband, by his answer, denied the charge of cruelty, and denied any association of any kind between himself and Mrs. Davies. A copy of the petition and notice of the proceedings, together with a memorandum of appearance was served on Mrs. Davies. This memorandum of appearance was completed by Mrs. Davies's solicitors, and stated that she intended to deny the charge made against her. Although she had not obtained leave to intervene in the suit, this memorandum of appearance was accepted as effective at the district registry in which the cause was proceeding. Thereafter, she was treated as an intervener. She filed an answer denying that she had associated with the husband in any way, and prayed to be dismissed from the suit with costs. The registrar granted his certificate under rule 30 of the Matrimonial Causes Rules, 1957, and the cause proceeded to hearing, Mrs. Davies being described in the cause list and during the hearing as an intervener. The charge of cruelty was proved and the wife was granted a decree

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[Reported by D. R. ELLISON, Esq., Barrister-at-Law.]

nisi, but the charge against Mrs. Davies was dismissed. Application was then made on behalf of Mrs. Davies for her costs, but no application was made for her position to be regularised by her being granted leave to intervene. The case is reported only on the questions whether she was to be regarded as a party to the suit, and on costs.

C. G. Heron for the wife.
G. Green for the husband and Mrs. Davies.

MR. COMMISSIONER GALLOP Q.C. I deal, as counsel requested me to do, with the matter of Mrs. Irene Davies's costs. She ought not to be involved in any costs. The wife, a woman with no responsibilities, earns about £8 a week and I should be disposed to order her to pay all Mrs. Davies's costs, but the matter is difficult. I am told that the solicitors in this suit have been uncertain how to apply the decision in *Green* v. *Green and Partridge*.[1] I have been told the same thing at other courts. That was a case in which Karminski J. had to consider charges against a husband of improper, but not adulterous, association with a number of women who were named by the wife. Those charges were relied upon to revive condoned adultery. Karminski J. said[2]: "First she relies "on an association with a number of other women; they are five "in succession starting in 1948 or thereabouts. I do not propose "to give the names of these women in the course of my judgment "and for this reason: In this case (as, I think, unfortunately), no "effort has been made to find out and to serve these women, who "might, if served with notice of these charges, have applied for "and have obtained leave to intervene. It is right to say that one "or two of them seem to have disappeared, but I deplore the "introduction of people in charges of this kind (admittedly short "of adultery, but discreditable) without some effort to find them. "I want to make it as clear as I can that, if I thought that the "justice of the case had required it, I should have adjourned this "matter for the service on the women who have been named in "the answer, with possibly certain consequences as to costs "as against the person alleging, but not serving these charges. "For that reason I propose to refer to these women, when necessary, by their Christian names."

That reference to costs no doubt involves that a litigant might be ordered to pay the costs thrown away on an adjournment. A party finding himself in that position might attribute the blame to the solicitor who had omitted to serve notice if it is in law required. The second supplement to Rayden on Divorce (7th ed.) accurately says: "It is to be noted that the rules do not *require* "such service to be effected [the word 'require' is in italics]; but "if no attempt is made, there is the risk that the trial judge may "adjourn the case for this to be done."

[1] [1958] 1 W.L.R. 1104; [1958] 3 All E.R. 242.

[2] [1958] 1 W.L.R. 1104.

1959

COLLINS
v.
COLLINS.

Mr. Commissioner Gallop Q.C.

I have not succeeded in reconciling the observations of Karminski J. with that which was said in the Court of Appeal in *D.* v. *D.*[3] That was a case where the husband petitioned for divorce on the ground of cruelty, alleging unnatural practices by the wife with another woman. The woman applied under section 31 of the Matrimonial Causes Act, 1950, for leave to intervene in the suit. Barnard J., reversing the decision of Mr. Registrar Long, refused leave to intervene. The Court of Appeal, however, restored the registrar's order. Singleton L.J. said: "Barnard J., we "understand, took the view that it was not right to apply the "terms of [section 31 of the Act of 1950] to a case in which the "allegation on the file was one of cruelty. I agree with him to "the extent that I think it is very seldom that such a position can "arise in a cruelty case, and, in any event, I feel that the "powers given by the section should be applied sparingly, but in "the present circumstances there is an allegation on the file of "cruelty of a most unusual kind." Even if it is possible to attach a sufficiently determinate meaning to the words "improper associa-"tion," I must say with the greatest respect that I do not really see the value of an automatic obligation to serve notice of charges if the outcome is to be that leave to intervene will only be granted sparingly, or in other words will usually be refused. Within the principle of *D.* v. *D.*[3] I should have thought that Mrs. Davies need not have been served, but having regard to *Green's* case,[4] the petitioner's solicitors could scarcely have taken the responsibility of omitting to create an opportunity for her to apply for leave to intervene by some form of notice at any rate.

I would have made an order for costs against the wife and given leave to appeal, but there is yet another happening. The wife's solicitor served the entire petition on Mrs. Davies. I doubt whether that is what Karminski J. had in mind, but I cannot criticise any solicitor for being very careful. The next step, in my view, could only have been for an application to be made for leave to intervene under section 31, which provides as follows: "In every case in which . . . the court may consider, in the "interest of any person not already a party to the suit, that that "person should be made a party to the suit, the court may, if it "thinks fit, allow that person to intervene upon such terms, if "any, as the court thinks just." What was done in this case was not only to serve the entire pleading upon Mrs. Davies but to serve her with the document called "Memorandum of Appear-"ance; co-respondent, party cited, or person named." That was completed on her behalf by her solicitors, and Mrs. Davies said, not unnaturally, that she did intend to deny the charges of association, but no application was ever made for leave for her to intervene.

The result is that I cannot regard Mrs. Davies as a party.

[3] [1952] W.N. 486; [1952] 2 T.L.R. 791; [1952] 2 All E.R. 854, C.A.

[4] [1958] 1 W.L.R. 1104.

Therefore, she does not require to be dismissed from the suit. The associate tells me, however, that her name appears in the title of the suit, and that it cannot be taken out without an order. I suppose that the best thing for me to do, if that is so, is to dismiss her from the suit. I do not see how I can order anyone to pay her costs.

1959

COLLINS v. COLLINS.

Mr. Commissioner Gallop Q.C.

Order accordingly.

Solicitors: *H. W. W. MacNaught, Worcester; Thursfield & Adams, Kidderminster.*

[COURT OF APPEAL.]

* BLATCHER AND ANOTHER *v.* HEAYSMAN AND ANOTHER.

[1957 B. No. 1379.]

C. A.

1960 *May* 31.

Lord Evershed M.R., Ormerod L.J. and Salmon J.

Legal Aid—Costs—Aided plaintiff and defendant—Action for damages for fraud—Plaintiffs awarded damages—No order as to costs—Liability of defendants to pay costs—Proper order—Legal Aid and Advice Act, 1949 (12, 13 *&* 14 *Geo.* 6, *c.* 51), *ss.* 1 (7) (*b*), 2 (*e*), 3 (1).

The plaintiffs, a married couple, agreed to purchase from the defendants, who were also married, freehold premises, together with the goodwill of the business carried on by the defendants on the premises. In this action the plaintiffs claimed damages for fraudulent misrepresentation on the sale of the business. Stable J. found that fraud was established and awarded to the plaintiffs £350 as damages. On being informed that both the plaintiffs and the defendants were legally aided, he refused to make any order as to costs, except to direct the taxation of the parties' costs in accordance with the provisions of the Act. The plaintiffs appealed against the refusal of the judge to award to them costs. The contribution payable by the plaintiffs under the Act was assessed at £5 each payable by instalments. The male defendant's contribution under the Act was assessed at £47 10s. payable by instalments, and the female defendant's at £200 to be paid by a single payment. Both parties were legally aided on the appeal:—

Held, (1) that section 1 (7) (*b*) of the Legal Aid and Advice Act, 1949,[1] imposed upon the court the duty of considering the question who was to pay the costs of an action in accordance with the

[1] Legal Aid and Advice Act, 1949, s. 1 (7): "Save as expressly provided "by this Part of this Act or by regu-"lations made thereunder . . . (*b*) the "rights conferred by this Part of this "Act on a person receiving legal aid "shall not affect the rights or "liabilities of other parties to the "proceedings or the principles on "which the discretion of any court or "tribunal is normally exercised."

S. 2 (2): "Where a person "receives legal aid in connection with "any proceedings . . . (*e*) his liability "by virtue of an order for costs made "against him with respect to the pro-"ceedings shall not exceed the "amount (if any) which is a reason-"able one for him to pay having "regard to all the circumstances, "including the means of all the "parties and their conduct in connec-"tion with the dispute."

C. A.
1960
BLATCHER
v.
HEAYSMAN.

principles on which such discretion was normally exercised and that since, if the parties had not been legally aided, the defendants would have been ordered to pay the plaintiffs' costs, the defendants should be ordered to pay the costs subject to the limitation imposed by section 2 (2) of the Act.

(2) That on the evidence and on the basis of the assessment of their contributions under the Act, the male defendant's liability to pay the plaintiffs' party and party costs should be limited to the sum of £47 10s. payable by instalments, and the female defendant's liability to pay the plaintiffs' costs should be limited to the payment of a single capital sum of £200.

Decision of Stable J. reversed.

APPEAL from Stable J.

The plaintiffs, Mr. and Mrs. Blatcher, brought an action against the defendants, Mr. and Mrs. Heaysman, claiming damages for fraudulent misrepresentation on the sale to them of freehold premises at Tonbridge, Kent, together with the greengrocery business carried on on those premises. Stable J., who tried the action, found that the defendants had been guilty of fraud and he awarded to the plaintiffs £350 as damages. On being informed that both parties to the action were legally aided, he refused to make any order as to costs other than the usual order for taxation in accordance with the provisions of the Third Schedule to the Legal Aid and Advice Act, 1949.

The plaintiffs appealed against that part of Stable J.'s order refusing an order for costs against the defendants. The grounds of the appeal were (1) that there were no materials upon which the judge could exercise his discretion as to costs so as to deprive the plaintiffs of their costs; (2) that the judge failed to exercise his discretion judicially; (3) that the judge misdirected himself as to the law in holding that the fact that the parties were assisted persons under the Legal Aid and Advice Act, 1949, was a fact on which he could exercise his discretion so as to deprive the successful plaintiffs of their costs.

The facts and the judgment of Stable J. are fully stated in the judgment of Lord Evershed M.R.

Gerald Owen for the plaintiffs.
Mark Smith for the defendants.

No cases were cited in argument.

LORD EVERSHED M.R. This is an appeal related solely to a question of costs. Having said so much, it is plain that the court would not normally entertain such appeal; but it is here the case of the plaintiffs that the judge did not exercise the judicial discretion which is vested in a judge in this matter of costs. Nor has it been objected by Mr. Mark Smith, for the defendants, that this is an appeal which we should not entertain on that ground.

The case was one in which the plaintiffs, as were the defendants, were husband and wife. It related to a greengrocery

business which the defendants were seeking to sell and which the plaintiffs had contracted to buy. The nature of the case was that in their advertisements, and in their instructions to their agents, which were passed on, as was obviously intended, to the plaintiffs, the defendants, or one of them, had made dishonest and fraudulent misrepresentations as regards the takings of the business. The plaintiffs' claim was for damages based on fraud.

The business itself changed hands, that is to say, the plaintiffs did not take the point that because of the misrepresentations the contract was at an end. They preferred to rely upon their common law remedy, if they could make it good, namely, to claim damages for misrepresentation.

It is quite unnecessary to pursue the details of the claim because Stable J., in a full and careful judgment, came, without any hesitation, to the conclusion that the first defendant had in truth dishonestly represented the weekly takings of the business, and, further, that the plaintiffs, having relied upon the misrepresentations, were entitled to recover damages at common law for the fraud. So he ordered payment by both the defendants of a sum assessed by way of damages of £350.

Mr. Owen, for the plaintiffs, read us the judgment and the point was taken at the end of this part of it, should both the defendants be rendered liable by the order to pay damages? The judge, quite naturally, if I may venture to say so, took the view that, although the female defendant was not herself guilty of any personal dishonesty, still she was a seller with her husband, had associated herself with him in the sale and had been a party to defending the action, and he ordered that there should be judgment against both the defendants in the sum of £350.

Mr. Owen naturally enough then asked for costs and stated: "In this case all four people are legally assisted." It is quite obvious that on that information being imparted to him the judge expressed himself with the refreshing vigour characteristic of him. He said: "If what I am invited to do is to make some sort of "contribution for the legal aid fund, I am not going to do it. I "have said for years and years and years that until they pay "costs to the successful defendants when they lose they are "going to get no assistance from me." In the context, I think the word "they" was a reference to the legal fund or those who are responsible for its administration. It is, I think, quite plain that the judge holds, and strongly holds, the view that under the legal aid scheme serious injustices may sometimes be done to an unaided party in a suit in which the other party is legally aided, if the non-aided party wins and is thereby disabled from recovering any costs. That is a point of view which it is legitimate for me to say has recently received a certain amount of publicity and no one can deny the possible injustices in these cases to parties to law suits with legally aided litigants who themselves are not so aided. It is the fact that such parties may sometimes

C. A.
1960
BLATCHER
v.
HEAYSMAN.
Lord Evershed M.R.

suffer from being unable to recover any costs in asserting or defending what the court holds to be their just claim. I would add that that injustice, if such it is, is certainly no less when a case comes to the Court of Appeal and the non-legally aided party may have to find (for the second time) the money for his own costs after he has successfully defended in the Court of Appeal the judgment that he has already obtained. That is a matter beyond doubt proper for public and parliamentary consideration. Still, the Legal Aid and Advice Act, 1949, imposes duties on the court, and I am bound to say that I think that the service which is rendered to the community by the scheme and by the Law Society in its administration of the scheme is highly creditable. I would also point out that the scheme is, after all, on its face, a contributory scheme. Parliament has very recently seen fit, by the Legal Aid Act, 1960, to alter and amend the Act of 1949 by substantially expanding its scope, so that persons with incomes far greater than those contemplated by the Act of 1949 may be able to get legal assistance. But they do so on contributory terms. It is also, of course, wrong to suggest that the scheme is one which can be looked at as being in any sense for the advantage of the particular fund or the society that administers it. Still, the judge clearly feels, and feels strongly, that there is under this scheme, as is obvious, a possibility of injustice. But the passage which I have read and which is restated on the following page of his judgment, seems to me to show that he felt that, until the law was altered, it was not right that he should, as he expressed it, make any order which would either give anything to the fund or would diminish the fund. He added: "I "was brought up in the school of law that regarded maintenance "and champerty as bad things; I still think they are." I also was so brought up and I have read what the judge has said; but I hope he will forgive me for saying that I cannot help thinking that it may have had the effect of his not having in mind the fact that, if an order for costs were made against the unsuccessful defendants (one of whom, as he says, was a dishonest defendant) it would not make the slightest difference to the legal aid fund or to the Law Society. By the statute, the society, which is responsible to account to Parliament for the administration of the fund, has a first charge on any property recovered in an action. In this case, it would be a charge on the sum of damages. So far as I can see, the society, in execution of its public duty, would be bound to enforce the charge; otherwise the amount concerned would fall upon the taxpayers generally. I must, therefore, dissociate myself from what the judge said when he seemed to indicate that the society would not in this case execute the charge. He said: "In this case there will be no order as "regards costs on either side, each party being legally aided, and "if the plaintiffs do not get their damages I hope we shall hear "more of it."

The effect of the failure to make any order as to costs was

merely to benefit the defendants, one of whom, as I have already said, he found to be deliberately dishonest. So, while I certainly respect the view that the judge took of the working of the scheme, I am bound to say I cannot agree that his decision does justice to the scope and purposes of the Act, and in any case it seems to me impossible to say that the judge properly exercised his discretion in this matter by confining himself to the views which he expressed.

By section 1 (7) (*b*) of the Act of 1949 it is expressly provided that "the rights conferred by this Part of this Act on a person "receiving legal aid shall not affect the rights or liabilities of "other parties to the proceedings or the principles on which "the discretion of any court . . . is normally exercised." That imposes upon the court, as I conceive, the duty of considering the question who is to pay costs in accordance with the principles on which such discretion is normally exercised. If that be the right premise, it seems to me unanswerable, I confess that, prima facie, these defendants ought to have been ordered to pay the costs of the action. If no parties had been legally aided, the conclusion in the case which I have read quite manifestly would have led to the result that the defendants would have been ordered to pay the costs. Therefore, I think that, subject to the limitation which the next section imposes, the inescapable result here is that the defendants, one of whom, as I repeat, was held to have deceived the plaintiffs, should pay the costs. But, then, by section 2 (2) it is provided: "Where a person receives legal aid "in connection with any proceedings . . . (*e*) his liability by virtue "of an order for costs made against him with respect to the "proceedings shall not exceed the amount (if any) which is a "reasonable one for him to pay having regard to all the circum-"stances, including the means of all the parties and their conduct "in connection with the dispute." As regards the last few words, "and their conduct in connection with the dispute," there is, plainly, no ground for altering what would be the normal incidence of costs. I must, therefore, look and see what, on the evidence before us, it is reasonable for the two defendants in this case to pay having regard to all the circumstances, including the means of everybody concerned. The material before us shows that substantially speaking the plaintiffs have no means and their contributions would be negligible. The only relevance of that is to emphasise the point that if the defendants are not bound to pay costs, then the damages which the plaintiffs have been rightly awarded will, for the most part, be expended in the payment of costs. The defendants appear to have carried on in collaboration this greengrocery business—I do not use any more precise term, because I know not whether there was anything in the nature of a partnership or how they regarded themselves as beneficially interested. It appears, however, from the certificate obtained in the usual course from the National Assistance Board that the male defendant, when he obtained that certificate, had an income

C. A.
1960
BLATCHER
v.
HEAYSMAN.
Lord Evershed M.R.

of £251 and a capital of £4. I do not read section 3 (1), which specifies the limits of the disposable income relevant to the total of the income. It is sufficient to say that the relevant committee of the Law Society assessed the proper contribution that the male defendant should make towards his own costs at the rate, broadly speaking, of £4 a month for 12 months—the total was £47 10s. His wife, though herself innocent of any dishonesty, was perhaps more generously treated when the proceeds of sale were received, for the finding in her case was that her disposable income was £346 per annum and her disposable capital was £491. On the basis of these figures an assessment of her liability was a single capital payment of £200. I need hardly add that, if her own costs and those of her husband's costs came to less than the sum total of those two amounts, they would be entitled to a refund of the balance. If the costs exceeded the total of their contributions, then the excess would fall upon the general assets of the fund.

Those being the data in front of us relevant to our consideration, under section 2 (3), the question then arises what order ought we now to make? After considering the matter with my brethren, the conclusion which I think is the right one is to take as broadly correct the assessment which the Law Society made for the purposes of the defendants' own costs. I would therefore make an order as regards the costs in the court below upon the two defendants jointly to pay between them the costs of the plaintiffs of the action, subject to the limitation that the taxed costs payable should not exceed the sum total of the contributions in the case of the male defendant corresponding to that which he was ordered to make of roughly £4 a month—the exact figure will be put in the order—and in the case of the female defendant of the single figure of £200. The effect of that, be it observed, will be that, when the costs are taxed, they will be apportioned between the two defendants, and each will be only liable to the extent of the contribution which I have mentioned. If the costs when taxed do not amount to the sum total of the two sums, then each will be naturally relieved to the extent to which that total is not reached. If the taxed total exceeds those two sums, then the two defendants' liability will be exhausted when they have contributed the amounts I have stated. I think that there should be no practical difficulty in working that out. It may be, from what Mr. Owen says, that the costs will be in excess of the sum total I have mentioned, and it follows to that extent that the plaintiffs will suffer the excess to be discharged out of the damages, but I should hope that the excess, if there be an excess, will not be as great as Mr. Owen has intimated. However that may be, I think, applying myself as best I can to the obligations imposed by section 2 (3) of the Act, that is the order as to costs which I would make.

When I have spoken of costs, I mean costs taxed as between party and party. That will be the costs which the defendants would, subject to the limitation I have mentioned, be bound to

pay. That disposes of the matter subject only to the costs in this court. Mr. Owen can justly say that he was not only bound to come, but was entitled in the result to come, to this court, and, therefore, he is entitled, in accordance with the practice of this court, to an order that his costs here as between party and party be paid by the defendants. But, following our usual practice, the order will contain the proviso that no step will be taken towards enforcing that order without leave of the court and there shall be liberty to apply.

ORMEROD L.J. I agree and I have nothing to add.

SALMON J. I agree.

Appeal allowed with costs. Adjourned to a Master of the Queen's Bench Division to determine the amount of costs proper to be paid by the defendants. No order as to costs to be made without further application to the Court of Appeal.

Solicitors: *Rubenstein, Nash & Co.; F. B. Jevons, Riley & Pope, Tonbridge.*

B. A. B.

[COURT OF APPEAL.]

* REGINA *v.* REGISTRAR OF BUILDING SOCIETIES. *Ex parte* A BUILDING SOCIETY.

1960
April 27, 28.

Lord Parker C.J., Gorman and Ashworth JJ.

C. A.
1960
May 9, 10, 11, 12.

Hodson, Pearce and Upjohn L.JJ.

Building Society—Order against advertisement for capital—Hearing of representations by society—Determination by registrar to make order — Information subsequently received — Whether registrar's decision affected—Whether capacity of registrar quasi-judicial or administrative—Whether publication of society's name should be withheld—Prevention of Fraud (Investments) Act, 1958 (6 *&* 7 *Eliz.* 2, *c.* 45), *s.* 11 (1), (2), (3).

Crown Practice—Certiorari—Inferior tribunal—Registrar of Building Societies—Order against society advertising for capital—Prevention of Fraud (Investments) Act, 1958, *s.* 11 (1), (2), (3).

Open Court—Publication of name—Whether court has jurisdiction to forbid publication—Name of party—Court of Appeal.

The Registrar of Building Societies, after carrying out an investigation of the affairs of a building society, gave notice on February 19, 1960, of his intention to make an order under

1960

REG.
v.
REGISTRAR
OF BUILDING
SOCIETIES.
Ex parte
A BUILDING
SOCIETY.

section 11 (1) of the Prevention of Fraud (Investments) Act, 1958,[1] directing that no advertisement for capital should be made by the society. The notice was accompanied by a letter stating the grounds on which the registrar proposed to make the order, and informing the society that they could make representations thereon, both orally and in writing. Representations were made by counsel on behalf of the society on March 18, 22 and 25, 1960. On March 28, 1960, the registrar made up his mind to make the order and to ask for Treasury approval pursuant to section 11 (1), and formal application therefor was made on March 30. Treasury approval was given on April 6.

On April 1, the society's auditor had an interview with the executive registrar at the latter's invitation in respect of a question arising on the society's accounts. During that interview some discussion took place on matters which included those which the registrar had been considering. This interview was reported to the registrar.

By this application the society applied for a writ of certiorari to bring up and quash the registrar's decision to make the order under section 11 (1) of the Act. Their principal contention was that at the interview on April 1 reference was made without the society's knowledge or consent to matters relating to the order, and that fresh prejudicial material was introduced there, of which the society had no notice, and on which they had no opportunity of making representations; and further, that the registrar, who was acting in a quasi-judicial capacity, thus failed to act in accordance with judicial principles. The registrar contended, inter alia, that he was not acting in a quasi-judicial capacity, or that if he were acting in a quasi-judicial capacity it ended at the latest on March 28 when he decided to make the order.

Held, (1) that the registrar was acting in a quasi-judicial capacity from the moment when he gave notice of an intention to make an order on February 19, 1960, until Treasury approval was given on April 6, 1960; and his judicial capacity could exist notwithstanding that he was not conducting a full form of judicial inquiry inter partes, and representations were being made to him only by the party against whom he had signified his provisional intention to make an order.

(Post, p. 681.)

[1] Prevention of Fraud (Investments) Act, 1958, s. 11: "(1) If, "with respect to any building society, "the registrar considers it expedient "so to do in the interests of persons "who have invested or deposited or "may invest or deposit money with "the society, he may by an order "made with the approval of the "Treasury direct that, unless and "until the order is revoked, no invita-"tion to subscribe for, or to acquire "or offer to acquire, securities or to "lend or deposit money shall be made "by or on behalf of the society . . . : "Provided that, before deciding to "make an order under this subsec-"tion . . . the registrar shall serve "on the society a written notice "stating his intention to make the "order, and shall consider any repre-"sentations with respect to the pro-"posed order made to him by the "society within the period of one "month from the date of the service "of the notice, and, if the society so "requests, afford it an opportunity of "being heard by him within that "period. (2) Any order under the "preceding subsection may be revoked "by a subsequent order of the regis-"trar made with the approval of the "Treasury. (3) The registrar may, "at any time, by notice in writing "served on a building society . . . "require that society . . . to produce "to the registrar such books, "accounts, deeds and other documents "relating to the business of the "society, and to furnish to him such "other information relating to that "business, as he considers necessary "for the exercise of the powers which "he has by virtue of subsection "(1) . . ."

(2) That so long as the judicial or quasi-judicial capacity existed it was no answer to say that justice was done, it was necessary to examine what took place and see whether, when the matter was examined objectively, there was any likelihood of injustice resulting therefrom.

Rex v. *Sussex Justices, Ex parte McCarthy* [1924] 1 K.B. 256; 40 T.L.R. 80, D.C.; and *Reg.* v. *Camborne Justices, Ex parte Pearce* [1955] 1 Q.B. 41; [1954] 3 W.L.R. 415; [1954] 2 All E.R. 850, D.C. applied.

(Post, p. 684.)

(3) That no matter was raised at the interview on April 1 beyond legitimate illustration of the points which, in his administrative capacity, the registrar was entitled to raise; no fresh evidence was received by him relating to matters on which he was acting judicially, and nothing took place which on any reasonable view could be regarded as likely to prejudice the conclusion which the registrar had to embody in his final order; and although it was indiscreet to consider matters, which had been raised on the hearing, it was not a case in which the court was obliged to exercise its discretion to make an order of certiorari to quash an order (post, p. 685).

Semble, the Court of Appeal had no jurisdiction to forbid the publication of the society's name (post, p. 689).

Decision of the Divisional Court upheld.

APPLICATION for an order of certiorari.

The following statement of facts is taken substantially from the judgment of Lord Parker C.J.: In May of 1959, the Registrar of Building Societies served on the applicant building society a notice under section 11 (3) of the Prevention of Fraud (Investments) Act, 1958, requiring the society to produce books, accounts, deeds and other documents, and to furnish him with certain information. Thereafter, the registrar carried out an investigation of the affairs of the society until February, 1960, and on February 19, 1960, served on the society a notice under section 11 (1) of the Act in the following terms: "Notice is hereby given "pursuant to the provisions of subsection (1) of section 11 of the "Prevention of Fraud (Investments) Act, 1958, that it is the "intention of the registrar to make an order directing that no "invitation to subscribe for, or to acquire or offer to acquire, "securities or to lend or deposit money shall be made by or on "behalf of the above-named society. Any representation that "the society desires to make to the registrar with respect to the "proposed order must be submitted to him within the period of "one month from the date of the service of this notice." That notice was accompanied by a letter of the same date stating: "The principal grounds upon which the registrar proposes to "make an order are as follows" and there were then set out the four following grounds:

"(1) The unsatisfactory reserve position in relation to the "total assets of the society.

"(2) Inadequacy of security for the advances in respect of the "'Oak Farm' properties, resulting in a position of potential loss "which would jeopardise the society's solvency.

1960

REG.
v.
REGISTRAR OF BUILDING SOCIETIES.
Ex parte A BUILDING SOCIETY.

"(3) Division of mortgages artificially thus avoiding disclosure "of details in the schedule of the annual accounts.

"(4) The unauthorised deposit of large amounts of the "society's 'liquid' funds on terms which require up to six "months' notice of withdrawal.

"With regard to (2), the registrar has received from the district valuer a provisional valuation of the Oak Farm Estate at a "total figure of £149,000 compared with the society's valuation "of £370,000."

The letter ended by saying: "Representations in respect of "the proposed order may be made both orally and in writing. "If representatives of the society wish to attend before the "registrar for this purpose I will arrange an appointment upon "hearing from you."

As a result, on March 18, exactly within the month, a hearing took place before the registrar, when the society were represented by leading and junior counsel. In the course of that hearing counsel for the society traced the reserve position from 1955, covering the years 1955, 1956, 1957 and 1958, with the object of showing that year by year the reserve position was improving despite enormous increases in capital. It appears he was about to move on to the year 1959, the accounts for which were not due until March 31, 1960 (after the date of the hearing), when the registrar said: "Yes, we have no accounts whatever for 1959," and "I cannot really listen to representations on current accounts "until I have had them laid before me and until I have had a "chance to peruse them. If you want to make further repre-"sentations on that, Mr. McKinnon, you can come again, but "until I have had an opportunity to consider the state of affairs "as disclosed by these accounts, it is premature to hear repre-"sentations on them." A little later he said: "I do not think "it would be right to offer you a general adjournment on all "matters, but on this particular matter of the accounts if, when "you yourself have seen them, you want to make observations "on them, I shall be prepared to listen to you on a further date "on that particular point."

A further hearing took place on March 22, when the accounts still were not available. Finally, there was an adjourned hearing on March 25, when the accounts were produced together with a special report from the auditor. Those accounts had only come forward that morning shortly before the hearing. Mr. McKinnon had not had an opportunity to go through them in detail, but they were put in, and the registrar said: "But it was because you "referred to the accounts in your submission and representations "that we thought we would like to see them." Counsel said: "Yes, sir; I make no complaint. I dare say I have brought this "on my own head by referring to them, and as I say, I am not "making any complaint. But when those accounts are examined "you may think that if there is any further point, having regard "to the importance of this matter, upon which you want any

"representation from the society, that can be done, because "although we have now gone over the statutory period"—that was referring to the fact that more than a month had elapsed since the notice of intention had been served—"I cannot com-"plain, and the society would not dream of complaining if there "was any further information you wanted; but as far as I can "say with my limited knowledge of accounts, I am prepared to "rely on the certificate of a man like [the auditor], who knows "about these things, and he has made a special report." Later on counsel said: "Inasmuch as it has only been delivered today, "if there is anything that requires explanation I do not know "whether there are any representations you would like to hear "from the society in respect of it, and, of course, there is this "about it, that the representations which I made to you on the "first occasion, dealing with the specific matters dealt with in "the notice—my argument, you will recollect, was that supposing "for the sake of argument, at the time when those transactions "arose and in view of what has happened since, if an order had "then been made, what has happened since would justify an "application for the revocation of the order; that was my "contention." Finally, counsel said: "Subject to anything "arising on the accounts or on the correspondence, you may think "that the matter is now closed and for you to deal with," and the matter ended there so far as the hearings were concerned.

The registrar thereafter considered the matter and, as he said in his affidavit did consider the 1959 accounts and the special report, and on March 28 made up his mind to make the order. On March 30 Treasury consent was asked for, and on April 6 the consent was obtained and the order in question was made.

Meanwhile, on March 31, the auditor wrote to the registrar, being concerned about a point in regard to the way accounts should be certified under the Act: there was a new Bill before Parliament, and he wanted to take up the matter with the registrar. His letter, however, was headed in the name of the applicant building society, and said: "You will be aware that we "have submitted a special report on our audit of the accounts "of the above-named society for the year ended December 31, "1959. The preparation of that report and the signature of the "form A.R.11 caused considerable difficulty because of the "wording of the printed certificate on the form A.R.11. It "became necessary for us to consult leading counsel and the "opinion which he gave to us was such that we would like to have "the opportunity to report to you thereon. In our opinion the "matter is of concern to all auditors of building societies, despite "the advent of the new Act." That letter was received on March 31, not by the registrar, but by the executive registrar, who, thinking that a point of general importance was likely to arise on which it might be necessary to take urgent steps, the matter being before Parliament, spoke to the auditor on the telephone. During that telephone conversation it was arranged

1960

REG.
v.
REGISTRAR
OF BUILDING
SOCIETIES.
Ex parte
A BUILDING
SOCIETY.

that the point in issue should be illustrated by reference to the accounts of the applicant society. An appointment was made, and on April 1 the auditor spent some hour and a half with the executive registrar, in the course of which reference was made to the affairs of the applicant society. After that interview the executive registrar reported to the registrar, who said in his affidavit: "After I had taken my decision to make an order against "the society under section 11 and had instituted an application "for Treasury approval thereto, . . . the executive registrar "reported to me the interview that he had had with the society's "auditor on April 1. I considered whether I should advise that "any action should be taken in relation to the Bill"—that was the Bill before Parliament—"in view of the problem raised by the "auditor. I took note of the comments of the auditor about "the society's accounts. Those comments had no effect upon my "mind in relation to the question, already decided, whether an "order under section 11 should be sought from the Treasury."

The society sought leave to apply for an order of certiorari to bring up and quash the registrar's order of April 6, 1960, under section 11 (1) on the grounds (i) that the registrar had refused to consider representations made on behalf of the society unless and until there were produced to him accounts for the year ending December 31, 1959, which accounts were not due to be produced until March 31, 1960; (ii) that the registrar on production of the accounts and of a special report prepared thereon by the society's auditor, considered matters contained therein which did not relate to the representations made on behalf of the society, and which introduced fresh prejudicial material of which the society had not notice, and upon which they had no opportunity of making representations; (iii) that the registrar, after the conclusion of the representations made on behalf of the society, by his assistant, the executive registrar, without the knowledge or consent of the society, interviewed a third party, the auditor, with reference to the accounts and to the special report, and thereafter gave the society no opportunity of making further representations thereon; and (iv) that the registrar gave no or no sufficient particulars to the society of the allegations upon which he proposed to make the order.

On April 12 and 13, 1960, the Divisional Court (Lord Parker C.J., Ashworth and Salmon JJ.) gave leave to apply for the order subject to certain cross-undertakings being given, one having the effect that the name of the society should not be published meanwhile.

Neil McKinnon Q.C. and *John Peppitt* for the building society.
J. R. Cumming-Bruce for the registrar.

The following cases were cited in argument: *Errington* v. *Minister of Health*[2]; *Franklin* v. *Minister of Town and Country*

[2] [1935] 1 K.B. 249; 51 T.L.R. 44, C.A.

Planning[3]; *In re City of Plymouth (City Centre) Declaratory Order, 1946*[4]; *B. Johnson & Co. (Builders) Ltd.* v. *Minister of Health*[5]; *Rex* v. *Sussex Justices, Ex parte McCarthy*[6]; *Horn* v. *Minister of Health*[7]; *Local Government Board* v. *Arlidge*[8]; *Young & Co.* v. *Royal Leamington Spa Corporation*[9]; *Board of Education* v. *Rice*[10]; and *Rex* v. *Westminster Assessment Committee, Ex parte Grosvenor House (Park Lane) Ltd.*[11]

LORD PARKER C.J. In these proceedings Mr. McKinnon moves for an order of certiorari on behalf of a building society to bring up and quash an order dated April 6 of this year made by the Registrar of Building Societies pursuant to his powers under section 11 of the Prevention of Fraud (Investments) Act, 1958. That section gives the registrar somewhat drastic powers in order to safeguard the interests of persons who have invested or deposited money in building societies. [His Lordship read the relevant parts of section 11 (1) and (2) and continued:] Subsection (3) provides for machinery whereby the registrar may require in advance all the information that he thinks necessary from the society, and call upon the society "to produce to the registrar "such books, accounts, deeds and other documents."

As I have said, the powers of that first subsection are drastic. Once an order is made, whether published or not, the knowledge that it is being made will no doubt get round, and not only will further invitations for money be stopped but there is a real likelihood that withdrawals will result, causing considerable damage to the society. Such safeguards as there are must be found in the proviso which I have read, and clearly it is of the utmost importance that the procedure envisaged in the proviso is meticulously followed.

[His Lordship stated the facts set out above, observed that the position on March 28, when the registrar made up his mind to make the order, was that having, on information obtained between May, 1959, and February, 1960, evinced an intention to make an order, the registrar was satisfied that he had heard nothing since which would cause him to change his mind, and continued:] In those circumstances, three points are taken on behalf of the society. The first point, and perhaps points 1 and 2 rather go together, but I propose to deal with them in three stages, is that the registrar refused to hear representations as to the 1959 accounts as he had promised to do. I am quite satisfied that, looked at baldly in that way, there was

[3] [1948] A.C. 87; 63 T.L.R. 446; [1947] 2 All E.R. 289, H.L.

[4] [1947] K.B. 702; (sub nom. *Robinson* v. *Minister of Town and Country Planning*) 63 T.L.R. 374; [1947] 1 All E.R. 851, C.A.

[5] [1947] 2 All E.R. 851, C.A.

[6] [1924] 1 K.B. 256; 40 T.L.R. 80, D.C.

[7] [1937] 1 K.B. 164; [1936] 2 All E.R. 1299, C.A.

[8] [1915] A.C. 120; 30 T.L.R. 672, H.L.

[9] (1883) 8 App.Cas. 517, H.L.

[10] [1911] A.C. 179; 27 T.L.R. 379, H.L.

[11] [1941] 1 K.B. 53; 57 T.L.R. 57; [1940] 4 All E.R. 132, C.A.

1960

REG. v. REGISTRAR OF BUILDING SOCIETIES. *Ex parte* A BUILDING SOCIETY.

Lord Parker C.J.

no refusal by the registrar whatsoever to hear representations. On March 18 he had promised that counsel should have an opportunity when the accounts were prepared of making representations. On March 25, when the accounts were forthcoming and were produced, counsel, so far from then desiring to make representations in the passages I have already read, was stating that the matter so far as he was concerned was closed unless the registrar required any further information after studying the accounts. There, the matter was left. The bald ground that representations as to the accounts were refused, in my judgment, wholly fails. The only way in which it can be put, and this is really, I think, the second ground, is that in operating the procedure in the proviso to section 11 (1), natural justice demands that the registrar should state either in writing or orally to the society every ground and every matter which is operating upon his mind in order to give the society a lead as to the sort of representations which might be useful. It can be put in this way, that it is quite impossible for a society to make proper and adequate representations unless they know the case they have to meet. It is said that natural justice demands such a course, bearing in mind particularly the drastic powers that there are under this section, and the serious results to the society if an order is made.

In this connection, reference has been made to most of the leading cases in this field of law, beginning with *Board of Education* v. *Rice*,[1] and going through *Local Government Board* v. *Arlidge*[2] and the other cases up to and including *Franklin* v. *Minister of Town and Country Planning*,[3] dealing with the New Town at Stevenage. I would like to say at once that I always find the expression "natural justice" very difficult. There is no one code of natural justice which is automatically imported into any procedure of a judicial nature. What is imported by way of natural justice depends entirely on the tribunal or official in question, the nature of his functions, and, perhaps most important of all, the exact words of the statute, because Parliament may by suitable words provide for a procedure which conflicts in many respects with the concepts of natural justice which one would find adopted by the courts. Each case must depend upon the nature of the function and the exact words of the statute.

Mr. Cumming-Bruce, for the registrar, has suggested that this is one of those extreme cases, of which *Franklin's* case[3] is one, where the official concerned is acting in an administrative capacity from first to last, and where there is never a stage when he is acting in a quasi-judicial capacity. As at present advised I cannot accept the full length of that contention. It seems to me here that the natural approach where an official is given the power of life and death—because it almost amounts to that—over a building society, is that one would expect to find that at some stage of the proceedings he should act in a quasi-judicial capacity.

[1] [1911] A.C. 179; 27 T.L.R. 379.
[2] [1915] A.C. 120; 30 T.L.R. 672.
[3] [1948] A.C. 87; 63 T.L.R. 446; [1947] 2 All E.R. 289, H.L.

and although I find it unnecessary to come to a final conclusion in the matter, I think that from the moment he enters upon a hearing and up to the time when the order is made, he is acting in a quasi-judicial capacity. As I say, I find it unnecessary to decide it, because even assuming that that is so, I go on to the next stage and ask myself in what, if any, manner the registrar in this matter of representations on accounts has acted in conflict with any principle of natural justice. He started by giving the notice, accompanied by the principal grounds which moved him to think that he ought to make an order. There has been some argument as to whether that was a necessary step. In particular, reference was made to section 6 of the Act of 1894, which provide particularly that the grounds for cancelling or sustaining the registration of a society should be specified; and it is noteworthy that in the section with which we are now concerned there is a complete absence of any such provision. Nevertheless, for the purposes of this argument I am willing to assume that natural justice demands that the registrar should inform a society in these circumstances of the sort of matters which are passing through his mind, and on which he wishes to inform himself by representations from the society. That was done. I am also prepared to assume that if, in the course of the hearing or the inquiry, some new point, some new ground, should come to light, then clearly, and I think that this is conceded, fairness would demand that the society should be informed of that matter and given an opportunity to make representations in regard to that new ground. But that is not this case. What happened here—and this is the scheme of the whole matter—is that the registrar makes up his mind in advance that, as at present advised, it is his intention to make an order, and he gives his grounds. In the course of the proceedings reference is made to the later position, namely, in 1959, which he has not had an opportunity heretofore of considering. As I have said, he has only dealt with the years 1955 to 1958. Reference is made to 1959. He quite rightly says that he must see the accounts. He sees the accounts, and nothing which he sees in the accounts alters his mind as to the provisional intention he has formed having looked at the years 1955 to 1958. I can see no ground for saying that natural justice should demand that, having looked at the accounts himself, accounts which did not affect his mind at all, he should nevertheless call upon the society to make representations with regard to what he has seen in the accounts, and the same, of course, applies to the special report of the auditor. It seems to me that the whole of the argument on this point on the facts of this case is quite artificial. The matter was left entirely with the registrar to say whether there were any points upon which he wanted any further information. Counsel had ample opportunity either of making representations at once on the accounts or, if he felt that he was not in a position to do so, to ask for an adjournment, and no adjournment was requested.

1960

REG.
v.
REGISTRAR OF BUILDING SOCIETIES.
Ex parte
A BUILDING SOCIETY.

Lord Parker C.J.

The third ground relates to the interview which took place between the executive registrar and the auditor. Quite shortly, it is said that this is a case akin to that of *Errington* v. *Minister of Health*[4]; in other words, that an investigation or a hearing was continued in the absence of and behind the back of one of the parties, and yet no opportunity was given to that party to deal with the matters elucidated in that private investigation. The principle laid down in *Errington's* case[4] is still good law, and it is beyond doubt that when there is a lis or a quasi-lis, matters being dealt with inter partes, it is wrong for a Minister or a tribunal to hear evidence from one party in the absence of the other, or to get outside information which may tell against one of the parties without giving that party an opportunity of dealing with it. But this, as it seems to me, is quite a different case. Granted that the registrar was acting in a quasi-judicial capacity, the position had arrived when he had, in the light of the years 1955 to 1958, said that he intended to make an order. The accounts for 1959 were introduced. Those accounts for 1959 did not cause him to change his mind, witness the fact that on March 28 before the auditor ever had his interview he had decided that nothing in the 1959 accounts caused him to change his mind. In those circumstances, supposing that, contrary to what the registrar says, the auditor had produced some damaging evidence, if I may put it that way, in connection with the 1959 accounts, supposing that had happened, one asks oneself how that can affect the matter if the 1959 accounts, without the prejudicial evidence at the interview, had not affected the registrar? I cannot see how in those circumstances natural justice demanded that the society should have been informed of what the auditor had said and been given an opportunity of dealing with it. Incidentally, it was not done, it is only right to say, in any hole-and-corner way because the society were in fact informed that this interview had taken place. In my judgment the last ground in relation to that interview also fails.

I would only add this: In the course of these proceedings the court has given the applicant society considerable latitude to raise a number of matters which go outside the grounds of the statement for relief, and many allegations of unfairness have been made against the registrar. No doubt the applicants think that they are suffering under some grievance, but it is only right to say that, having heard the multitude of accusations made against the registrar I am satisfied that he acted fairly, and that none of the imputations that have been made have been validly made. I would dismiss this application.

I should add that the scope of section 11 has been argued before this court, the question being whether there is any condition precedent before the registrar can consider it expedient to make an order; but it is quite unnecessary to come to any conclusion on the matter.

[4] [1935] 1 K.B. 249; 51 T.L.R. 44, C.A.

GORMAN J. I agree so completely with what my Lord has said that I do not think that any useful purpose would be served by my saying anything further.

ASHWORTH J. I also agree.

Application dismissed with costs.

J. F. L.

At the question of counsel for the society, and with the consent of the registrar, a stay on the publication of the society's name was granted for one day, on condition that thereafter any moneys sent to the society as subscriptions for shares or deposits should be paid into court and should not be taken out by the society until further order, to enable counsel for the society to apply to the Court of Appeal for a further stay.

April 29. On an application to the Court of Appeal (Hodson, Pearce and Upjohn L.JJ.) the registrar again consented, and their Lordships continued the order banning the publication of the society's name, subject to the same condition, until the appeal was decided.

The building society appealed to the Court of Appeal.

Neil McKinnon Q.C. and *John Peppitt* for the society.
J. R. Cumming-Bruce for the registrar.

The following cases, in addition to those in the judgments and to those cited before the Divisional Court, were cited in argument: *Rex* v. *Essex Justices, Ex parte Perkins* [5]; *Reg.* v. *Camborne Justices, Ex parte Pearce* [6]; *Nakkuda Ali* v. *M. F. De S. Jayaratne.* [7]

HODSON L.J., having stated the facts, continued: It was at the interview on April 1, 1960, that the conversation took place between Leigh, the executive registrar, and the auditor, which gives rise to the main question upon which this appeal turns. The point then raised comes under the heading of administration, but for the purpose of the illustration of the point which the auditor desired to make and have elucidated, with an eye on proposed legislation, the balance-sheet of the society was discussed, and the executive registrar, as in duty bound, reported the matter to the registrar himself—the registrar being the officer who had heard the representations on behalf of the society.

[5] [1927] 2 K.B. 475; 43 T.L.R. 415, D.C.

[6] [1954] 2 All E.R. 850.

[7] [1951] A.C. 66; 66 T.L.R. (Pt. 2) 214.

C. A.
1960
REG. v. REGISTRAR OF BUILDING SOCIETIES. *Ex parte* A BUILDING SOCIETY.
Hodson L.J.

It is contended on behalf of the society here (and this is the main contention) that there should have been no discussion between the auditor and the registrar through his executive registrar upon the affairs of the society, and that this vitiates the order of April 6, since the registrar was acting in a quasi-judicial capacity, and was not at liberty to receive information upon the subject-matter of the representations behind the back of the society.

Lord Parker C.J., in giving judgment in the Divisional Court [1] (a judgment with which the other members of the court concurred), did not accept the submission of the Crown that the registrar was acting throughout in an administrative capacity in the full sense of the word so that certiorari would not lie; but he dealt with the case on the assumption, at any rate, that from the moment that he entered upon a hearing such as I have spoken of until the order was made the registrar was acting in a quasi-judicial capacity.

In order that the point may be determined, the Crown, by cross-notice in this court, contended that throughout the registrar was acting administratively: alternatively, even if he was not acting administratively throughout, it is submitted by the Crown that from March 28, when he finally made up his mind to seek Treasury approval to the order which he intended to make, he had shed his judicial habit and put on again his administrative clothing which (it is submitted) he was wearing at the time of the interview between the auditor and the executive registrar.

The hybrid capacity of a Minister or official who, when holding an inquiry, may be acting in a judicial capacity, but who may at the time of the making of an order be acting in an administrative capacity, is a not uncommon symptom which arises when statutory provisions of the kind with which we are now concerned fall to be considered. In each case the relevant statutory provisions have to be considered, and the duty of the official who conducts the inquiry has to be considered, having regard to the language of the statute which imposes the duty upon him.

The position is well put by Scott L.J. in *Horn* v. *Minister of Health* [2]: " . . . where public departments are given under this " type of Act [Housing Act, 1935] quasi-judicial duties as well as " administrative duties, the need of their carrying out their quasi- " judicial duties in strict accordance with natural justice must " always be considered in the light of their administrative duties " also. The administrative duties have to be carried out as part of " the policy of Parliament imposed upon the Minister by the " statute which he is administering, and Parliament must be taken " quite deliberately to have decided that the performance of his " administrative duties under the Act is compatible with the exer- " cise of his quasi-judicial functions. In my view, this particular

[1] Ante, p. 675.

[2] [1937] 1 K.B. 164, 186; [1936] 2 All E.R. 1299.

"case illustrates very clearly how the two types of duties can go "together and be compatible one with the other."

The Crown has submitted from the fact that the registrar is under no obligation to do what he in fact did here—give notice of the grounds upon which his intention had been formed—that he was conducting an inquiry not, at any rate, in the full sense, judicial or even quasi-judicial. It was submitted that it was repugnant to the idea of judicial inquiry that no precise notice should be given of charges made which required an answer. It is, of course, further to be noticed that the registrar was not conducting an inquiry in the full sense (as Lord Parker C.J. pointed out) inter partes, because he was having representations made to him only by the party against whom he had himself signified his intention—his provisional intention—to make an order. The quasi-judicial capacity may, I think, subsist even though the full form of a judicial inquiry is not there. (Compare *Rex* v. *Westminster Assessment Committee, Ex parte Grosvenor House (Park Lane) Ltd.*,[3] which concerned proceedings before a rating assessment committee.) The purpose of the inquiry is shown by the language of the section, and the object of representation by the society must surely be to give it an opportunity of persuading the registrar to alter the intention which he has previously indicated. It is unnecessary to consider further whether, in the preliminary investigation under section 11 (3), when he was calling for documents and examining them, he was acting administratively or judicially. He was, it may be said, obtaining as it were discovery as a preliminary to forming his intention. But having regard to the range of the inquiry it is open to the view that at that stage, at any rate, he was acting in an administrative capacity. As I say, no question in this appeal arises under that subsection; but after he had formed his intention to make an order under section 1 (1), on which he gave notice on February 9, it seems to me that his quasi-judicial capacity arose and persisted until the order was made on April 6.

The principles of law applicable are to be found in Lord Loreburn's speech in *Board of Education* v. *Rice*,[4] where he said[5]: "Comparatively recent statutes have extended, if they "have not originated, the practice of imposing upon departments "or officers of State the duty of deciding or determining questions "of various kinds. In the present instance, as in many others, "what comes for determination is sometimes a matter to be "settled by discretion, involving no law. It will, I suppose, "usually be of an administrative kind; but sometimes it will "involve matter of law as well as matter of fact, or even depend "upon matter of law alone. In such cases the Board of Educa-"tion will have to ascertain the law and also to ascertain the "facts. I need not add that in doing either they must act in "good faith and fairly listen to both sides, for that is a duty

[3] [1941] 1 K.B. 53; 57 T.L.R. 57; [1940] 4 All E.R. 132, C.A.

[4] [1911] A.C. 179; 27 T.L.R. 379.

[5] [1911] A.C. 182.

C. A.
1960
REG.
v.
REGISTRAR OF BUILDING SOCIETIES.
Ex parte A BUILDING SOCIETY.
Hodson L.J.

"lying upon everyone who decides anything. But I do not think "they are bound to treat such a question as though it were a "trial. They have no power to administer an oath, and need not "examine witnesses. They can obtain information in any way "they think best, always giving a fair opportunity to those who "are parties in the controversy for correcting or contradicting any "relevant statement prejudicial to their view." I emphasise the last phrase—"always giving a fair opportunity to those who are "parties in the controversy for correcting or contradicting any "relevant statement prejudicial to their view."

A case of a more recent date which is relied upon, and rightly relied upon, by the society in this case, is a decision of the Court of Appeal in *Errington* v. *Minister of Health*.[6] I need not go through the facts of that case, but the point which emerges is that it is immaterial for the purposes of considering this question to say that anyway, whatever happened, it made no difference: the matter must, I think, be looked at from a wider and more detached and objective point of view than that. Greer L.J.,[7] in dealing with this matter, quoted from the First Schedule, paragraph 4, of the Act there in question, which reads: "' . . . in "' any other case he shall, before confirming the order, cause a "' public local inquiry to be held and shall consider any objection "' not withdrawn and the report of the person who held the "' inquiry, and may then confirm the order, either with or with-"' out modification.'" He continued[8]: "It seems to me that that "involves the proposition that the matters there mentioned are "the only matters which he is entitled to consider, and that if, "instead of directing his mind solely to those matters, he takes "into consideration evidence which might have been, but was "not, given at the public inquiry, but was given ex parte after-"wards without the owners having any opportunity whatever to "deal with that evidence, then it seems to me that the confirm-"ing order was not within the powers of the Act. It is "admitted that though the draughtsmanship of section 11 (3) is "not perfect, the order there referred to is the confirming order "and not the original order. In my judgment, it is true to say "that an order made by a quasi-judicial officer based on materials "which are not the materials referred to in paragraph 4 of the "First Schedule is an order which is not within the powers of "the Act, having regard to the proposition which has been estab-"lished in common law that a quasi-judicial officer in exercising "his powers must do it in accordance with the rules of natural "justice, that is to say, he must hear both sides and must not "hear one side in the absence of the other."

Maugham L.J. said[8]: "As I think, the question whether "the Minister, after such an inquiry has been held and after a "report has been made, can then proceed—I am not dealing with "the facts for the moment—to hear ex parte statements from one

[6] [1935] 1 K.B. 249; 51 T.L.R. 44, C.A.
[7] [1935] 1 K.B. 268.
[8] [1935] 1 K.B. 268, 272, 273.

"side or the other in the absence of those whose obvious desire "it would be to controvert them is precisely similar to the "question whether, after holding a public local inquiry or after "having caused a public local inquiry to be held of a quasi-"judicial character, the Minister can then hold a private inquiry "of his own to which one party only is admitted. That seems "to me to be a very extraordinary result, and one which I should "be very slow to approve. . . . My conclusion is that, although "the act of affirming a clearance area order is an administrative "act, the consideration which must precede the doing of that "act is of the nature of a quasi-judicial consideration, and the "Minister is bound to the extent mentioned by the House of "Lords in the *Board of Education* v. *Rice*.[9]" He there refers to the speech of Lord Loreburn, to which I have referred. The final paragraph of the judgment reads [10]: "The only question that "remains is whether the court should come to the conclusion "that the interests of the applicants have been substantially "prejudiced by what has been done, because the quashing of the "order is, of course, a matter of discretion of the court. I do not "think it has been proved that the statements which were made "to the Ministry in fact affected the decision of the Minister, "or of his officials, and I certainly have no reason to doubt that "the officials were acting in what they thought to be the public "interest. On the other hand, it seems to me a matter of the "highest possible importance that where a quasi-judicial function "is being exercised, under such circumstances as it had to be "exercised here, with the result of depriving people of their "property, especially if it is done without compensation, the "persons concerned should be satisfied that nothing unfair has "been done in the matter, and that ex parte statements have not "been heard before the decision has been given without any "chance for the persons concerned to refute those statements. "That seems to me a matter of the greatest possible public "importance, and if I am right in the view that I have expressed "as to the functions of the Minister being of a quasi-judicial "character, I think it follows that in the special circumstances "of this case, as I understand them to be, the court has no "option but to quash the order, as my brother has suggested."

That shows that the question cannot be solved by merely deciding whether or no the Minister made up his mind without reference to the particular matter in question; and I think, accordingly, that the submission made on behalf of the society in that respect is sound—that is to say, that the matter must be dealt with objectively. Indeed, I think that follows from the principles which have been laid down in another class of case, dealing with bias of the court, the most recent enunciations of which have stemmed from Lord Hewart's observations in *Rex* v. *Sussex Justices, Ex parte McCarthy*,[11] where the clerk to the

[9] [1911] A.C. 179.
[10] [1935] 1 K.B. 279.
[11] [1924] 1 K.B. 256, 259; 40 T.L.R. 80.

C. A.
1960
REG. v. REGISTRAR OF BUILDING SOCIETIES. *Ex parte* A BUILDING SOCIETY.
Hodson L.J.

justices retired with the justices, although it made no difference to the case. The Lord Chief Justice then used those famous words that justice "must be seen to be done." The same problem has been considered more recently in *Reg.* v. *Camborne Justices*,[12] where Slade J. gave the judgment of the court and referred to a number of authorities on this topic, including the well-known case of *Reg.* v. *Rand*,[13] where Blackburn J., in dealing with "bias" cases, referred to the matter as depending upon whether there was or was not[14] "a real likelihood" of bias. In the judgment of the court in *Reg.* v. *Camborne Justices* it was stated[15] that "the "right test is that prescribed by Blackburn J. in *Reg.* v. *Rand*,[16] "namely, that to disqualify a person from acting in a judicial or "quasi-judicial capacity on the ground of interest (other than "pecuniary or proprietary) in the subject-matter of the proceed-"ing, a real likelihood of bias must be shown. This court is, "further, of opinion that a real likelihood of bias must be made "to appear not only from the materials in fact ascertained by the "party complaining, but from such further facts as he might "readily have ascertained and easily verified in the course of his "inquiries."

Earlier, the court had cited[17] from a judgment of Vaughan Williams L.J. in *Reg.* v. *Sunderland Justices*[18]: "'Can it be "'said here that there was nothing more than a mere possibility "'or suspicion that these justices would be biased? We must "'judge of this matter as a reasonable man would judge of any "'matter in the conduct of his own business. Can one doubt "'that a reasonable man as a matter of business would, under "'the circumstances of this case, infallibly draw the inference "'that the justices who had negotiated and brought about this "'agreement would have a real bias in favour of granting the "'licence? . . .'"

It is true that these cases to which I have just referred are cases about judicial bias, and nobody has raised the question of bias in this case. But they do show that so long as the judicial or quasi-judicial capacity persists it is no answer to say that justice was in fact done, and I think, therefore, one is bound to examine what took place at the interview, which was in the form of a conversation which was ultimately communicated to the registrar, and see whether, when one looks at this matter objectively, there is any likelihood that the fountain of justice would be sullied.

[His Lordship referred to the affidavit of the auditor with which Leigh agreed, and continued:] Nothing material was added and no fresh information was given during that conversation beyond that contained in the special report which had already been put in on behalf of the society on March 25 by counsel for

[12] [1954] 2 All E.R. 850.
[13] (1866) L.R. 1 Q.B. 230.
[14] Ibid. 233.
[15] [1954] 2 All E.R. 855.
[16] L.R. 1 Q.B. 230, 233.
[17] [1954] 2 All E.R. 854.
[18] [1901] 2 K.B. 357, 373.

the society; on examination, I think that any such notion turns out to be without any substance. [His Lordship then referred to representations at the hearing in relation to the mortgage reserves and general reserve account, and continued:]

No doubt it was indiscreet for the executive registrar, in considering the point which he had to consider in relation to the Parliamentary Bill, the administrative matter, to allow the report which had been put in evidence in the judicial hearing to be used, even as an illustration of the problem; but I am satisfied upon the evidence of the parties to the interview that in doing so nothing was done which went beyond legitimate illustration, so that the registrar in the exercise of his undoubted administrative function relating to the point raised by the auditor did not fall into the error of receiving fresh representations relating to the matter upon which he was acting judicially. Nothing took place which on any reasonable view could be regarded as likely to prejudice the conclusion which the registrar had to embody in its final form by the order he made on April 6. This interview, therefore—and I accept the submission of the Crown in this respect—does not form a foundation for the edifice which the society seeks to build upon it, of a reception of material evidence behind the back of the society of a kind which would compel a fair tribunal to give the society a further hearing. Indeed, upon my reading of the evidence it is difficult to see how the registrar could have framed an invitation to the society to make any further representation, or to answer any supposed further material which had been put before him, for upon my reading of this evidence there was no fresh material contained therein. The proceedings over which the registrar was presiding were not concluded until the final order was made, but up to that time he received no relevant representations upon those matters, and no further material was brought to his attention after the representations had been closed. The accounts were in no sense new. The accounts and the special report were part of the material which had been produced for consideration when the representations of the society were made. The auditor and the executive registrar were not discussing with one another the accounts of 1959 with an eye on the order which the registrar was about to make, but with an eye on the administrative problem which they had to discuss, namely, the form of the certificate and the special report, which either would be an alternative or an addition to the signature to the account.

For my part, I have come to the conclusion that this case is a long way from those where the court has been obliged to exercise discretion to make an order of certiorari to quash an order on the ground that the principles of natural justice have not been followed.

There are further grounds of appeal, to which I shall refer very shortly. The society, it is said, was in effect debarred from making representations to the registrar; but a reading of the transcript of what occurred before the registrar on the occasions

C. A.
1960
REG.
v.
REGISTRAR OF BUILDING SOCIETIES.
Ex parte A BUILDING SOCIETY.
Hodson L.J.

when the hearing took place satisfies me that there is no substance in that at all. There was never any refusal of the registrar at any time to hear representations; and, indeed, at the final hearing on March 25, no adjournment was asked for. I need add nothing further to what Lord Parker C.J. said upon that topic.

Similarly, a complaint was made in this court, as well as in the court below, upon the form of the letter covering the notice which was sent on February 19, 1960, because that letter gave merely the principal grounds upon which the registrar had stated his intention of making an order, and it is said "that is wholly "insufficient as a foundation for a judicial hearing because no "notice was given in any sufficient form for us, the building "society, to be able to deal with the matters which were being "said or being considered to our prejudice."

The answer to that seems to me to be this. So far as the Act of Parliament is concerned, the registrar is not bound to give any particulars of the allegations which he makes at all: he merely has to give notice of the hearing to the other side—notice of his intention and notice that he is ready to hear their representations. That he did. He went further than the Act of Parliament compelled him to do in giving, under four headings, an indication of the matters to which the society would be asked to address themselves. It could hardly be a matter of complaint that the registrar went further than was necessary in complying with the provisions of the Act of Parliament.

For these reasons, I would dismiss the appeal.

PEARCE L.J. I agree entirely with what my Lord has so clearly stated, and merely add this with regard to the subject-matter of the remarks at the interview between the executive registrar and the auditor. Three matters were referred to casually —the question of the erasures, the question of Oak Farm, and the question of reserves.

So far as the erasures were concerned, there was nothing in that: the auditor was able to give an answer better than anyone else could have done, and he gave an answer which was obviously correct—namely, that, owing to the hurry, there had not been time to prepare a new and perfectly clean set of accounts.

As to Oak Farm, the arguments were plain to view and had already been fully ventilated in the representations by the society's counsel. On one view of the case, the district valuer's valuation was correct, and in that case the advances were ill-judged. The other view, put forward by the society, was that the third valuation—a far higher valuation—was correct, that the market value had in the result confirmed that valuation, and that, therefore, the advances were not ill-judged but were fully justified. Any reference by the executive registrar or the auditor to that topic in no way advanced those obvious arguments, and no further representations on the matter could have had any effect.

The question of the reserves was not a matter which would reflect adversely on the character of the society. It had been made plain at the hearing that the mortgage reserve could be transferred to the general reserve; but the registrar had pointed out that that really made no difference to the position. For, if he were examining the society's accounts from the point of view of its trustee status, he would deduct the mortgage reserve from the general reserve; since the mortgage reserve was necessary against mortgage losses and should not be part of the general reserve, and therefore, adding it to the general reserve in no way strengthened the society's financial position. He left it open as to whether that should or should not be done, and apparently gave the impression that it could properly be done, if the auditor was accurately representing the view of the society. But there was nothing deceitful about it: it was perfectly apparent and aboveboard, and it made no difference to the strength of the society's financial position.

For those reasons, in my view, nothing was said at that interview which could reasonably be thought to affect the mind of the registrar; and I agree entirely that, for the reasons my Lord has given, this appeal should be dismissed.

UPJOHN L.J. I agree completely with both the judgments that have been delivered, and do not desire to add anything of my own.

The building society was refused leave to appeal to the House of Lords and applied for a stay of publication of the name of the building society pending application to the House of Lords for leave to appeal.

UPJOHN L.J. When the matter was first mentioned Mr. Cumming-Bruce took the point that the court had no jurisdiction to order a suspension of publication, that being a duty cast (he submitted) by the statute entirely upon the registrar. I suppose it is still open to him to take that point, and we should then have to determine whether it is a good one or not.

HODSON L.J. We never considered it before because he agreed in the end.

Cumming-Bruce. I was agreeing before.

McKinnon. I am prepared to argue before the court that the registrar has not got power under section 11 of the Act to effect publication of the name of the society.

HODSON L.J. But when public proceedings take place in court the newspapers name the society, and that is publication. There is great doubt about whether there is any power in the court to

C. A.
1960

REG.
v.
REGISTRAR OF BUILDING SOCIETIES.
Ex parte
A BUILDING SOCIETY.

order the names to be suppressed in almost any case where the court is sitting in open court.

McKinnon. With respect, in criminal proceedings it is commonly done, and a witness is referred to as "Mr. X," or "Y," or "Z."

HODSON L.J. That is probably on the ground that justice cannot be done without something of that kind. But you would have to argue before us that justice could not be done unless the name was suppressed. I think that is the basis of it. We are not at present disposed to make any order affecting publicity. There may be doubts whether we have any power to do it.

Cumming-Bruce. (1) I do not consent, and (2) if necessary I take the point as to jurisdiction.

HODSON L.J. That is so, broadly speaking, the court has no power to suppress names.

Cumming-Bruce. There is the practice in infant cases, but they are proceedings in chambers and everything flows from that; and then there are the solicitor cases. In the case of solicitors, there is provision that the order made by the disciplinary committee shall itself not be placed on the file or published until the determination of any appellate proceedings, if an application to that end is made by the solicitor. So that that statute specifically contemplates that the order shall not come into public notice until the legal proceedings are finished. But I should think it is quite reasonable to hold that as that statute expressly contemplates protecting the anonymity of the solicitor by keeping the order off the file, that would be a warrant to the court not to publish the name of the solicitor in the appellate proceedings in relation to the order. There is nothing of that sort here; and there is a real practical objection to the continuance of the secrecy which is sought.

UPJOHN L.J. I should have thought we are not really concerned with publication at all. We have merely refused to issue a writ of certiorari. Whether the registrar has power to publish or whether he does publish or what his practice is does not seem to me to be a matter, strictly speaking, concerning this court.

Cumming-Bruce. The first heading on the notice of appeal, the question whether the registrar has a right to publish or not, is outside the jurisdiction of this court. What this court is concerned with is simply the title of these proceedings, and whether the order of this court should continue to be an anonymous order; it is submitted that it should not be and, indeed, cannot continue to be anonymous.

HODSON L.J. The court thinks that is right. The court has no power to alter the title of the suit.

McKinnon. The application to the court arises out of an order which has been made in proceedings which were private proceedings, not public proceedings. If my point on that is right, it is an order which is a private order.

HODSON L.J. But if you come to a court of certiorari you come to a public court where justice is seen to be done. How is the court to do justice publicly if the names of the parties are suppressed?

McKinnon. Assuming that the House of Lords takes the view that there is a case here for the society, it would only be right, if the order should never have been made in the first place, that the society before that has been decided should not have been irreparably damaged. On any view, there will be substantial damage to the society; and if in the end the House of Lords takes the view that the order of the registrar ought never to have been made, then it would be contrary to the principles of any system of justice that before that decision had been reached by the final tribunal the society should have been irreparably damaged.

UPJOHN L.J. The principle applicable is clear, it is stated by Lord Haldane in *Scott* v. *Scott* [19]: "While the broad principle is "that the courts of this country must, as between parties, "administer justice in public, this principle is subject to apparent "exceptions, such as those to which I have referred. But the "exceptions are themselves the outcome of a yet more fundamental principle that the chief object of courts of justice must "be to secure that justice is done." He then goes on to deal with the well-known exceptions of lunatics and infants and certain criminal cases: ". . . the burden lies on those seeking to displace "its application in the particular case to make out that the ordinary rule must as of necessity be superseded by this paramount "consideration. The question is by no means one which, consistently with the spirit of our jurisprudence, can be dealt with "by the judge as resting in his mere discretion as to what is "expedient. The latter must treat it as one of principle, and as "turning, not on convenience, but on necessity." That is the principle which we have to apply, sitting in public—that "necessarily" the name is published, I would have thought.

HODSON L.J. I agree.

PEARCE L.J. I agree.

[19] [1913] A.C. 417, 437, 438.

C. A.
1960
REG.
v.
REGISTRAR OF BUILDING SOCIETIES.
Ex parte A BUILDING SOCIETY.

HODSON L.J. The court is of opinion that we really cannot treat this as a matter of pure discretion, and in the exercise of our duty all we can do is to dismiss this appeal, with costs. We refuse leave to appeal to the House of Lords; and make no further order.

McKinnon. There is only this difficulty now. I ask leave for the money in court to be repaid to the society. There is something like £60,000 or more in court.

Cumming-Bruce. Not to the society, my Lord. When the society's application was made to the Divisional Court that there should be no publicity, the Divisional Court granted that application on terms designed to the effect that the continued flow of money, which would have been prevented by the order, into the society's coffers, would go into court, on conditions which would enable the court to return the money to the depositors. The registrar is strongly opposed, as defeating the whole nature of the exercise of cross-undertakings, to the money being returned to the society.

HODSON L.J. How is it to be disposed of?

Cumming-Bruce. The names of the depositors will be communicated to the court and the money repaid; the money is in court, and so there is a jurisdiction to give directions for its disposal.

HODSON L.J. If there is an order of the Divisional Court outstanding and we dismiss the appeal against the Divisional Court's order, the Divisional Court's order still stands and you will have to solve this problem with the Divisional Court. Mr. McKinnon will say: "We have not in fact advertised since the order was "made. The money is our money."

Cumming-Bruce. The material part of the Divisional Court order is as follows, that "The society do not take out of court "any part of the said moneys which said moneys are to be dealt "with in accordance with directions to be given by the court"; and the first order is that "The society lodge in court any moneys "hereinafter paid to the society as subscriptions for shares or any "part of a share or by way of a deposit indicating the names and "addresses of the payers and to produce to the registrar a copy "of the receipt for lodgment." What I envisage happening now is an application to the Divisional Court that it give directions for the said moneys to be returned to the payers whose names and addresses are held in court.

HODSON L.J. Yes. That is a matter for the Divisional Court.

McKinnon. The stay on publication still exists till we go back to the Divisional Court. There is an order of the Divisional Court so far as that is concerned.

HODSON L.J. Whether they have exceeded their jurisdiction or not we have not concerned ourselves with. All we have done is to dismiss the appeal.

Cumming-Bruce. There is no stay on publication in the order.

UPJOHN L.J. There is nothing in this order.

McKinnon. There was a consent that there be no publication. By consent, there was to be no publication during the subsistence of this order. That was the position. It was on those terms that I agreed to enter into these undertakings which were incorporated in the order of the court.

PEARCE L.J. It does not recite it.

HODSON L.J. You are thinking of two different kinds of publication all the time. All we are concerned with is the publicity which this case may receive as being a case heard in public. We are not concerned with the other matter.

McKinnon. Publication of the order will not matter in the least if this case receives the sort of publicity which might be expected.

HODSON L.J. Exactly. I see the practical side of it. But all we are concerned with is the publicity of this case here. I cannot say anything further about the publication of the order as such by the registrar.

Application dismissed with costs; leave to appeal to the House of Lords refused.

[Later that day counsel for the registrar applied to the Divisional Court (Lord Parker C.J., Byrne and Ashworth JJ.) for directions in regard to the money lodged in court by the building society pursuant to an order of the Divisional Court. The name of the society was mentioned in open court at the request of Lord Parker C.J. Counsel for the building society did not ask for the money to be paid back to the society. It was ordered that the appropriate officer of the court should pay back their deposits to such depositors as had not already been repaid by the society, and that, on the officer being satisfied that any depositors had been

C. A.
1960
REG. v. REGISTRAR OF BUILDING SOCIETIES. *Ex parte* A BUILDING SOCIETY.

repaid by the society, the amount of their deposits should be repaid to the society.]

Solicitors: *W. J. Wade & Co., Slough; Treasury Solicitor.*

I. G. R. M.

[CHANCERY DIVISION.]

1960
May 16, 23, 30.
CROSS J.

* *In re* BROWNE (A BANKRUPT). *Ex parte* THE OFFICIAL RECEIVER *v.* THOMPSON AND ANOTHER.

[No. 1155 of 1912.]

Bankruptcy—Debt—Proof of debt—Application to expunge proof—Commission agent's proof of debt for money due on taking accounts—Debtor and creditor dead—Whether debtor's statement of affairs admissible against trustees of creditor's estate—Whether gaming debt—Burden of proof—Bankruptcy Act, 1914 (4 *&* 5 *Geo.* 5, *c.* 59), *s.* 141, *Sch. II, r.* 24.

Evidence — Deceased's statement — Bankrupt — Statement of affairs — Whether admissible—Whether a "deposition"—Bankruptcy Act, 1914, *s.* 141.

Gaming—Betting—Promise to pay—Debtor and creditor both dead—Onus of proving whether debt is enforceable—Proof of debt admitted by debtor's trustee in bankruptcy.

By rule 24 of the Second Schedule to the Bankruptcy Act, 1914: "If the trustee thinks that a proof has been improperly admitted, "the court may, on the application of the trustee . . . expunge the "proof . . ."

By section 141 of the Act: "In the case of the death of the debtor "or his wife, or of a witness whose evidence has been received by "any court in any proceeding under this Act, the deposition of the "person so deceased . . . shall be admitted as evidence of the matters "therein deposed to."

A debtor was adjudicated bankrupt in 1912. In 1913 he made a statement of affairs verified by affidavit, pursuant to section 16 of the Bankruptcy Act, 1883, and subsequently a proof of debt was sworn on behalf of H., trading as J. S. H. & Co., commission agent, for a sum of £4,796 10s. 1d. for money found due on taking accounts between the parties. H. died in 1919 and the debtor died in 1921. In 1924 the debtor's trustee in bankruptcy admitted H.'s proof and obtained his release from the trusteeship in 1925. No dividend was ever paid by the trustee.

In June, 1958, a sum of £1,501 came into the hands of the official receiver as trustee in bankruptcy of the debtor; and about £1,300 became available for distribution among his creditors. The official receiver applied to the court, under rule 24 of the Second Schedule to the Bankruptcy Act, 1914, to have H.'s proof expunged on the ground that it was an unenforceable gaming debt, and that the proof was, therefore, improperly admitted:—

Held, (1) that the statement of affairs was inadmissible as against the trustees of H.'s estate: it was not rendered admissible by the fact that it was a sworn statement which the debtor was bound to make in discharge of the duty imposed on him by section 16 of the Act of 1883, nor were its contents "evidence . . . received by any "court" or the statement or affidavit verifying it "the deposition" of the debtor within section 141 of the Act of 1914.

Ex parte Revell, In re Tollemache (No. 1) (1884) 13 Q.B.D. 720, C.A. applied.

(2) That, where both the debtor and the creditor were dead, and relevant documentary evidence might have been lost, it was for the trustee in bankruptcy to satisfy the court beyond any reasonable doubt that a proof had been improperly admitted; and that, although the only admissible evidence, the proof itself, appeared in its face to be a claim on an account between bookmaker and client, the official solicitor had failed so to satisfy the court, for a fresh agreement might have been made between the debtor and the creditor resulting in an enforceable debt, and without knowing the facts of the case it could not be said for certain that the debt was not enforceable. Accordingly, the application must be dismissed.

Hyams v. *Stuart King* [1908] 2 K.B. 696; 24 T.L.R. 675, C.A. and *Hill* v. *William Hill (Park Lane) Ltd.* [1949] A.C. 530; 65 T.L.R. 471; [1949] 2 All E.R. 452, H.L. considered.

MOTION.

On November 19, 1912, a receiving order was made against a debtor, James Joseph Aloysius Patrick Browne. The debtor was adjudicated bankrupt on December 30, 1912, and one, Laurence Robert Dicksee, was appointed trustee of his estate. On April 10, 1913, the debtor made out an amended statement of affairs verified by affidavit in accordance with the provisions of section 16 of the Bankruptcy Act, 1883.

On May 21, 1913, John Gregg Spears, a bookkeeper in the employ of the creditor, James Stanley Halsall, swore a proof which stated that "[the debtor] was, at the date of the receiving "order . . . and still is, justly and truly indebted to [the creditor] "trading as J. Stanley Halsall & Co., . . . commission agent, "in the sum of £4,796 10s. 1d. for money found due to [the "creditor] by [the debtor] on taking accounts between the parties "on November 23, 1912."

The creditor died on February 18, 1919, and the respondents, Gerald Conrad Thompson and Doris Isobel Flemmich, were the present trustees of his will. The debtor died on November 28, 1921, without having obtained his discharge. On April 3, 1924, the creditor's proof was admitted for dividend together with six other proofs. The total amount of the proofs admitted was £10,060 1s. 7d. No dividend was ever paid by the then trustee, who obtained his release from the trusteeship on January 15, 1925, whereupon the official receiver became trustee of the debtor's estate.

In June, 1958, a sum of £1,501 in respect of the debtor's reversionary interest in the estate of a deceased relative came into the hands of the official receiver, and, after payment of outstanding costs and expenses, there was a balance of about £1,300

1960

BROWNE (A BANKRUPT), *In re.*

available for distribution by way of dividend among the creditors of the debtor. By a notice of motion dated February 11, 1960, the official receiver asked for an order that the creditors' proof be expunged.

Bryan Clauson for the official receiver.
Muir Hunter for the respondents.

The following cases, not referred to in the judgment, were cited in argument: *In re Browne, Ex parte Martingell* *; *In re Harry Dunn* †; *Watt* v. *Assets Co. Ltd.* ‡; *In re Van Laun, Ex parte Chatterton* §; *In re Bottomley* **; *Ex parte Nicholson, In re Ridsdale* ††; *In re Brünner* ‡‡; *Gugenheim* v. *Ladbroke & Co. Ltd.* §§

Cur. adv. vult.

May 30. CROSS J. read the following judgment. This is a motion by the official receiver, who is now the trustee in bankruptcy of the late James Browne, asking that a certain proof of debt which has been admitted for dividend be expunged.

[His Lordship stated the facts and continued:] The official receiver has formed the view that five of the seven proofs admitted by the debtor's trustee, including the proof in question, were in respect of unenforceable gambling debts and ought not to have been admitted. The motion now before me, however, relates only to the proof of Halsall.

Rule 24 of the rules in the Second Schedule to the Bankruptcy Act, 1914, is in the following terms: "If the trustee thinks that "a proof has been improperly admitted, the court may, on the "application of the trustee, after notice to the creditor who made "the proof, expunge the proof or reduce its amount." It is clear that mere lapse of time alone, however long, is no objection to an application to expunge a proof, though the creditor is entitled to retain any dividend which he may previously have received: see *In re Tait, Ex parte Harper.*[1] I do not, however, read that case as deciding that there can never be any estoppel against a trustee who seeks to have a proof expunged. Thus if the creditor had been given to understand by the trustee that he was going to receive a certain sum by way of dividend, and had acted in some way in reliance on the expectation of receiving it, I think that the court might well refuse to expunge his proof even though it was satisfied that it had been wrongly admitted in the first place. This appears to have been the view taken by Knight Bruce L.J. in *Ex parte Sanderson, In re Alexander,*[2] and I do not think that

* [1904] 2 K.B. 133; 20 T.L.R. 289.
† [1949] Ch. 640; 65 T.L.R. 521; [1949] 2 All E.R. 388, C.A.
‡ [1905] A.C. 317, H.L.
§ [1907] 2 K.B. 23; 23 T.L.R. 97, C.A.
** [1915] W.N. 146.
†† (1836) 6 L.J.Bcy. 2.
‡‡ (1887) 19 Q.B.D. 572.
§§ [1947] 1 All E.R. 292, C.A.
[1] (1882) 21 Ch.D. 537, C.A.
[2] (1856) 8 De G.M. & G. 849.

there is anything in *In re Tait, Ex parte Harper* [3] inconsistent with it; but in this case the creditor's estate cannot rely on any estoppel of this sort since he died before the proof was admitted and the receipt of the £1,300 was entirely unexpected.

This case, however, differs from *In re Tait, Ex parte Harper* [3] in a very material particular. In *In re Tait, Ex parte Harper* [3] there was no doubt as to the facts which existed when the proof was admitted and no doubt that the proof was improperly admitted. The argument turned simply on whether the delay which had occurred precluded the trustee from asking to have the proof expunged. Here, on the other hand, it is by no means clear upon what material the trustee admitted the proof. The creditor died many years ago, and the respondents say that they can find nothing about the debt in such papers of his as survive. The trustee who admitted the proof retired in 1925 and for all I know he may now be dead. At all events, I have no evidence from him. Finally, the debtor himself is long since dead and cannot give any evidence as to the nature of the debt.

Counsel for the official receiver submitted that certain references as to the nature of the creditor's claim contained in the debtor's statement of affairs were admissible against the respondents. He did not argue that what a deceased debtor states with regard to his liabilities in his statement of affairs is admissible in evidence as a statement against interest. He contended, first, that the statement of affairs was admissible as a sworn statement which the debtor was bound to make in discharge of the duty imposed on him by what is now section 14 of the Act. Alternatively, he submitted that it was expressly made admissible by section 141 of the Act. The first submission was addressed to the Court of Appeal as long ago as 1884 in the case of *Ex parte Revell, In re Tollemache (No. 1)*,[4] as an alternative to the argument that the debtor's entry of the debt in his statement of affairs was a statement against interest. The court rejected the latter argument, and though they did not expressly deal with it they must, I think, be taken to have rejected the former as well. The argument based on section 141 is also, in my judgment, ill-founded. The section runs as follows: "In the case of the death of the debtor "or his wife, or of a witness whose evidence has been received "by any court in any proceeding under this Act, the deposition "of the person so deceased, purporting to be sealed with the seal "of the court, or a copy thereof purporting to be so sealed, shall "be admitted as evidence of the matters therein deposed to."

A statement of affairs must, of course, be verified by affidavit, but the debtor cannot be cross-examined on it and I do not think that what is contained in it can fairly be said to be evidence received by the court or that the statement or the affidavit can properly be described as a deposition of the debtor. Section 141 appears to me to be referring to the depositions properly so called

[3] (1882) 21 Ch.D. 537, C.A.

[4] (1884) 13 Q.B.D. 720, C.A.

1960

BROWNE (A BANKRUPT), *In re.*

CROSS J.

of the debtor or of his wife or some third party made either at the public examination of the debtor or at a private examination under section 25 of the Act.

As I see the matter, therefore, the only evidence which I have to show that the proof was wrongfully admitted is the proof itself. In a case where the vital witnesses are dead, and relevant documentary evidence may have been lost, the maxim "omnia praesumuntur rite esse acta" applies with peculiar force. In such a case it is not enough for the official receiver to say that, as the terms of the proof suggest that the debt in question was an unenforceable gambling debt, the onus is thrown on the creditor's representatives to show that it was not. It is for the official receiver to satisfy me that the proof was wrongly admitted, and not, as I see it, simply to satisfy me on the balance of probabilities but to satisfy me beyond any reasonable doubt.

The first thing that strikes me on looking at the proof is that it appears on the face of it to be a claim on an account stated between a bookmaker and a backer. Although the point was not perhaps strictly speaking settled before the decision of Streatfeild J. in *Alberg* v. *Chandler*,[5] it was always, I think, tolerably clear that such a claim was not enforceable at all: see *per* Tucker L.J. in *Law* v. *Dearnley*.[6] It would be surprising to find any trustee in bankruptcy admitting such a proof without further inquiry, and I think it likely that if one knew the full facts one would find that the trustee, in admitting the proof, was acting on some further information from the creditor not contained in the proof itself.

Counsel for the official receiver was disposed to agree that this might well be so, but he argued that any further material upon which the trustee acted could at most only have been evidence of a fresh agreement by the debtor to pay the gambling debt founded on some new consideration such as a promise by the creditor to refrain from posting the debtor as a defaulter. Such evidence, he said, might well have justified the trustee in admitting the proof in reliance on the decision of the Court of Appeal in *Hyams* v. *Stuart King*[7]; but now that that decision has been overruled by the House of Lords in *Hill* v. *William Hill (Park Lane) Ltd.*,[8] one could see clearly that the proof must have been wrongly admitted.

I agree that it is possible—if not probable—that this was a *Hyams* v. *Stuart King*[9] case; and, as at present advised, I see no reason to doubt that, if a trustee admits a proof on a view of the law which is generally thought to be right but subsequently turns out to be wrong, the proof has been "improperly" admitted within the meaning of rule 24. But can I say that I am satisfied

[5] (1948) 64 T.L.R. 394.

[6] [1950] 1 K.B. 400, 410, 411; 66 T.L.R. (Pt. 1) 156; [1950] 1 All E.R. 124, C.A.

[7] [1908] 2 K.B. 696; 24 T.L.R. 675, C.A.

[8] [1949] A.C. 530; 65 T.L.R. 471; [1949] 2 All E.R. 452, H.L.

[9] [1908] 2 K.B. 696.

beyond reasonable doubt that the creditor's claim was unenforceable under the law as now understood? As counsel for the respondents pointed out, it is possible—though no doubt unlikely—that, despite the reference in the proof to the creditor's profession, the debt was not in respect of betting transactions at all, and even if I disregard this possibility, the speeches in *Hill* v. *William Hill (Park Lane) Ltd.*[10] show that it is always a question of fact whether or not a fresh agreement arrived at between a bookmaker and an unsuccessful backer results in an enforceable debt or not. The overruling of *Hyams* v. *Stuart King*[11] has much reduced the number of cases in which there will be an enforceable claim, but without knowing the facts of the particular case no one can say for certain that there will not be. If it was my function to guess whether or not the creditor's proof was properly admitted, I should have no hesitation whatever in guessing that it was not; but my function, as I see it, is to refuse this motion unless I am satisfied beyond any reasonable doubt that it was improperly admitted; and in the state of the evidence I cannot say that I am so satisfied.

Motion dismissed. Respondents' costs to be taxed on a common fund basis and paid out of the debtor's estate. Applicant's costs also to be paid out of the debtor's estate.

Solicitors: *Tarry, Sherlock & King; Kearton & Co. for Garnett, Tarbet, Lindsay & Elsworth, Liverpool.*

V. A. M.

[10] [1949] A.C. 530, 551, 559, 574.

[11] [1908] 2 K.B. 696.

[QUEEN'S BENCH DIVISION.]

* REGINA *v.* EDMONTON JUSTICES. *Ex parte* BROOKS.

1960
May 24.

Lord Parker C.J., Byrne and Donovan JJ.

Road Traffic—Notice of intended prosecution—Issue whether notice given—Procedure—Appropriate time to dispute service of notice—Whether necessary to raise matter as preliminary point—Road Traffic Act, 1930 (20 *&* 21 *Geo.* 5, *c.* 43), *s.* 21.

The defendant was charged with driving without due care and attention contrary to section 12 of the Road Traffic Act, 1930. At the hearing, after a police witness for the prosecution had given his evidence-in-chief, the defendant by cross-examination sought to show that he had never been given the statutory warning or notice of

1960

REG.
v.
EDMONTON
JUSTICES.

intended prosecution as required by section 21 of the Road Traffic Act, 1934. The magistrates disallowed that cross-examination and refused to allow the defendant himself to give evidence that he had not received a warning or notice on the ground that the defendant had not stated at the beginning of the case that there was an issue regarding the notice of intended prosecution. The magistrates found the offence proved. On an application for an order of certiorari:—

Held, allowing the application, that while it was a very convenient practice for an issue regarding the notice of intended prosecution to be treated as a preliminary point, there was no ground on which a defendant could be prevented from raising the matter at any stage of the proceedings.

APPLICATION FOR CERTIORARI.

The applicant, Henry Gordon Brooks, was convicted on November 26, 1959, by Edmonton magistrates sitting at Tottenham, on an information laid by a police inspector, alleging that he drove without due care and attention contrary to section 12 (1) of the Road Traffic Act, 1930. He was fined £20, ordered to pay £4 5s. costs, his driving licence was endorsed and he was disqualified from driving for two months. He applied for an order of certiorari to bring up and quash the conviction and order on the grounds that the magistrates refused to permit cross-examination of the prosecution witnesses or the presentation of evidence for the defence on one of the issues, namely, compliance with section 21 of the Road Traffic Act, 1930 [1] (which related to notice of intended prosecution), and that the conviction and order were contrary to natural justice.

By his affidavit in support of the statement of grounds for his application, the defendant stated that at the hearing of the information he was represented by counsel and pleaded not guilty. The third witness for the prosecution was police constable Chapman who, inter alia, stated that he had given the defendant the usual warning. When the defendant's counsel cross-examined Chapman he asked him what he meant by that, and Chapman replied that he meant that he had informed the defendant that he would be reported so that the question of prosecuting him for one or more of the offences of careless, dangerous or reckless driving could be considered. The defendant's counsel, on the defendant's instructions, put it to Chapman that he had not so informed

[1] Road Traffic Act, 1930, s. 21: "Where a person is prosecuted for an offence . . . relating . . . to reckless or dangerous driving, and to careless driving he shall not be convicted unless either—(*a*) he was warned at the time the offence was committed that the question of prosecuting him for an offence . . . would be taken into consideration; or (*b*) within 14 days of the commission of the offence a summons for the offence was served on him; or (*c*) within . . . 14 days a notice of the intended prosecution . . . was served on or sent . . . to him . . . : Provided that—(i) Failure to comply with this requirement shall not be a bar to the conviction of the accused in any case where the court is satisfied that—(1) neither the name and address of the accused . . . could with reasonable diligence have been ascertained in time . . . ; or (2) the accused by his own conduct contributed to the failure; and (ii) the requirement of this section shall in every case be deemed to have been complied with unless and until the contrary is proved."

the defendant. At that point the clerk to the magistrates observed that it was the practice of the court not to permit the raising by the defence of issues relating to notice of intended prosecution unless the defence had stated at the beginning of the case that there was an issue on that score, and that he believed that to be the correct practice. The defendant's counsel then pointed out that as the notice was, by statute, deemed to have been given until the contrary were shown it was not possible to take the point as a preliminary one. The chairman of the magistrates said that the Bench had to be guided by the clerk and ruled that the question was not a proper one, and that counsel should not put any further questions to that issue. The defendant's counsel then asked whether the defendant would be permitted to give evidence that Chapman had not informed him that he would be reported, and the clerk said that he considered that followed from the prior ruling, whereupon the chairman further ruled that the defendant should not be permitted to give evidence concerning the issue. The defendant's counsel asked that those rulings should be recorded, which was done. The defendant subsequently gave evidence but not on the issue of notice of intended prosecution. The Bench retired and found the case against the defendant proved, and thereupon made the order which the defendant sought to have quashed.

The magistrates put in an affidavit to the same effect as that of the defendant.

J. Nevin for the applicant.

The respondents did not appear and were not represented.

LORD PARKER C.J. stated the facts and continued: For my part, I think it is a very convenient practice that in these cases defendants should be asked whether any issue is going to be raised in regard to notice of intended prosecution because if there is, it is clearly convenient to dispose of that issue at once without having to go into all the facts. But while that is a very convenient practice, I can see no ground on which one can prevent a defendant raising the matter at any stage of the proceedings. After all, section 21 of the Road Traffic Act, 1930, says, and only says, that the defendant shall not be convicted unless there has been a notice of intended prosecution and, by the second proviso, it is provided: "The requirement of this section shall in every "case be deemed to have been complied with unless and until the "contrary is proved." If, therefore, a defendant chooses not to raise the issue at once but to wait until the appropriate prosecution witness gives evidence and then cross-examines him, I myself see no possible power to prevent that cross-examination. Accordingly, I feel in this case that while there is no reflection on the

1960

REG. v. EDMONTON JUSTICES.

justices, there has in fact been a conviction contrary to natural justice and, in those circumstances, I would allow the order to go and the conviction to be quashed.

BYRNE J. I agree.

DONOVAN J. I also agree.

Order for certiorari.

Solicitors: *Adler & Adler.*

C. J. E.

[QUEEN'S BENCH DIVISION.]

1960 *May* 17.

Lord Parker C.J., Donovan and Davies JJ.

* REGINA *v.* LEWES JUSTICES. *Ex parte* PLUMPTON AND DISTRICT CLUB TRUSTEES.

Licensing—Forfeiture—Conviction of "the owner or occupier"—Members' club—Unlawful sale of liquor—Seizure by police—Conviction of one member—Liquor forfeited—Whether member was "the owner "or occupier"—Licensing Act, 1953 (1 *&* 2 *Eliz.* 2, *c.* 46), *s.* 152 (2).

Crown Practice—Certiorari—Jurisdiction of inferior tribunal—Evidence—Admissibility of affidavit evidence.

The police, on the authority of a warrant issued under section 152 (1) of the Licensing Act, 1953, entered a members' club and found liquor being served to non-members. The club was run by a managing committee; the freehold and assets were vested in three trustees, the present applicants. The police seized the liquor and subsequently those persons found selling the liquor were charged with selling it without a justices' licence, to which they all pleaded guilty, including S., who was a member of the club and of the managing committee. The memorandum of conviction against S. included the direction that the liquor forfeited under section 152 should be sold. The applicants applied for an order of certiorari on the grounds that the record was bad on its face in that it did not disclose that S. was "the owner or occupier" of the premises, and that, in any event, the magistrates had no jurisdiction to give that direction in that S. was not the owner or occupier of the premises from which the liquor had been removed and that, accordingly, forfeiture could not take place:—

Held, that (1) although the record was incomplete in as far as it did not specify that S. was the owner or occupier, there was no error of law on the face of the record.

(2) Since section 152 (2) provided for automatic forfeiture if the owner or occupier was convicted, and an incorrect decision by the magistrates that the person convicted was an owner or occupier could not bring about that automatic forfeiture, the court was entitled to look at affidavit evidence in order to see whether the magistrates had jurisdiction, which meant to ascertain whether S. was the owner or occupier of the place from which the liquor was removed.

(3) On the true construction of section 152 (2), it was plain that all the owners or all the occupiers had to be convicted before the forfeiture could operate; accordingly, whoever might be the occupiers

of a members' club, it was clear that, at the most, S. was only one of many occupiers and, accordingly, the court would quash that part of the record setting out the forfeiture and order for sale.

APPLICATION FOR CERTIORARI.

The applicants, the three trustees of the Plumpton and District Club, applied for an order of certiorari to bring up and quash an order made by East Sussex justices sitting at Lewes on January 27, 1959, purporting to forfeit under section 152 (2) of the Licensing Act, 1953,[1] intoxicating liquor and vessels, the property of the applicants removed from the club under section 152 (1) on November 22, 1958. The grounds on which the order was sought were: (1) that the order was bad in law in that section 152 (2) operated only when the owner or occupier of the place, from which intoxicating liquor had been removed under subsection (1), was convicted of stated offences. The accused and convicted person, one Edward William Sasse, convicted of selling by retail intoxicating liquor without holding a justices' licence, was not on record on summons or final conviction as being the owner or occupier of the premises of the club, nor was he the owner or occupier; (2) that in making the order the magistrates exceeded their jurisdiction.

By affidavit in support of the application the secretary of the club stated that on November 22 certain intoxicating liquor and vessels valued at £52 2s. 10d. were seized and removed pursuant to section 152 (1) of the Act of 1953 from the premises of the club. By an information dated January 10, 1959, Sasse was charged that he on November 22, 1958, at 10.20 p.m. at the Plumpton and District Club unlawfully did sell by retail certain intoxicating liquor, to wit ale without holding a justices' licence. On January 27, 1959, Sasse was convicted of selling by retail intoxicating liquor which he was not authorised to sell. The memorandum of conviction entered in the register of the magistrates' court dated January 27, 1959, read: (Name of defendant) "Edward "William Sasse"; (nature of offence) "Selling by retail intoxi- "cating liquor without holding a justices' licence"; (date of offence) "22.11.1958"; (plea or consent to order) "Guilty";

[1] Licensing Act, 1953, s. 152: "(1) If a justice of the peace is satisfied by information on oath that "there is reasonable ground for "believing that any intoxicating "liquor is sold by retail . . . at any "place in the county or borough for "which he is justice, being a place "where that liquor may not lawfully "be sold by retail, he may issue a "search warrant . . . to a constable "authorising him . . . to enter that "place . . . and search the place for "intoxicating liquor and seize and "remove any intoxicating liquor that "the constable has reasonable "grounds for supposing to be in the "place for the purpose of unlawful "sale there or elsewhere, and the "vessels containing the liquor. "(2) If the owner or occupier of the "place from which any intoxicating "liquor has been removed under the "preceding subsection is convicted of "selling by retail . . . any intoxi- "cating liquor that he is not autho- "rised to sell by retail, or is convicted "of having in his possession intoxi- "cating liquor that he is not autho- "rised to sell, any intoxicating liquor "so removed, and the vessels contain- "ing it, shall be forfeited."

1960

REGINA
v.
LEWES
JUSTICES.

(minute of adjudication) "Defendant convicted, fined £2. Intoxicating liquor and vessels forfeited under section 152 of the Licensing Act, 1953, directed to be sold by informant."

By his affidavit the clerk to the Lewes justices stated that acting under the authority of warrants issued by a justice of the peace under sections 143 and 152 of the Licensing Act, 1953, officers of the East Sussex Police Force entered the premises of the Plumpton and District Club on November 22, 1958, and seized, inter alia, a quantity of intoxicating liquor and containing vessels which were found therein. On January 27, 1959, at Lewes Magistrates' Court various persons appeared on informations charging them with offences against section 120 (1) (*a*) alleged to have been committed at the club, amongst them Edward William Sasse, who was charged with three offences alleged to have been committed on October 4, 1958, one on October 18 and two on November 22, 1958. Each of the persons accused pleaded guilty. Following the pleas of guilty the solicitor for the prosecution outlined the facts and circumstances of the case, which included, inter alia, that on the execution of the warrant under section 152 liquor and vessels had been seized and removed from the club premises on November 22; that the club was a members' club; that the various accused persons and in particular Sasse were members of the club and on the occasions of the several offences were serving behind the bar of the club; that in his submission for the purposes of section 152 (2) the various accused, and in particular Sasse, as members, were occupiers of the club premises; and that therefore under the provisions of section 152 an occupier, having been convicted of selling by retail intoxicating liquor without holding a justices' licence any intoxicating liquor and containing vessels which had been seized under the warrant issued, would be automatically forfeited. Counsel appearing for the club and the accused raised no objections to any of the facts or submissions, and in due course, when pleading in mitigation on behalf of the accused, pointed out that in any event the prosecution might be a crippling blow to the club as £51 worth of intoxicating liquor had been seized in addition to the value of the containers. When the magistrates retired to consider the penalties, the clerk was invited and did retire with them. The clerk understood that the magistrates assumed that it was not disputed that Sasse was an occupier of the club premises, and that on his conviction for the offences committed on November 22, when the liquor and containers were seized under warrant, the liquor and vessels were automatically forfeited under the provisions of section 152 (2). Announcing the penalties, the chairman of the court stated that the liquor and vessels were forfeited automatically under section 152. In so doing, the chairman was merely stating the effect of section 152, and the court in no way purported to make any order directing such forfeiture, which was in their opinion unnecessary in view of the provisions of section 152. It was not therefore accurate to say, as was set

out in the club secretary's affidavit, that the justices made an order under section 152 (2). Thereafter, acting under their powers under section 160 (3), the court directed that the liquor and vessels should be sold by the informant. In the clerk's submission, it being agreed between the parties before the court that Sasse was both a member and, for the purposes of the Act, an occupier of the club on November 22, 1958, on his conviction for any one of the three offences alleged to have been committed on that date any intoxicating liquor or containers seized in pursuance of a warrant issued under section 152 (1) were forfeited under section 152 (2), and that the magistrates acted properly in making a direction under section 160 (3) for the disposal of the liquor and containers.

By a further affidavit the secretary of the club agreed with the facts set out in the clerk's affidavit but submitted that there was no proof that Sasse was the occupier of the premises. Sasse was at all material times a member of the club and of the managing committee; he was not a trustee. The applicants submitted that Sasse was not the occupier of the premises and, if necessary, would submit that the premises were in occupation of the trustees, alternatively, of the managing committee, alternatively, of both the trustees and the managing committee. Of the three other persons charged with Sasse, one was a member of the managing committee, another was assistant secretary. At all material times there were eight members of the managing committee.

Patrick O'Connor Q.C. for the applicants.
F. B. Purchas for the respondents.

The following cases, in addition to those referred to in the judgment, were cited in argument: *Graff* v. *Evans* [2]; *Brittain* v. *Kinnaird* [3]; *Rex* v. *Weston-super-Mare Justices, Ex parte Barkers (Contractors) Ltd.* [4]; *Davies* v. *Price* [5]; *Gill* v. *Bright.* [6]

LORD PARKER C.J. stated the facts and continued: The submissions made on behalf of the applicants are twofold. First of all, it is said that that record is bad on its face. Secondly, it is said that in any event the magistrates had no jurisdiction to give that direction in that Sasse was not the owner or occupier of the place from which the liquor had been removed, and that, accordingly, forfeiture could not take place.

Having said that, it is necessary to look in a little more detail at the relevant sections of the Act of 1953. By section 120 (1) it is provided: "(1) Subject to the provisions of this Act, if any "person—(*a*) sells or exposes for sale by retail any intoxicating

[2] (1882) 8 Q.B.D. 373.
[3] (1819) 1 Brod. & Bing. 432.
[4] 60 T.L.R. 382; [1944] 1 All E.R. 747, D.C.
[5] [1958] 1 W.L.R. 434; [1958] 1 All E.R. 671, C.A.
[6] (1871) 36 J.P. 198.

1960

REGINA
v.
LEWES
JUSTICES.

Lord Parker
C.J.

"liquor without holding a justices' licence authorising him to "hold an excise licence for the sale of that liquor, or (*b*) holding "a justices' licence sells or exposes for sale by retail any intoxi-"cating liquor except at the place for which the justices' licence "authorises him to hold an excise licence for the sale of that "liquor, he shall be guilty of an offence under this section." By subsection (6) of that section it is provided: "Where intoxicating "liquor is sold in contravention of this section on any premises, "every occupier of the premises who is proved to have been privy "or consenting to the sale shall be guilty of an offence under this "section."

Section 152 is not dealing with licensed premises. [His Lordship read the material provisions of subsections (1) and (2) of section 152 and continued:] It was pursuant to a search warrant issued under section 152 (1) that the police raided this club on November 22, 1958, and seized a quantity of liquor and the vessels containing the same. The persons whom they thereafter brought before the court were persons who were found selling the liquor to non-members and who were guilty of an offence under section 120 (1) (*a*).

Observe in passing that the forfeiture in section 152 (2) is an automatic forfeiture. It does not depend upon any finding of the magistrates or any discretion on the part of the magistrates. It is something which follows automatically if the owner or occupier of the place from which the liquor has been removed is convicted of selling by retail any intoxicating liquor that he is not authorised to sell.

Finally, by section 160 (3) it is provided: "Liquor or vessels "forfeited under this Act shall be sold or otherwise disposed of as "the court imposing the forfeiture may direct; and the proceeds "shall be applied as if they were a fine." There are other provisions in the Act giving the magistrates a discretion to forfeit, and that is no doubt why there is a reference to the court imposing the forfeiture.

In the present case, as I have said, the forfeiture is automatic, but I think that the magistrates would, even so, have to make an order providing, as they did, that the liquor should be sold. It was as the result of that that this entry to which I have referred appears in the register of the magistrates' court. It is to be observed that the magistrates do not therein impose the forfeiture, but they recite that the intoxicating liquor and vessels had been forfeited under section 152 of the Act, and directed that they be sold by the informant.

The first point taken by Mr. O'Connor is that that record is bad in that it does not disclose that Edward William Sasse was the owner or the occupier. Whether one looks at that or at the information preferred against him, he is not charged with selling by retail without a licence "being the owner or the occupier" of any premises, and in the minute of adjudication it is not stated

that the defendant, being the occupier, the liquor and vessels are forfeited. Mr. O'Connor maintains that the record is incomplete in that respect and bad. I am not prepared to say that this record is bad in the sense that it contains an error of law on its face. I think that it would have been far better if it had been recited that the defendant, being the owner or occupier, the liquor and vessels were forfeited automatically. Also, I think it would have been better if the quantity of liquor and the number of vessels had been inserted. But certiorari will only go if there is an error of law on its face, and although it is incomplete, when I look at this record I cannot say that it is necessarily bad because, for all I know, Edward William Sasse might well have been the owner or the occupier. Accordingly, I would not allow this application on that ground.

The other ground is one which is said to go to jurisdiction. It is said that if this court looks at affidavits they will find that Edward William Sasse was not the owner or the occupier within section 152 (2); that, accordingly, there could not have been any automatic disqualification and, once more, that there could not have been an order for sale under section 160 (3). On the other side, it is argued by Mr. Purchas that this is not a case in which the court is entitled to look at affidavit evidence. He says that this is the type of case in which the magistrates have jurisdiction to inquire into the matter. If they have gone wrong in law or in fact, that is not a matter for certiorari, because the remedy by way of certiorari is not a remedy by way of appeal; and he points to the well-known passages in *Reg.* v. *Bolton*[1] and the very well-known passage of Lord Sumner in *Rex* v. *Nat Bell Liquors Ltd.*[2] I think I should read the passage in that speech to make Mr. Purchas's point clear. Lord Sumner said: "It has been "said that the matter may be regarded as a question of jurisdic-"tion, and that a justice who convicts without evidence is acting "without jurisdiction to do so. Accordingly, want of essential "evidence, if ascertained somehow, is on the same footing as "want of qualification in the magistrate, and goes to the question "of his right to enter on the case at all. Want of evidence on "which to convict is the same as want of jurisdiction to take "evidence at all. This, clearly, is erroneous. A justice who "convicts without evidence is doing something that he ought not "to do, but he is doing it as a judge, and if his jurisdiction to "entertain the charge is not open to impeachment, his subse-"quent error, however grave, is a wrong exercise of a jurisdiction "which he has, and not a usurpation of a jurisdiction which he "has not. How a magistrate, who has acted within his juris-"diction up to the point at which the missing evidence should "have been, but was not, given, can, thereafter, be said by a "kind of relation back to have had no jurisdiction over the charge "at all, it is hard to see."

[1] (1841) 1 Q.B. 66.

[2] [1922] 2 A.C. 128, 151.

1960

REGINA
v.
LEWES
JUSTICES.

Lord Parker
C.J.

Mr. Purchas maintains that applying that principle this was a case in which the magistrates had jurisdiction to inquire whether the person convicted was the owner or the occupier within the subsection, and that if they have gone wrong in fact or in law that is not a matter for this court. I am quite satisfied that this is not a case which comes within that principle. In particular, this is not a case where it has been left to the magistrates to be satisfied that the person convicted is the owner or the occupier. The subsection provides that there is an automatic forfeiture if the owner or occupier is convicted. That has to be so before there is any forfeiture, and then the forfeiture is automatic, and the magistrates by wrongly deciding that the person convicted is an owner or occupier cannot bring about that automatic forfeiture. Accordingly, I am quite satisfied that this is a case where we are entitled to look at the affidavit evidence in order to see whether the magistrates had jurisdiction, which means to ascertain whether Edward William Sasse was the owner or occupier of the place from which the liquor was removed.

All that appears on the affidavit evidence is that Sasse was a member of this club. It was a members' club and he was one of many, many members. It also appears that he was one of a number of members of the managing committee. The freehold of the club and the assets of the club were vested in three trustees, the applicants in the present case. Of course, the application of section 152 (2) raises great difficulties in the case of members' clubs, and I do not find it necessary in this case to say who exactly were the occupiers, whether it be the members of the managing committee or all the members of the club. I am quite clear, however, that Edward William Sasse was, at most, only one of many occupiers. Indeed, he may not have been an occupier at all, but I am assuming that he was, and indeed it is to be observed that it was admitted before the magistrates that he was. Even on that assumption, however, I am quite clear that he is not "the occupier" within the meaning of subsection (2). I think the opening words of that subsection are clear, and when it says "If the owner or occupier of the place . . . is "convicted of selling by retail" it means, if there is more than one owner or more than one occupier, all the owners or all the occupiers. In the ordinary way, under the Interpretation Act, 1889, the singular includes the plural but, much more important, there would be manifest injustice done if it were possible for this automatic forfeiture to take place with only one of many occupiers or one of many owners before the court. I think that on the plain meaning of those words all the owners or all the occupiers must have been brought before the court and convicted.

As I have said, it raises obvious difficulties with regard to members' clubs, but the section covers many other premises besides members' clubs and one must look at the matter of construction strictly. In these circumstances I am satisfied that the

magistrates here had no jurisdiction to treat the case as one in which an automatic forfeiture had taken place and to make an order for sale under section 160 (3).

1960

REGINA v. LEWES JUSTICES.

For these reasons I would allow the order to go to quash that part of the record which sets out the forfeiture and the direction for sale.

DONOVAN J. I agree. Like Lord Parker C.J. I would reserve the question whether Sasse was an occupier by virtue of his membership of the club or by virtue of his membership of the managing committee. Obviously many matters would have to be considered, but it matters little in this case either way, for in my view he was only one of several such occupiers.

DAVIES J. I agree and can express my agreement in two or three sentences really repeating what Lord Parker C.J. has said. It is obviously a fundamental condition precedent to the power of the magistrates to direct a sale under section 160 (3) that the liquor and vessels should be forfeited; but unless the owner or occupier has been convicted, the liquor and vessels are not forfeited. Sasse, one member of the club, would not be the owner or occupier, for the reasons my Lord has indicated. He might be an occupier. In my opinion, therefore, there is no forfeiture, and, consequently, there was no jurisdiction in the magistrates to make the order for sale. I agree with the order proposed.

Order for certiorari with costs.

Solicitors: *Taylor, Jelf & Co. for Adams, Lewes; Walmsley & Stansbury for J. E. Dell & Loader, Shoreham.*

C. J. E.

[NOTTINGHAM ASSIZES.]

* MARSHALL *v.* NOTTINGHAM CORPORATION.

[1958 M. No. 948.]

1959 *Nov.* 18, 19; 1960 *Jan.* 29.

Glyn-Jones J.

Town and Country Planning—Development—Material change of use—Pre-Act use of land for manufacture and display for sale of portable buildings and garden furniture—Subsequent use of land for display for sale of caravans—Whether cesser of manufacture and change in type of goods sold material change of use—Use of hut on land for retail sales—Whether hut and land a shop—Meaning of "shop"—Town and Country Planning (Use Classes) Order, 1950, (*S.I.* 1950, *No.* 1131), *arts.* 2, 3, *Sch.*

[Reported by GROVE HULL, Esq., Barrister-at-Law.]

1960

MARSHALL
v.
NOTTINGHAM
CORPN.

In 1957 the plaintiff bought a plot of land from one L. From 1912 until the date of the sale L., who was a carpenter and handyman, had carried on business on the land, making use of it to manufacture (in a workshop) portable buildings, such as greenhouses and garages, and garden implements and furniture, and to display many of these articles for sale. Although most of the goods which were displayed and sold on the land by L. were manufactured there by him, some of them were bought elsewhere. L.'s business was at one time substantial, but by 1946 it had greatly diminished, and was carried on by L. alone; from this date until 1957 L. used only to visit the land two or three times a week. Among other buildings on the land there was a hut erected by L. which he used as an office and saleroom.

The plaintiff was managing director of a company, for whose purposes she bought the land. The major part of the company's business was the sale of caravans, although it also sold portable buildings and garden furniture. The company took possession of the land, cleared, levelled and surfaced it and removed most of the buildings. The company then displayed for sale there a number of their caravans, together with large advertisements, and continued to use the hut, which they had retained, as an office and saleroom. The defendant corporation, as local planning authority, being of opinion that the plaintiff had carried out development consisting of the making of a material change in the use of the land, served on the plaintiff an enforcement notice requiring her to discontinue using the land for the sale of caravans and wooden buildings and the use of the hut as a "sales-shop."

The plaintiff claimed, inter alia, declarations that no development consisting of material change of use had taken place on the land; that the enforcement notice was of no effect in law; and that the hut, together with the land on which goods were exposed for sale, was a shop within Class I of the Schedule to the Town and Country Planning (Use Classes) Order, 1950,[1] and its use, and that of the land, for the purposes of retail trade, was therefore not development and was lawful for the purposes of the Town and Country Planning Act, 1947:—

Held, (1) that the primary use, which continued until 1957, of the land under L.'s ownership, had been the advertisement, display and sale of the products of L.'s business; that had L. bought rather than manufactured the goods which he sold this would not have amounted to a material change of use; and that, accordingly, the mere fact that the plaintiff's company did not manufacture on the land the goods sold there did not amount to development; but that this did not mean that sales of goods on the land on a vastly

[1] Town and Country Planning (Use Classes) Order, 1950, art. 2: "(2) In this Order unless the context "otherwise requires, the following "expressions have the meanings "respectively assigned to them, "namely:— . . . 'shop' means a "building used for the carrying on of "any retail trade or retail business "wherein the primary purpose is the "selling of goods by retail, and in-"cludes a building used for the "purposes of a hairdresser, undertaker "or ticket agency or for the reception "of goods to be washed, cleaned or "repaired, or for any other purpose "appropriate to a shopping area . . ."

Art. 3: "(1) Where a building or "other land is used for a purpose of "any class specified in the Schedule "to this Order, the use of such build-"ing or other land for any other "purpose of the same class shall not "be deemed for the purposes of the "Act to involve development of the "land."

Schedule: "*Class I.*—Use as a "shop for any purpose except as:— "(i) a fried fish shop; (ii) a tripe "shop; (iii) a shop for the sale of "pet animals or birds; (iv) a cats-"meat shop."

increased scale might not amount to a material change of use (post, p. 716).

Dictum of Lord Evershed M.R. in *Guildford Rural District Council* v. *Fortescue* [1959] 2 Q.B. 112, 124, 125, C.A.; [1959] 2 W.L.R. 643; [1959] 2 All E.R. 111 considered.

(2) That the fact that the main purpose of the company was to sell caravans, which L. had not sold, did not show that the company had carried out development, since, deciding the matter as one of fact and degree, had L. dealt in caravans on the scale on which the company had done, he would not have made a material change of use of the land (post, p. 718).

(3) That the use of the hut and the land in L.'s time was for carrying on a retail business wherein the primary purpose was the sale of L.'s goods; that the hut and land were, accordingly, then a shop within the meaning of the Use Classes Order; that the use by the company of the hut and land was as a shop for a purpose within the same class under the Order; and that, therefore, by virtue of the provisions of the Order, development was deemed not to have taken place and the plaintiff was entitled to succeed (post, p. 719).

Per curiam. If the business of a retail dealer is being carried on in any building, it may be that there is a change of use if the business of a baker is substituted for that of a grocer; but such a change cannot be material from any point of view which could legitimately be taken by a planning authority.

ACTION.

The following statement of facts is taken in substance from the judgment.

The plaintiff, Miss Edith Agnes Marshall, by this action against Nottingham City Corporation (hereinafter referred to as "the corporation") sought, inter alia, a declaration that no development consisting of a material change of use had been carried out on land belonging to her known as 428, Mansfield Road, Nottingham.

The plaintiff bought the land on September 30, 1957, from E. J. Ledger, who gave evidence, which was accepted, to the effect that he had carried on business on the land since about 1912, living in a nearby house at 2, Mapperley Park Drive. He was a woodworker and handyman, and in a large workshop which stood on the land he used to make, inter alia, portable buildings of various kinds, including potting and other garden sheds, greenhouses, summerhouses and, later, garages of wood, corrugated iron or asbestos. Some of these buildings Ledger made to order; others he made for stock, and erected and exposed for sale on the land. He had a hut on the land which he used as an office and saleroom. In addition to the portable buildings, Ledger used to make wheelbarrows, garden ornaments and furniture on the land; and besides this work on the land he was accustomed to carrying out work in his customers' gardens, such as the construction of rustic work, the supply and laying of rockery stone, the making of paths, the supply and erection of fencing and other tasks. Most of the goods sold by Ledger were of his own manufacture, but certain goods such as ladders, wattle fencing and rustic poles were bought by him for sale. The business carried on on the land was

1960

Marshall v. Nottingham Corpn.

at one time substantial and quite prosperous, and Ledger employed seven men in it. The goods sold varied with changing conditions; in the course of time a demand for garages largely replaced that for greenhouses and potting sheds. After the outbreak of war in 1939 the business dwindled, and by 1945 Ledger was carrying it on alone. At about this time he made some garages for stock, which he erected on the land and let to car-owners pending their sale, and a summerhouse which he also erected on the land. In 1946 Ledger moved from his house at 2, Mapperley Park Drive, which thereafter was occupied by his son, and went to live 10 or 12 miles away; but he still came in to his office and workshop several times a week and executed the few orders which he still received; as time went on the number of these continued to dwindle, and for several years before the sale of the land to the plaintiff in 1957 his profits were not large enough to render him liable to income tax. By 1957 the business was almost moribund.

At the time of the sale the condition of the land was as follows: nearest to Mansfield Road were the summerhouse and the hut used as an office and saleroom. Next to these buildings was a large stack of poles used for making rustic work, and behind these buildings were the four garages, the workshop and a stack of timber. These buildings and the poles and timber were to some extent concealed from view by a number of trees, and in the space between them were growing bushes, grass and weeds. The land was untidy, but not disagreeably so; it was described as having a bosky appearance. Between the land and Mansfield Road there was a fence.

The land lay on the eastern side of Mansfield Road about one and a half miles north of the city centre. Mansfield Road here formed the western boundary of a large and good-class residential area. The land had a frontage of 50 feet and a depth of 150 feet, and adjoined the gardens of houses on its northern, eastern and southern sides. To the west, on the opposite side of Mansfield Road, were a public house, a swimming bath (set well back from the road) and the parish church. There were other mixed uses on the western side of the road in a southerly direction, but to the north there was residential development of good character. The appearance of the land with the trees and other vegetation was not thought by the neighbours or by the corporation to be out of keeping with the general appearance of the district, and no attempt was made between 1948 and 1957 by the corporation as planning authority to exercise its power under section 26 of the Town and Country Planning Act, 1947 (hereinafter referred to as "the Act"), to bring about an improvement.

The plaintiff was the managing director of Leicester Caravans Ltd. (hereinafter referred to as "the company"). The company sold caravans, portable buildings for use as garages, garden sheds, summerhouses and similar purposes, interwoven wooden fencing

and other goods; the major part of the business was the sale of caravans. The plaintiff bought the land in order that the company might carry on business there, which it did from the autumn of 1957. On taking possession of the land the company cut down all the trees and bushes, demolished all the buildings with the exception of the summerhouse and hut, cleared and levelled the site (an operation which involved raising the level at the back of the land by some three feet), and covered the whole surface with tarmacadam, with the exception of small flower beds near the front of the plot. The company displayed a number of their caravans on the hardstanding so made, and also exhibited large advertisements of its business. The hut was used by the company as an office, in which sales were conducted, and the company continued to make use of Ledger's notice directing customers to it. The company took down the fence between the land and Mansfield Road and built in its place a stone wall, work which provided a somewhat wider access to the footway in Mansfield Road, but did not alter or interfere with the footway or the access thereto from the carriageway. A fence of woven wood panels was erected four or five feet inside the rear boundary wall of the site.

The altered appearance of the land displeased the corporation and many of the neighbours. The corporation took the view that the company had made a material change in the use of the land, so as to constitute development within the meaning of the Act. As no permission had been given for any development, the corporation served an enforcement notice dated December 20, 1957, stating that development had been carried out on the land without the grant of planning permission; the development complained of was: "A change from the uses mentioned in paragraph (a) to the "uses mentioned in paragraph (b) set out below:—(a) use for "the following purposes:—(i) the manufacture and storage of "rustic furniture including garden seats, pergolas and the like in "a wood joinery workshop (now demolished): (ii) lock-up garages "(now demolished): (iii) storing and stacking of rustic poles: "and (iv) orchard and kitchen garden. (b) Use for the following "purposes:—(i) the display for sale of caravans and wooden "buildings, and (ii) a building used as a sales-shop." The enforcement notice required the company to discontinue using the land for the sale of caravans and wooden buildings, to remove all caravans and wooden buildings from the land and to discontinue "the use of a building on the land as a sales-shop."

The plaintiff, by letter written on January 28, 1958, replied that no planning permission was required for the use made of the land. Without prejudice to this contention she applied under cover of the same letter for permission to retain the use of the land for the display for sale of caravans and wooden buildings, and the use of a wooden building thereon as an office. The plaintiff also appealed to the justices under section 23 (4) of the Act against the enforcement notice. The hearing of this appeal was adjourned pending the hearing of the present action.

1960

Marshall
v.
Nottingham
Corpn.

The application for planning permission was refused by the corporation, and the plaintiff appealed to the Minister of Housing and Local Government against the refusal. The Minister's inspector reported, after a local inquiry, that he "had no doubt "that, judged solely on its planning merits as a use of land, the "caravan centre was quite out of place. The site had been made "as attractive as possible. The front wall was a pleasant feature "matching the adjoining garden walls, the flower beds were neat, "the structures and caravans were bright and clean and the site "as a whole was tidy. Nevertheless it was in his view a highly "commercialised use of land. Not only physically, but also in "the incidental effects resulting from the advertisements, from "the attraction of customers and the presence of towing vehicles, "and from the general activity on the site, the use was wholly "alien to a residential area of good quality and character." The inspector set out many of the facts stated above. The Minister, having received the report, dismissed the application by letter dated September 11, 1958, in which he concurred with the inspector's findings of fact (which coincided with those of Glyn-Jones J. on the evidence adduced before him in this action).

The plaintiff then began the present action. She claimed (1) a declaration that no development consisting of a material change of use had been carried out on the land; (2) a declaration that the lawful use of the land included the display and sale of caravans, sectional buildings and garden furniture and/or the manufacture, sale and display of such articles; (3) a declaration that the enforcement notice was of no effect in law; and (4) an injunction restraining the corporation from taking any further steps under the enforcement notice. By an amendment of her prayer for relief, the plaintiff further claimed a declaration that prior to July 1, 1948, and after January 7, 1937, a building on the land [the hut] was used for the carrying on of a retail trade or business, and that the land was occupied therewith and used for the same purposes; that the building was a shop within Class I of the Schedule to the Town and Country Planning (Use Classes) Order, 1950; and that the use of the building and of the land for these purposes was not development and was lawful for the purposes of the Act.

By their defence the corporation contended that the plaintiff's company had changed the use of the land and that this change constituted development, and that no planning permission had been obtained for the change of use. In particular, the corporation pleaded that a shed which remained on the land after the sale to the plaintiff [the hut] then began to be used as a sales-shop in connection with the display and sale of caravans and wooden buildings.

J. G. S. Hobson Q.C. and *D. P. Kerrigan* for the plaintiff.

G. D. Squibb Q.C. and *J. D. James* for the defendants.

In addition to the case which is referred to in the judgment, the following cases were cited in argument: *Eastbourne Corporation* v. *Fortes Ice Cream Parlour (1955) Ltd.*[2]; *Keats* v. *London County Council.*[3]

Cur. adv. vult.

January 29. GLYN-JONES J., reading his judgment in London, stated the facts, referred to the plaintiff's unsuccessful attempt to obtain planning permission for her use of the land, and continued: Having failed to persuade the Minister that planning permission, if needed, ought to have been granted, the plaintiff now in this action fires her second barrel at the corporation by claiming that there has been no material change of use of the land and, therefore, that planning permission was not and is not required; and this is the question I have to decide.

The Town and Country Planning Act, 1947, provides, in effect, that for planning purposes every plot of land is stamped, as it were, with a hall-mark of permission to use it after the coming into force of the Act for the purpose for which it had been last used before the Act came into force: and a hall-mark stamped by previous use is not expunged by the fact that at the date when the Act came into force the land was being used temporarily for some purpose other than that for which it was normally used; nor, if the land were unoccupied, by the fact that the previous use had ceased, provided that the date when the land became unoccupied was later than January 7, 1937. It is also provided by the Act that the carrying out of building, engineering, mining or other operations in, on, over or under land shall constitute development for which planning permission is required.

The corporation pleads in paragraphs 6 and 8 of its defence that the works and operations of the company which I have described constituted in themselves a development of the land. Mr. Hobson, in opening the plaintiff's case, referred me to the provisions of article 3 of the Town and Country Planning General Development Order, 1950, and to the entry "Sundry minor "operations" in the First Schedule thereof. But Mr. Squibb, for the corporation, did not take or argue the point that, assuming the plaintiff established that there had been no material change of use, the works done by the company would nevertheless constitute development requiring planning permission; and I think Mr. Squibb was right, for the object of this action is to challenge the validity of the enforcement notice, and that notice does not mention the works carried out by the company, nor does it require the company to restore the land to its former condition, but is based solely upon the allegation that there has been a sufficient change of use to constitute development. I therefore treat the evidence of what has been done upon the land by the company

[2] [1959] 2 Q.B. 92; [1959] 2 W.L.R. 630; [1959] 2 All E.R. 102.

[3] [1954] 1 W.L.R. 1357; [1954] 3 All E.R. 303.

1960

MARSHALL v. NOTTINGHAM CORPN.

Glyn-Jones J.

merely as evidence relevant to the issue whether or not there has been a material change of use of the land; and I refrain from expressing any opinion as to whether or not the works done by the company constitute of themselves a development of the land or as to whether or not, if they do, it would be, or would have been, reasonable to issue an enforcement notice in respect thereof.

I turn then to the question: What was the last use of the land? Upon that question I have the evidence of Mr. E. J. Ledger, the plaintiff's predecessor in title, and it is evidence which in substance I accept. [His Lordship stated the matters given in evidence by Ledger, and continued:] Mr. Squibb contends that from 1946, when Ledger moved away from 2, Mapperley Park Drive, he in effect abandoned his business, and thereafter it was the son who used the land, and that merely as ancillary to his occupation of the dwelling-house. Mr. Ledger's use of the land thereafter, says Mr. Squibb, was minimal and should be disregarded: at the most, what he did should be described as pottering about the workshop as a hobby rather than as the carrying on of a business. And Mr. Squibb, in support of this contention, points to the fact that in 1956 it was the son who made a proposal for the alteration of the valuation list by reducing the assessment for rating purposes, which had been recently increased fourfold. In this proposal the description of the plot, which is separately rated, was "workshop, yard, store and "premises," and Ledger junior said that the workshop was used only occasionally during spare time for personal and domestic use. He also described himself as the occupier. Ledger junior was not called as a witness by either side. What he wrote in the proposal is not admissible evidence before me to prove the truth of what was so written. There is no evidence before me that he ever acquired a tenancy or any other legal interest in the land. I find that the most that he had was his father's permission or licence to go upon the land and to use the workshop, and doubtless to pick the fruit, if any. On the evidence before me I cannot find that his use of the land was other than minimal. In any event, it was no more than a temporary use: his father must have retained the power to terminate it at any time, whatever licence the son had, and he must have done so before the sale to the plaintiff.

Even if Mr. Squibb is right in saying that by the time the Act came into force the business had ceased to be carried on and the land was used only by the son as ancillary to his occupation of 2, Mapperley Park Drive, plus some small use by the father more by way of a hobby than otherwise, I find that both uses were only temporary. I do not see why Ledger senior should have required planning permission before terminating his son's licence, if he needed to do so, and starting to carry on once more his former business. But I do not find that Ledger had ceased to carry on business. The business may have been almost moribund by 1957,

but it was not then dead; nor a fortiori was it dead in 1948. It could have been revived; and I find that at the coming into force of the Act this plot of land was used by Ledger for the purpose of carrying on his business thereon, and that at the time of the sale of the land to the plaintiff it was still so used, even though the business being done was small. After the coming into force of the Act Ledger was entitled without planning permission to continue to use the land for the purpose of his business, and the plaintiff has succeeded to that right to use the land for the purpose of carrying on thereon a similar business.

This brings me, I think, to the crux of the case; for Mr. Squibb's next contention is that the business now carried on by the plaintiff's company differs so widely from the business carried on by Ledger that I ought to find that there has been a material change in the use of the land. His main points, as I understand them, are these: (1) that Ledger was a manufacturer and made most of the goods he sold; that the plaintiff's company has demolished the workshop, does not manufacture and is a mere distributor of the goods of others; and (2) that the main purpose of the company is to sell caravans, which Ledger neither made nor sold; and even if the sale of an occasional caravan by Ledger would not have constituted a material change of use, a business the main purpose of which is the sale of caravans differs from his, Ledger's, use to such a degree as to be a different business, and the carrying on of such a business is a material change of use of the land.

I test this by assuming that Ledger, instead of selling his land to the plaintiff, had employed a manager or taken in a partner who was a capable business man and had set himself to revive and rebuild the business. He would doubtless have sought to increase the stock displayed for sale. For that purpose he would have needed more room. It might well have been good business to cut down the trees, clear and level the site and lay down a surface that could be conveniently walked on by prospective customers in all weathers. That would have made more obvious, more obtrusive and much more disagreeable to the neighbours the fact that the land was being used for a commercial purpose, as it had been used since 1912; and it may well be that a conspicuous prospect of workshop, corrugated iron garages, greenhouses, potting sheds and the like, no longer concealed by boskiness, would have been just as disagreeable to the neighbours and to the planning authority as are the plaintiff's caravans. But I do not think that the exposure for sale of more buildings on a scale corresponding to that on which the plaintiff's company has displayed caravans would have involved a material change in the use of the land. As Mr. Lawson, the deputy city engineer of Nottingham, said in evidence, any substantial increase in the scale on which Ledger carried on business would have been detrimental to the amenities of the district; but the question

1960

MARSHALL v. NOTTINGHAM CORPN.

Glyn-Jones J

whether there has been a material change in use does not depend, in my opinion, on whether the business carried on is a success or a failure, though I bear in mind in saying this that the business may be so successful as to involve a vast increase in the intensity of the use of the land, and that increase in the intensity of use may perhaps amount to a material change of use. At all events, in *Guildford Rural District Council* v. *Fortescue*,[1] Lord Evershed M.R. says[2]: "Mr. Megarry contended that the mere "intensity of user or occupation could never be relevant. As a "general proposition, I am not prepared to accept that argument; "nor, indeed, is it necessary to do so. Mere intensity of user may "(as it seems to me; but I must not be taken as deciding this "point) affect a definable character of the land and of its use— "or one of them."

Lord Evershed M.R. having kept the point open, I certainly do not propose to decide it. With that qualification, therefore, I go on to say that if the presence on this land of a successful rather than an unsuccessful commercial enterprise is detrimental to the neighbourhood, the corporation's remedy, it seems to me, is to exercise its powers under section 26 and get rid of it on payment of compensation. If the business had grown and still more room were wanted it might have occurred to Ledger to remove the workshop and stocks of raw materials to another site elsewhere. I cannot agree with Mr. Squibb that either the cutting down of the trees and bushes or the removal of the workshop to another site would have involved a material change in the use of the land. In my opinion, the primary purpose for which the land was used was to advertise, display and sell the various products of Ledger's business, whether they were made on the same site or elsewhere. I go further. In my view, there would be no material change in the use of the land if the buildings and other products displayed and sold thereon were not made by Ledger at all, but were bought from some other manufacturer. If Ledger, having found himself incapacitated by age or infirmity from continuing to work, or having found it cheaper to buy his stock rather than to make it, had accordingly ceased to manufacture, I do not think the Act gives power to the planning authority to serve an enforcement notice on him requiring him to resume manufacture under pain of having to cease using the land for selling goods. On the evidence in this case I am not prepared to find that the fact that the caravans exposed for sale are not made or built on the site constitutes a material change of use.

I pass next to Mr. Squibb's second point; that is to say, whether or not the fact (which I find) that the majority of the goods now sold and displayed are caravans rather than portable buildings and other goods constitutes a material change in the

[1] [1959] 2 Q.B. 112, C.A.; [1959] 2 W.L.R. 643; [1959] 2 All E.R. 111.

[2] [1959] 2 Q.B. 124, 125.

use of the land. There is some similarity between caravans and the portable buildings which Ledger sold. Mr. Squibb conceded as much when he said, rightly as I think, that if Ledger had sold one or two caravans in addition to his portable buildings he would not thereby have made a material change in his use of the land. Mr. Squibb's case must be, I think, not that Ledger by selling caravans would have gone wholly outside the class of goods in which he dealt, but that if the proportion of his total turnover represented by the sale of caravans had been as high as it must be in the business of the plaintiff's company, the nature of the business would have been so transformed that it would have become a different business altogether; for the primary purpose of the business would have become the sale of caravans.

The mere fact that a dealer in the course of his business begins to deal in goods in which he had not dealt before does not necessarily involve a change, still less a material change, in his use of the land or premises where the business is carried on. A dealer in musical instruments might fifty years ago have begun to deal in gramophones or phonographs, as I suppose they would then have been called; and then in the course of time in radio sets and later in television sets. A dealer in electrical appliances, as demand changed and fresh appliances were invented, might have successively added vacuum cleaners, refrigerators, washing machines and the like to his stock-in-trade, and he too might have begun to deal in radio and television sets. Each of them may have ceased to sell goods formerly sold for which there is no longer an adequate demand. Yet neither, in my view, has thereby altered the use he is making of his premises. Moreover, if the business of a retail dealer is being carried on in any building, it may be that there is a change of use if, for example, the business of a baker is substituted for a different business, for example that of a grocer; but I am unable to see why or how such a change can be material from any point of view which could legitimately be taken by a planning authority; that is to say, material for the purposes of the Town and Country Planning Act. It may be argued perhaps that the proviso to section 12 (2) of the Act and the Town and Country Planning (Use Classes) Order, 1950, are inconsistent with the view I have last expressed; or, on the other hand, that so far as the business of a retail dealer is concerned, the proviso is unnecessary and the Use Classes Order does no more than remove doubts and make it plain that a change of use from carrying on in a retail shop an innocuous trade to carrying on one of the scheduled trades which might be noxious or offensive could be material. But it is unnecessary for the purpose of this case for me to deal in generalities. I need only ask myself whether or not if Ledger had dealt in caravans on the scale on which the plaintiff's company has done he would have made a material change in his use of his land.

1960

MARSHALL v. NOTTINGHAM CORPN.

Glyn-Jones J.

This question, as I understand it, is one of fact and degree to be answered upon the evidence in this case: and my answer is that the plaintiff's company has not made a material change in the use of the land. It is, of course, immaterial to my decision, but perhaps only fair to the plaintiff, that I should state at this point that, having acquired an option to buy Ledger's land, she did not exercise it until after she had informally consulted the planning officer of the corporation or a member of his staff, had disclosed to him what she proposed to do upon the land and had been informed by the officer concerned that planning permission would not be required.

The plaintiff raised by amendment of her statement of claim—to which no objection was offered and which I allowed—a further point which arises in this way. The corporation charges the plaintiff with having made a change of use in that the hut I have spoken of is used as what is called in the enforcement notice and in the defence a "sales-shop." The plaintiff by her amendment has taken advantage of this description of what she had described as "an office": she now adopts the corporation's description of the hut as "a shop" and says that the hut, together with the land on which goods are exposed for sale, constitute a shop within the meaning of the Use Classes Order, 1950. By article 3 (1) of the Order it is provided that: "Where a building or other land is used for a purpose of any "class specified in the schedule to this Order, the use of such "building or other land for any purpose of the same class shall "not be deemed for the purposes of the Act to involve develop-"ment of the land." The first entry in the schedule is: "*Class I.*—Use as a shop for any purpose except as"—and then certain exceptions are set out which are not material to this case. "Shop" is defined as follows—and I leave out immaterial words: "'Shop' means a building used for the carrying on of "any retail trade or retail business wherein"—that is to say, in which business, not in which building—"the primary purpose "is the selling of goods by retail, and includes a building used "for the purposes of"—and then there are set out a number of purposes, including that of a ticket agency and so on—"or for "any other purpose appropriate to a shopping area. . . ."

This definition is very wide, and I do not see how I can avoid a finding that in Ledger's time the hut I have already mentioned was a building used for the carrying on of Ledger's retail trade or retail business wherein (that is to say, in Ledger's trade or business) the primary purpose was the selling of Ledger's goods. It is true that Ledger also carried on the business of doing work in customers' gardens, and the same hut was used for taking orders for such work to be done and as his office; but the primary purpose of the retail trade and business carried on by Ledger in the hut was the sale of the goods displayed on the surrounding land or illustrated or described in

his catalogue. It was, therefore, by definition a shop within the meaning of the Order. In the same hut there is being carried on by the plaintiff's company a retail trade or business the primary purpose of which is the sale of the caravans or other goods displayed on the land; and if this does amount to a use of the building or other land for some purpose other than that for which Ledger used it, it is expressly laid down by the Order that such a change of user is not to be deemed to involve development. On this ground also the plaintiff succeeds.

The successive owners of this land have enjoyed since early in the development of this estate the right to carry on a commercial enterprise thereon, notwithstanding that it is in the middle of a residential area. It is not a case in which there has been an attempt to set up a commercial enterprise within an established residential area. Provided the enterprise is not so conducted as to give to the neighbours a remedy in nuisance, I do not see how the use of the land for commercial purposes is to be stopped unless the corporation, for the protection of the rateable values in the area, or for any other reason, thinks it proper to exercise its powers under section 26 of the Act, under penalty of having to pay the compensation, if any, to which the plaintiff can show that she is entitled. The plaintiff is entitled to a declaration.

[His Lordship, after hearing counsel, indicated that the plaintiff was entitled to the first and third of the declarations claimed by her, together with the declaration claimed by her amended prayer; but that a declaration in the terms of the second declaration prayed for was unnecessary and might appear to decide the question left open by Lord Evershed M.R. in *Guildford Rural District Council* v. *Fortescue*.[3]]

Judgment for the plaintiff with costs.

Solicitors: *Shelton, Cobb & Co. for Rorke, White & Holbrook, Nottingham; Sharpe, Pritchard & Co. for T. J. Owen, Nottingham.*

[3] [1959] 2 Q.B. 112, C.A.

[CHANCERY DIVISION.]

1960
May 24, 25, 26, 27.

Pennycuick J.

* JEFFREY *v.* ROLLS-ROYCE LTD. INLAND REVENUE COMMISSIONERS *v.* SAME.

Revenue—Income tax—Capital or income receipt—Sale of "know-how" by manufacturers of aircraft engines to foreign governments and companies—To aid establishment of aircraft engine industry in foreign countries—Whether receipt of company's trade or proceeds of sale of capital asset—Income Tax Act, 1952 (15 *&* 16 *Geo.* 6 *&* 1 *Eliz.* 2, *c.* 10), *s.* 123 (*Sch. D., Case I*).

A company, for the purpose of its business as a manufacturer of motor-cars and aircraft engines, had, since its formation in 1906, been engaged in metallurgical research and the discovery and development of engineering techniques and secret processes. As a result it acquired in the course of the years a fund of technical knowledge, or "know-how," of which only a comparatively small part was capable of forming the subject-matter of patent rights. For some years the company, as a general rule, used its know-how only in its own trade, but during the period 1946 to 1953, as a result of overtures made to it by certain foreign governments and companies, the company entered into a number of agreements whereby, in consideration of lump sum payments, it undertook to supply the foreign government or company with drawings and information necessary to enable them to manufacture specified types of aircraft engines. The special commissioners allowed an appeal by the company against assessments to income tax for the years 1948–49 to 1954–55 under Case I of Schedule D, on the ground that in computing its profits or gains the lump sums paid by virtue of the agreements had been wrongly included, since they were payments of a capital nature.

On appeal by the Crown:—

Held, that the know-how represented in great part a capital asset which it was open to the company to exploit by using it in its own trade or by communicating it to others, and that in the latter case the taxable character of the consideration depended on the particular circumstances; that, in the particular circumstances, the nature of the transactions represented by the agreements was that the company had communicated that asset to another with the consequence that, as regards the territory of that party, the asset had lost the whole or the greater part of its value; and that such a transaction was not the less a disposition of part of a capital asset by reason of the fact that the company had not previously exploited the asset in the territory concerned. Accordingly, the lump sum consideration represented the receipt of capital in the hands of the company and ought not to be brought into account in the computation of its revenue, and the appeal, therefore, must be dismissed (post, p. 731).

Dicta of Viscount Simonds in *Evans Medical Supplies Ltd.* v. *Moriarty* [1958] 1 W.L.R. 66, 76; 37 T.C. 540; [1957] 3 All E.R. 718, H.L. applied.

APPEAL from the Special Commissioners for the purposes of the Income Tax Acts.

The following summary of the facts is taken from the case stated.

Rolls-Royce Ltd., the respondent company, appealed against assessments to income tax made on them as manufacturers of motor-cars and aircraft engines under Case I of Schedule D for the years 1948–49 to 1954–55 in the sums of £1,300,000, £1,200,000, £1,800,000, £1,500,000, £2,300,000, £2,500,000, £4,800,000 respectively. The grounds of the appeal were that in computing the profits or gains of the company for the period relative to the assessments under appeal lump sums paid to and received by the company by virtue of certain licensing agreements had been included contrary to law, such lump payments being of a capital nature.

The company was incorporated in 1906; on July 24, 1951, its share capital was increased to £4,000,000, divided into 3,855,000 ordinary shares of £1 each and 145,000 workers' shares of £1 each. The object for which the company was established was, inter alia: 3 (1) To manufacture, sell, or let on hire, or in any manner dispose of or turn to account, motor-vehicles for use on land or water or in the air, and any parts of or accessories to the same, and internal combustion engines for stationary use, and to carry on all or any businesses directly or indirectly relating to or connected with any object or thing which the company is authorised to manufacture: 3 (5) To carry on any other business, whether manufacturing or otherwise, which may seem to the company capable of being conveniently carried on in connection with any of the above objects, or calculated, directly or indirectly, to advance any of the above objects, or add to the value of any of the company's property or rights: and 3 (8) To purchase, acquire, or apply for letters patent, or patent rights, which the company may deem it advisable to hold in connection with its business, and to sell or otherwise deal with such patents, or patent rights, and grant licences in respect thereof.

The business of the company in its early years was confined to the manufacture and sale of motor-cars. During the First World War the company began to manufacture aircraft engines; and with the development of the aircraft industry the manufacture of aircraft engines became the larger and more important part of the company's business. For the purposes of its business as a manufacturer of motor-cars and aircraft engines the company had throughout its life been engaged in metallurgical research and in the discovery and development of engineering techniques and secret processes. As a result it acquired in the course of the years a fund of technical knowledge (commonly called "know-how") of which only a comparatively small part was capable of forming the subject-matter of patent rights. The successful development of aircraft engines derived from the company's fund of "know-how" relating to their manufacture which was of the greatest value to the company. By contrast, the company set very little store by its patent rights which it took out to prevent other persons copying processes long known to the company and

1960

JEFFREY v. ROLLS-ROYCE LTD.

interfering with the company's manufacture by themselves taking up patents relating thereto.

After the conclusion of the Second World War overtures were made to the company by representatives of the Chinese Nationalist Government who sought the grant of a licence for the manufacture of Rolls-Royce aero engines in China. At first the directors of the company were unwilling to grant such a licence, but eventually the request was supported by the then British Government, and on February 13, 1946, the company entered into an agreement with the Government of the Republic of China ("the China agreement") acting by the Commission on Aeronautical Affairs of the Republic of China, which recited: "Whereas Rolls-Royce are designers of aircraft engines (hereinafter defined in the schedule attached) and have agreed to license the commission to manufacture the same and to supply the drawings and information necessary therefor to the extent hereinafter stated upon the terms and conditions hereinafter provided"; and provided, inter alia, as follows: "Selection of Type: On or before June 30, 1946, the commission shall select and designate the desired type of jet engine and notify Rolls-Royce of such selection, whereupon such engine so selected shall be the basic type of engine referred to in this agreement. . . . 2. Rolls-Royce will supply the commission with the complete drawings and manufacturing and engineering data and information adequate and reasonably necessary to enable the commission to manufacture said engine referred to in clause 1 above. These engines will be the type numbered as set out in the schedule hereto which are the latest mark of the type referred to, of which the British Government has allowed particulars to be given at this date. Improvements of the engine defined in clause 1 will be supplied to the commission as they are released by the British Government and shall be included and governed by this numbered clause and clause 10. The manufacturing data and information shall include three sets of designs, which comprise two sets of blue prints and one set of either tracings, or in some form of black and white, so that they can be copied, together with copies of process schedules, material schedules, jig, tool and fixture drawings and full manufacturing details and instructions. These drawings, data, information and instructions shall include the items listed in the following and shall all be supplied within 90 days from June 30, 1946.

"3. The commission shall pay Rolls-Royce the following consideration for the rights granted hereunder: A capital sum of £50,000 sterling to be paid as follows: (i) On the signing of the contract, £20,000 sterling. (ii) On June 30, 1946, £20,000 sterling. (iii) On the complete delivery of drawings, data, and information referred to in clause 2, £10,000 sterling. . . ."

Clause 5 provided for the form of drawings, clause 6 for royalties and clause 7 for minimum royalty.

Clause 10: "Rolls-Royce will fully advise the commission from "time to time as to improvements and modifications in the manu- "facture and design of the engine referred to in clause 1, the sub- "ject of this licence as and when the British Government permit "Rolls-Royce so to do, provided always that this obligation shall "be suspended if the royalties in any year are in arrears, but shall "be revived when the royalty payments have been made up to the "annual minimums referred to in the contract."

Clause 11 provided, in effect, that the engines were only to be used in Chinese-owned or operated aircraft, and by clause 12: "The commission shall not use in engines other than engines "referred to in clause 1 any parts manufactured from the draw- "ings to be supplied hereunder." Clause 13 provided: "All "drawings and information supplied hereunder shall be kept "secret by the commission who shall not disclose the same or any "part thereof to any other person or corporation, but this clause "shall not prevent such disclosure as is necessary to enable the "engines to be manufactured by the commission, or to enable "them to be installed or repaired." Clause 14 provided: "Rolls-Royce will receive into their works or plants personnel "appointed by the commission with a view to instructing them in "the construction of the engines referred to in clause 1" on certain terms.

By clause 20: "All obligations of Rolls-Royce hereunder "shall cease at the expiration of five years from the date hereof; "provided that at the end of the first five years, the commission "has the right to extend this contract for another period of five "years if desired. During these two periods of five years each if the "commission exercise the option to acquire additional licence for "any newer type of Rolls-Royce engine the obligations of both "parties will then be defined; but any royalty paid on the newer "engine manufactured by the commission shall be counted to- "gether with the royalty on the type of engine referred to in "clause 1 being manufactured, in determining the minimum "royalty referred to in clause 7." Clause 21 provided: "As from "the date when the obligations of the commission cease hereunder "as aforesaid, the commission shall be entitled to continue to "construct the said type of engine without Rolls-Royce being paid "royalty . . . " and there followed certain provisions as to patents. Clause 22 was concerned with the patents and by clause 23: "If within five years from the signature of this contract Rolls- "Royce puts in series production a new type of gas turbine air- "craft engine and the British Government has authorised the "manufacture of the engine in the conceded territory Rolls-Royce "will not license anyone to manuafcture the engine in the con- "ceded territory without first giving the commission an option to "acquire a licence to do so. . . ."

As a result of overtures made to it the company entered into other agreements containing the same basic provisions with the

1960

JEFFREY v. ROLLS-ROYCE LTD.

governments of, or companies in, France, the Argentine, the United States of America, Italy, Belgium, Australia and Sweden.

It was contended on behalf of the company that the trade carried on by the company was correctly described in the income tax assessment under appeal as that of "manufacturers of motor-"cars and aero engines," and that the sale of "know-how" formed no part of the company's trade; that the metallurgical engineering research upon which the company had throughout its life been engaged was at all times directed exclusively to the more efficient production of motor-cars and aero engines, and not at all to the earning of profits by selling or licensing the results of that research; that the lump sums paid to the company under the provisions of the licence agreements hereinbefore referred to related to the sale by the company to the licensees of a capital asset referred to throughout the case as "know-how," and, accordingly, such sums fell to be excluded from the computation of the profits and gains of the company for the periods relative to the assessments under appeal; that a multiplicity of sales of portions of a fixed capital asset could not of itself convert that asset or any part of it into a revenue or trading asset.

It was contended on behalf of the Crown that the whole of the sums received by the company under the licence agreements hereinbefore referred to were normal receipts of a revenue nature of the trade or business carried on by the company and, accordingly, fell to be included in computing the profits or gains of the company for the periods relative to the assessments under appeal.

The commissioners decided that the case for the company succeeded, and they allowed the appeal.

The Crown appealed.

Roy Borneman Q.C. and *Alan S. Orr* for the Crown.

F. Heyworth Talbot Q.C. and *C. N. Beattie* for Rolls-Royce Ltd.

The following case, in addition to those referred to in the judgment, was cited in argument: *Associated London Properties Ltd.* v. *Henriksen.*[1]

Cur. adv. vult.

May 27. PENNYCUICK J. read the following judgment: This is an appeal by an inspector of taxes against a decision of the special commissioners upon appeals by Rolls-Royce Ltd. from assessments under Case I of Schedule D for the years 1948–49 to 1954–55 inclusive. The ground of appeal was that in computing the profits of the company for those years there were included certain payments under a number of agreements with foreign governments or companies which the company contended were of a capital nature. The special commissioners allowed the appeals and adjusted the assessments accordingly.

[1] (1944) 26 T.C. 46, C.A.

The facts as found by the special commissioners may be summarised as follows: The company was incorporated in 1906 and has ever since carried on the trade of manufacturing and selling motor-cars. During the the First World War the company began to manufacture aircraft engines, and the manufacture and sale of aircraft engines has become the larger part of the company's trade. For the purposes of its trade the company has been engaged in metallurgical research and in the discovery and development of engineering technique and secret processes, and in the result has acquired a fund of technical knowledge of which only a comparatively small part is capable of forming the subject-matter of patent rights. This technical knowledge is commonly called "know-how," and it will be observed that the commissioners use the expression "know-how" as covering secret processes. With one or two exceptions due to the exigencies of the period immediately before 1939, and to the Second World War itself, the company did not, until after 1945, turn its know-how to account, except in its own manufacturing trade. During the period from 1946 to 1953, however, being the period to which the assessments under appeal relate, the company entered into a number of agreements with foreign governments and companies, the basic provision of which was that in consideration of a lump sum payment the company undertook to supply the other party with drawings and information necessary to enable that party to manufacture specified types of aircraft engines. The company did not initiate proposals for these agreements, which generally appear to have arisen from the policy of foreign governments that aircraft engines should be manufactured in their own territories.

Agreements of this character were made between the company and governments or companies in China, France, the Argentine, the United States of America, Belgium, Australia and Sweden. All of those agreements, in addition to one or two others not directly material, are summarised in the case stated. Each of the agreements contained a number of other provisions beyond the basic provision indicated above, and they are by no means identical in their terms. In one agreement, for example that with Australia, the company received, in addition to the lump sum, an annual payment described as a "technical liaison fee." Neither party, however, has contended that for the present purposes any distinction falls to be made between payments in one or other of the agreements, and it would not, therefore, be useful for me to refer to all the agreements in detail. I will confine myself to reading certain of the provisions of the first agreement set out in the case stated, namely, that dated February 13, 1946, with the Republic of China. [His Lordship read the provisions of that agreement set out above, and continued:]

As I have said, the other agreements for the most part contain the same basic provisions, but the terms of them are widely different in certain respects. The question which has arisen on this appeal is whether the lump sums payable under clause 3 of

1960

JEFFREY v. ROLLS-ROYCE LTD.

Pennycuick J.

the Chinese agreement, and the similar lump sums payable under the other agreements, represent trade receipts of the company and, as such, must be brought into account in the computation of its profits.

The contentions of the parties before the commissioners are set out in the case stated. [His Lordship read the contentions and continued:]

The commissioners gave their decision in writing on October 24, 1956, in the following terms: After setting out the particulars of the assessments, they continued: "The grounds of the "appeal are that in computing the profits or gains of the "[respondent] for the periods relative to the assessments under "appeal, lump sums paid to and received by the [respondent] by "virtue of certain licensing agreements have been included con-"trary to law, such lump sum payments being of a capital nature. ". . . 3. The case for the appellant is that at all material times "it carried on the trade of 'manufacturers of motor-cars and aero "'engines,' being properly so described in the notices of assess-"ments relative to the appeal. In the course of its business it "had acquired a vast store of knowledge and secret information "relating to the secret processes of manufacture, referred to "throughout the case as 'know-how,' which represented a fixed "capital asset of the appellant's trade, but it had never been any "part of the policy of the appellant to make inventions and "discover secret processes with a view to the earning of profits "by realising its rights in those inventions and processes. On "February 13, 1946, the appellant entered into an agreement with "the Government of China (hereinafter called 'the China agree-"'ment') whereby, inter alia, the latter was licensed to "manufacture for itself certain of the appellant's aero engines. "As a separate part of this agreement, the appellant undertook, "inter alia, to make available to the Government of China its "'know-how' relating to the particular aero engines covered by "the agreement, in consequence of which it was confidently "expected that the time which must necessarily elapse before "production by the Government of China became effective would "be considerably reduced and the resulting product of higher "quality than might otherwise have been the case. Provision "was also made for the transfer of patents if necessary, though "in fact the appellants had no Chinese patents. The considera-"tion for the agreement took the form of a lump sum and "royalties on the engines that were made abroad. The appellant "concedes that sums received by way of royalties under the "agreement are taxable income in its hands, so also are any "sums received for the sale of patent rights properly so-called by "reason of the express provisions of the Finance Act, 1945, "though it is generally agreed by both parties that only a very "small value could be placed upon these patents. It was, how-"ever, contended for the appellant that the lump sum paid and "received under the China agreement, apart from a small amount

"attributable as aforesaid to patent rights, represented a capital "receipt in respect of 'know-how' which did not fall to be "included in the profits or gains of the appellant for the periods "relative to the assessments under appeal. In support of this "contention, reliance was largely placed upon two cases cited to "us, viz., *Page* v. *Butterworth*[1] and *Evans Medical Supplies* "*Ltd.* v. *Moriarty*.[2]" At that stage the *Evans Medical Supplies* case had been heard before Upjohn J. but had not reached the Court of Appeal.

"It is further contended for the appellant that if the subject-"matter with which we are concerned, i.e., 'know-how,' is "initially a fixed capital asset, then mere multiplicity of trans-"actions in it does not convert it into a revenue or trading asset "in the absence of other facts which suggest that there has been "a conversion, or that some new trade has been set up. It is "said that there has been no such change of circumstances "affecting the appellant's 'know-how,' and therefore, with regard "to the remainder of the agreements entered into by the appel-"lant for, generally speaking, licensing the manufacture of aero "engines and the provision of 'know-how' in connection there-"with, the lump sums, by whatever name they are called, paid "to and received by the appellant thereunder were also receipts "of a capital nature.

"5. The case for the Crown can be summarised as follows:

"(1) It is not contended that a new trade was set up by the "appellant between the years 1946 and 1954 which consisted of "dealing in patents and secret processes, but it is said that it "had become a part of the normal trade or business of the appel-"lant in order fully to exploit the commercial possibilities of aero "engines of its design in circumstances where it would otherwise "be unable to sell them, to enter into agreements for the produc-"tion of its engines by other persons under licence on payment "of a lump sum or technical liaison fee and/or a royalty per "engine manufactured.

"(2) That in order to permit the manufacture of engines so "licensed to commence at the earliest possible moment, and to "earn the maximum amount in royalties, it was the normal "practice of the appellant to furnish the licensee on payment "with the technical knowledge and information required to "manufacture such engines, i.e., the 'know-how.'

"(3) It was also part of the normal trade or business of the "appellant in association with the Ministry of Supply to exploit "commercially and to the best advantage technical knowledge and "manufacturing information acquired by the appellant in the "process of research into the design and production of aero "engines incorporating that technical knowledge and information "for reward.

[1] (1933) 19 T.C. 328, H.L.

[2] [1956] 1 W.L.R. 794; 37 T.C. 540; [1956] 2 All E.R. 706.

1960

JEFFREY v. ROLLS-ROYCE LTD.

Pennycuick J.

"(4) That on the facts of the case, it was also part of the "normal trade or business of the appellant, particularly when "licensing the manufacture of one of the appellant's engines, to "agree with the licensee to a mutual exchange of information "obtained in the course of manufacturing the licensed engine; "thus, the lump sums received by the appellant under the various "agreements which are the subject-matter of this appeal were "received by the appellant in the normal course of its trade or "business and not merely for parting with a capital asset.

"(5) The agreements provide for the licensee to make engines "and for the transfer to the licensee of technical knowledge and "information to enable him to do so, but they also provide for the "licensee to receive certain other benefits and advantages, e.g., "some of his personnel to be trained by the appellant, the appel-"lant's engineers to assist in setting up the production in the "country of the licensee, the appellant to act as agent in the "purchase of raw materials and equipment for the job, the grant "of an option for future engines: any part of the lump sum "attributable to such services cannot be transfers of capital.

"(6) Further, in so far as the lump sum payments were "received by the appellant in respect of the transfer of technical "information or of manufacturing knowledge they did not arise "from sales of property, but from the provision of a service.

"(7) When the whole of the transactions are looked at as a "whole, each agreement is seen to be merely a trading convention "between the appellant and the licensee, and the payments, "whatever form they take, are profits arising from the trade or "business between the appellant and the licensee which was to "be regulated by that convention.

"6. Upon consideration of the evidence adduced and the "arguments addressed to us on behalf of the parties we are of the "opinion that the case for the Crown succeeds and the appeal "must be allowed."

It will be observed that the commissioners' decision consists of a summary of the opposing contentions, and that their own conclusion is contained in a single sentence. It falls to me to decide whether this conclusion is right.

I think it is clear that, while due weight should be given to the view of the commissioners, this is eminently the type of finding which is open to review by the court: see *Commissioners of Inland Revenue* v. *Rustproof Metal Window Co. Ltd.*,[3] *per* Lord Greene M.R., where he says[4]: "It was argued by counsel on behalf of "the Crown that the decision of the special commissioners upon "a question of this kind ought not to be disturbed unless it could "be said that they had misdirected themselves in law. This, I "think, is to put the matter too high. Great weight should no "doubt be given to their view, but the courts have on many

[3] (1947) 29 T.C. 243; [1947] 2 All E.R. 454, C.A.

[4] 29 T.C. 243, 266.

"occasions acted on the principle that the decision of commis-
"sioners on the question whether a receipt is of a capital or an
"income nature is open to review, and I propose so to treat it in
"this case. It is a question which is to be answered upon a
"consideration of all the relevant facts."

The character of technical knowledge as an asset of a trader has been considered by the House of Lords in the recent case of *Evans Medical Supplies Ltd.* v. *Moriarty.*[5] I will read the headnote in that case: "Income Tax, Schedule D—Disclosure of "secret processes and provision of other information in con-"sideration of lump sum payment—Whether sum received capital "or income. The appellant company, which manufactured phar-"maceutical products and had a world-wide trade, carried on "business in Burma through an agency. In 1953 the Burmese "Government wished itself to establish an industry there for the "production of pharmaceutical and other products, and the com-"pany secured a contract, dated October 20, 1953, from the "Burmese Government to assist in setting up this industry. The "company undertook to disclose secret processes to the Burmese "Government and to provide other information in consideration "of the payment of a 'capital sum of £100,000.' The company "also undertook to provide certain services and to manage the "proposed factory in return for an annual fee, which was "admitted to be subject to tax. No similar agreement had been "entered into by the company with any other foreign government "or any other party. The profits of the company's trade as "wholesale druggists were assessed to income tax under Case I of "Schedule D for the year 1954–55 on the footing that the sum "of £100,000 should be included as a trading receipt. On appeal "to the special commissioners the company contended that the "sum of £100,000 was a capital sum received either for the sale "of fixed capital or for the granting to the Burmese Government "of an exclusive licence, and that in any event it did not arise "in the course of a trade. The Crown contended, inter alia, that "on a true construction of the agreement the sum in question "was, like the annual fee admitted to be subject to tax, received "by the company for providing services in the course of a trade. "The special commissioners held that the agreement should be "read as a whole as one for the provision of services, and that "the sum of £100,000 had been properly included in computing "the company's profits for income tax purposes. The Chancery "Division held that the sum in question was a capital payment. "The Court of Appeal held unanimously (1) that there was "evidence to support the special commissioners' finding that the "sum of £100,000 arose to the company as a receipt of its trade; "but (2) that the sum in question, to the extent that it was "attributable to the disclosure of secret processes, was a capital "receipt. The court ordered the case to be remitted to the

[5] [1958] 1 W.L.R. 66; [1957] 3 All E.R. 718; 37 T.C. 540, H.L.

1960

JEFFREY v. ROLLS-ROYCE LTD.

Pennycuick J.

"commissioners to determine the part so attributable. The "House of Lords, dismissing the Crown's appeal and allowing "the company's cross-appeal, restored the order of the Chancery "Division. Lords Simonds, Tucker and Denning held that, the "case having been stated by the commissioners and the appeal "argued throughout on the footing that the sum of £100,000 was "indivisible, it was not open to the Court of Appeal to direct "apportionment between consideration for the disclosure of secret "processes and consideration for other matters. Lords Simonds "and Tucker were of opinion that the company had parted with "a capital asset for a purchase price. Lord Denning considered "that there was nothing wrong in the commissioners' finding that "the amount in question was a payment for services, but that it "was not received in the course of the company's existing trade "of wholesale druggists, etc., and therefore could not be brought "into the assessment of the company's existing trade for 1954–55. "Lord Morton of Henryton, dissenting as to the cross-appeal, "agreed with the judgments in the Court of Appeal. Lord Keith "of Avonholm, dissenting, was of opinion that there was ample "evidence that the company was trading in 'know-how' and that "it was no more than a legitimate extension of their existing "trade."

It will be seen that in that case the consideration given by the company for the lump sum payment included alike the disclosure of secret processes and the provision of other information. Certainly three members of the House of Lords, Lord Simonds, Lord Morton of Henryton and Lord Tucker, in common with the Court of Appeal,[6] and Upjohn J. in the Chancery Division,[7] held that secret processes should be regarded as capital assets of the appellant company. In the present case, too, the technical knowledge possessed by the company, and described by the special commissioners as know-how, comprised secret processes; and it is evident from the nature of the trade that such processes must be of great importance in it. There can thus be no doubt that the know-how possessed by the company represented at any rate in great part a capital asset.

Mr. Borneman has pointed to certain apparent differences between the views expressed by the respective members of the House of Lords in the *Evans Medical* case[8] as to the precise ambit of the capital asset there in question, i.e., as to whether it should be regarded as confined to secret processes or comprising also knowledge outside of those processes. It might be necessary to explore this point further in the case where the secret processes were relatively unimportant or where there was an apportionment of consideration. But I do not think it is of practical importance here.

Once it is accepted that a trader possesses a capital asset in the nature of technical knowledge, or know-how, it must be open to

[6] [1957] 1 W.L.R. 288; [1957] 1 All E.R. 336; 37 T.C. 540, C.A.

[7] [1956] 1 W.L.R. 794.

[8] [1958] 1 W.L.R. 66.

him to exploit it either by using it himself in the process of his own trade, or by communicating it to others, and in the latter case the taxable character of the consideration received by him must depend upon the particular circumstances. It may be possible for the trader to a limited extent to retain the asset intact and to exploit it by rendering services to others in the way of imparting information or rendering assistance to them. This was the view which Lord Keith took upon the facts in the *Evans Medical* case.[8] But, again as pointed out in that case, it is in the nature of this particular asset to lose its value upon communication, and in a normal case communication of the asset is likely to represent the disposition of part of the asset itself. I refer on this point to two statements in the speech of Lord Simonds[9]: "It was no doubt the corollary of their view"—that is, the commissioners' view—"that the agreement was one for "the provision of services, that the commissioners should say that, "in any event, the company had not 'sold or assigned any "'property' to the Government. Here, again, they fell into an "error which vitiates their determination. For it is manifest that "a secret process, whether in composition or methods of storing "and packing, is something which can be disposed of for value, "and that, by imparting the secret to another, its owner does some-"thing which could not fairly be described as 'rendering a "'service.' I would not think that authority is needed for so "obvious a proposition, but it may be found in *Butterworth* v. "*Page*.[10]" Lord Simonds later said[11]: "A contention was put "forward on behalf of the Crown that, even if the divulging of a "secret process to the whole world could be regarded as parting "with a capital asset, the same could not be said of divulging it to "one other. This does not make sense. The whole value of the "secret might conceivably not be lost at once to the original "owner, but that its value must be greatly diminished is obvious: "in the present case it is doubtful whether, within a measurable "time, it will have any value at all, at any rate so far as the "Burmese market is concerned. I adopt, with respect, the apt "words of Lord Fleming in *Haig's Trustees* v. *Inland* "*Revenue Commissioners*[12]:' . . . the transaction here in ques-"'tion was not merely a use of the subject salva rei substantia "'but necessarily involved the realisation of a considerable part "'of its capital value.'"

In my judgment, this was the nature of the transactions effected by the various agreements in the present case. In each case the company, having a capital asset consisting of technical knowledge, or know-how, communicated that asset to another party, with the natural consequence that at least as regards the territory of that party the asset must lose the whole or the greater part of its value. This seems to me to represent a disposition of

[8] [1958] 1 W.L.R. 66.
[9] Ibid. 76.
[10] 19 T.C. 328.
[11] [1958] 1 W.L.R. 66, 77.
[12] 1939 S.C. 676, 685; 22 T.C. 725, 735.

1960

JEFFREY
v.
ROLLS-ROYCE
LTD.

Pennycuick J.

part of the capital asset itself. It follows that the lump sum consideration paid in each case, being the price of a capital asset, represents the receipt of capital in the hands of the company and ought not to be brought into account in the computation of its revenue profit.

Mr. Borneman contended that, even if the knowledge is to be treated as a capital asset, its communication should be treated, on the facts of this case, as in the nature of services rendered by the company. For the reasons given above, I do not think this is a proper view of this transaction. Mr. Borneman pointed out that in this case, unlike the *Evans Medical* case,[13] there is no evidence that at the date of the agreements the company was trading in the territories affected. But I do not think the transaction was any less a disposition of part of a capital asset by reason of the fact that the company had not previously exploited this asset by way of manufacture in the particular territories.

Mr. Borneman further pointed out that in the *Evans Medical* case [13] there was a single transaction, whereas in this case there were a number of transactions. This circumstance again seems to me to be irrelevant. A trader, having capital assets, may dispose of those assets by a single transaction or by a number of transactions, and in either case the price received would be a receipt of capital.

Mr. Borneman's principal contention, however, was that the trade of the company during the material years was, in his own words, "that of exploiting the commercial possibilities of the aero "engine and its design," and that the company carried on this trade in two ways; namely, one, by the manufacture and sale of engines, and, two, by teaching others how to manufacture engines. I find nothing in the case stated which justifies the view that the company has ever carried on any trade other than that of manufacturing and selling motor-cars and aircraft engines. The trade imputed to the company by this contention appears to me to be something of a travesty of the facts. But, in any event, I do not see how this description of the trade advances the argument, since it does no more than raise—in a slightly different form—the question whether in communicating information the company is parting with a capital asset or rendering a service. Perhaps conscious of this difficulty, Mr. Borneman said that the company should include know-how in its accounts as circulating capital, but this seems to me to postulate a different trade altogether, namely, that of a dealer in know-how; and, indeed, Mr. Borneman, as an alternative, contended that the company carried on such a trade. No assessment on the footing of this trade has been made on the company, and Mr. Borneman expressly disclaimed the view that the company carried on more than one trade.

Mr. Borneman during his argument placed great reliance on a sentence of Bankes L.J. in *British Dyestuffs Corporation* v. *Inland*

[13] 37 T.C. 540.

Revenue Commissioners,[14] where he says this: "The real question is, looking at this matter. is the transaction in substance a "parting by the company with part of its property for a purchase "price, or is it a method of trading by which it acquires this "particular sum of money as part of the profits and gains of that "trade? For that purpose one has to look at the nature and "substance of the transaction and the agreement as a whole." For the reasons given above, I think this should be answered in accordance with the first alternative.

The agreements here differ in an important respect from that in the *Evans Medical* case[15] in that there the agreement was divided into parts and the lump sum in question was allocated exclusively to the consideration specified in Part I of the agreement. Here there is no such division or allocation. Neither party at any stage in the proceedings has, however, contended that on this or any other ground the lump sum should be apportioned so as to represent in part a capital and in part a revenue receipt. In view of the decision of the House of Lords as to apportionment in the *Evans Medical* case,[15] it is clear I should not be entitled to make any such apportionment even if I were otherwise minded to do so.

For the reasons I have endeavoured to express above, I have come to the conclusion that the decision of the commissioners was right and I accordingly dismiss the appeal.

[Three other appeals by the Inland Revenue Commissioners which raised identical points upon assessments on the company to excess profits tax, profits tax and excess profits levy respectively as the points raised in the first case, and upon which no separate argument was addressed to the court, were also dismissed.]

Appeals dismissed with costs.

Solicitors: *Solicitor, Inland Revenue; Claremont, Haynes & Co.*

M. G. T.

[14] (1924) 12 T.C. 586, 596, C.A. [15] 37 T.C. 540.

[QUEEN'S BENCH DIVISION.]

* HUGHES *v.* HALL.

1960
May 24.

Lord Parker C.J., Byrne and Donovan JJ.

Road Traffic—Pedestrian crossing—Duty of drivers—Uncontrolled pedestrian crossing—Limits of crossing—Pedestrian Crossings Regulations, 1954 (*S.I.* 1954, *No.* 370), *reg.* 4.

On the true construction of the Pedestrian Crossings Regulations, 1954,[1] and in particular regulation 4, the limits of an uncontrolled

[1] Pedestrian Crossings Regulations, 1954, reg. 4: "Every foot-passenger "on the carriageway within the "limits of an uncontrolled crossing "shall have precedence within those "limits over any vehicle and the "driver of the vehicle shall accord "such precedence to the foot-passenger, if the foot-passenger is on "the carriageway within those limits "before the vehicle or any part thereof has come on to the carriageway "within those limits."

1960

HUGHES
v.
HALL.

pedestrian crossing are the studs bordering the striped crossing and not the studs indicating the approach to the crossing.

Where, therefore, a car driver, having passed over the approach studs of an uncontrolled crossing at the time when a pedestrian stepped on to the striped portion of the crossing, failed to stop:—

Held, he was guilty of an offence for failing to accord precedence to a pedestrian in accordance with regulation 4.

Per curiam. Regulation 4 imposes an absolute duty and it is immaterial whether there is any evidence of negligence or failure to take reasonable care.

CASE STATED by Denbigh magistrates sitting at Colwyn Bay.

The prosecutor, John Owen Hughes, preferred an information against the defendant, David Benjamin Hall, that he being the driver of a motor-car failed to accord precedence to a foot-passenger on the carriageway within the limits of an uncontrolled crossing contrary to regulations 4 and 9 of the Pedestrian Crossings Regulations, 1954,[1] and section 18 of the Road Traffic Act, 1934.

The magistrates found the following facts: On June 20, 1959, at about 2.20 p.m. the defendant was driving a Humber Hawk motor-car belonging to his father's firm along the Conway Road, Colwyn Bay, in the direction of Conway. The defendant was a learner-driver holding a provisional licence, and was accompanied by his father, a fully licensed driver sitting next to him, and by his mother and a friend sitting in the back of the car. The defendant was driving at a reasonable and proper speed approaching a slight bend in the road beyond which was situated an uncontrolled pedestrian crossing; the day was fine. As the car driven by the defendant was approaching the crossing a lady, who looked neither to right nor left, stepped on to the crossing and had proceeded thereon some nine to twelve feet when she was hit by the car. When the lady stepped on to the crossing the defendant's car had either wholly or in part passed over the studs indicating the approach to the crossing. The defendant applied his foot brakes on seeing the lady step on to the crossing and was rapidly pulling up when the lady was hit, and there was insufficient distance between the car and the crossing in which to stop. There was insufficient evidence of driving on the part of the defendant without due care and attention.

It was contended by the prosecution that regulation 4 of the Pedestrian Crossings Regulations, 1954, imposed an absolute duty to accord precedence to a foot-passenger on the carriageway within the limits of an uncontrolled crossing and that as the lady was hit on the carriageway at the crossing an offence against the regulations had been committed; that the limits of the crossing were defined by and comprised only that portion of the carriageway which was marked by studs across the carriageway and a pattern of black and white stripes as provided in the First Schedule to the Regulations, Part II (5).

It was contended by the defendant that the limits of an uncontrolled crossing were not defined by the portion of the carriageway marked by the pattern of black and white stripes but by the

studs which marked the approaches to the crossing, and that if a vehicle or any part thereof had come on to the carriageway within the limits indicated by the approach studs before a foot-passenger had come on to the carriageway no offence under the regulations had been committed; that the defendant's car, or a part thereof, had passed over the approach studs at that particular crossing before the lady stepped on to the carriageway and, therefore, no offence had been committed, and that there was no case to answer; that on the authority of *Leicester* v. *Pearson* [2] the duty imposed by regulation 4 was not an absolute duty and that, as there was no evidence of negligence or failure to take reasonable care, no offence had been committed.

The magistrates were referred to *McCrone* v. *Riding* [3]; *Leicester* v. *Pearson* [4] and *Gibbons* v. *Kahl.* [5]

The magistrates were of opinion (a) that the defendant's motor-car had either wholly or in part passed over the approach studs to the crossing before the foot-passenger stepped on to the crossing; (b) that the motor-car was then within the limits of the crossing, and (c) that there was no evidence of a failure on the part of the defendant to keep a proper look out or of negligence, and the magistrates upheld the defendant's contention that there there was no case to answer and dismissed the information.

The question for the opinion of the High Court was whether the magistrates were correct in deciding that when the motor-car had wholly or in part passed over the approach studs to the crossing it was within the limits of the crossing and that, therefore, no offence under regulation 4 had been committed.

D. T. Lloyd-Jones for the prosecutor.

The defendant did not appear and was not represented.

No cases were cited in argument.

LORD PARKER C.J. stated the facts, read regulation 4 of the Pedestrian Crossings Regulations, 1954, and continued: If the limits of an uncontrolled crossing are the approach studs on either side, then there is a finding here that either wholly or in part the defendant's car had entered the limits of the uncontrolled crossing and, accordingly, would not be bound to afford precedence to this lady. If, on the other hand, the limits are not the approach studs but the studs which border the striped crossing, then it is clear that this lady was on that crossing before the motor-car had come within the limits of the crossing. Looking at regulations 4, 6 and 8, I should have thought it was clear beyond doubt that the limits of an uncontrolled crossing are the studs bordering the striped

[2] [1952] 2 Q.B. 668; [1952] 1 T.L.R. 1537; [1952] 2 All E.R. 71, D.C.

[3] [1938] 1 All E.R. 157; 54 T.L.R. 238, D.C.

[4] [1952] 2 Q.B. 668.

[5] [1956] 1 Q.B. 59; [1955] 3 W.L.R. 596; [1955] 3 All E.R. 345, D.C.

1960

HUGHES v. HALL.

Lord Parker C.J.

way. The approach studs are dealt with in these regulations not as within the limits of the uncontrolled crossing but as something on each side indicating the approach to the uncontrolled crossing. I find it unnecessary to read those regulations in detail. It seems to me plain beyond doubt that the contention for the prosecutor is correct and that an offence was here committed.

I would only add this, that the justices have said, although it is not referred to in the question left to the court, "that there "was no evidence of a failure on the part of the defendant to keep "a proper look-out or of negligence, and we upheld the defen-"dant's contention that there was no case to answer and dismissed "the information." It is, I think, clear on the latest decisions of this court, that regulation 4 imposes an absolute duty, and that it is quite immaterial whether there is any evidence of negligence or failure to take reasonable care. In these circumstances, I would refer the case back to the justices with a direction that the offence charged was proved.

BYRNE J. I agree.

DONOVAN J. I agree.

Appeal allowed with costs.

Solicitors: *Bell, Brodrick & Gray for Guest, Vaughan & Pritchard, Old Colwyn.*

C. J. E.

[HOUSE OF LORDS.]

H. L. (E.)†

1960 *June* 22.

* ACKROYD & SONS . . . . . PETITIONERS;

AND

HASAN . . . . . RESPONDENT.

PETITION for leave to appeal to the House of Lords in *Ackroyd & Sons* v. *Hasan.*[1]

The Appeal Committee dismissed the petition.

F. C.

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† *Present*: LORD REID, LORD KEITH OF AVONHOLM and LORD DENNING.

[1] [1960] 2 W.L.R. 810; [1960] 2 All E.R. 254, C.A.

[COURT OF APPEAL.]

* TRUSTEES OF THE ESTATE OF J. W. ROUTH *v.* CENTRAL LAND BOARD. ROUTH *v.* CENTRAL LAND BOARD.

C. A.

1960
May 2, 3.

Lord Evershed M.R., Ormerod and Devlin L.JJ.

Lands Tribunal — Appeal from — Fact — Further evidence — Lands Tribunal Act, 1949 (12, 13 *&* 14 *Geo.* 6, *c.* 42), *s.* 3 (4).

Town and Country Planning—Development—Assessment of development value—Requisitioned land—Land in requisition on appointed day—Method of calculating development value—"State in which" land "was immediately before beginning of the period of requisition"—Meaning—Town and Country Planning Act, 1947 (10 *&* 11 *Geo.* 6, *c.* 51), *ss.* 58 (1), 61 (5), 89.

Practice—Title of proceedings—Plaintiffs "trustees of estate"—Change in trusteeship.

The subject-matter of these two appeals were adjoining parcels of freehold land. The one parcel was owned by the appellants in the first appeal, who were described in the title to the proceedings as the "Trustees of the Estate of J. W. Routh," the other parcel was owned by the appellant in the second appeal absolutely. On July 1, 1948, being the appointed day under the Town and Country Planning Act, 1947, all the land was subject to requisition. The appellants had appealed from the Central Land Board's determination of the development values of the freehold interests in these parcels of land to the Lands Tribunal. Their appeals were dismissed. The appellants appealed under section 3 (4) of the Lands Tribunal Act, 1949, to the Court of Appeal. At the time of the hearing before the Lands Tribunal two persons were trustees of the estate of J. W. Routh. At the time of the hearing of the appeal from the Lands Tribunal a third trustee had been appointed, who was the wife of one of the two original trustees. The appellants applied for leave to adduce further evidence as to value. On the appeal the question of law was raised as to the application of section 61 (5), as qualified by section 89 (1) of the Town and Country Planning Act, 1947,[1] when ascertaining the development value of the land which was on the appointed day, July 1, 1948, under requisition:—

[1] Town and Country Planning Act, 1947, s. 61: "(5) For the purposes "of this section, the restricted and the "unrestricted values of interests in "land shall be calculated by reference "to prices current immediately be-"fore the 7th day of January, 1947, "and for that purpose any such "interest shall be treated as if it "had been subsisting immediately "before that date with all incidents "to which it is subject on the "appointed day (being incidents "which are relevant to the calcula-"tion of the restricted or unrestricted "value of that interest, as the case "may be), and the land shall be "treated as having been immediately "before that date in the same state "as it is on the appointed day."

S. 89: "(1) For the purposes of "Part VI of this Act, the develop-"ment value of any interest in land "which is requisitioned land on the "appointed day shall be calculated as "if the land had been on that day in "the state in which it was imme-"diately before the beginning of the "period of requisition, and accord-"ingly, in relation to any such "interest, the second reference to the "appointed day in subsection (5) of "section 61 of this Act, and any "reference to that day in the Third "Schedule to this Act, shall be con-"strued as a reference to the begin-"ning of the period of requisition."

C. A.
1960
ROUTH'S TRUSTEES v. CENTRAL LAND BOARD.

Held, (1) that having regard to the terms of section 3 (4) of the Lands Tribunal Act, 1949, only questions of law could be raised on appeal from the Lands Tribunal, and since the estimation of development value was a question of fact and no appeal lay; and further, no permission could be granted for leave to call fresh evidence (post, pp. 740, 744).

(2) That where land was subject to requisition on July 1, 1948, in valuing it for the purpose of ascertaining its unrestricted value, it was necessary, having regard to the provisions of section 61 (5) of the Town and Country Planning Act, 1947, as interpreted by section 89 (1), that it should be valued as though the land had been on the appointed day "in the state in which it was immediately "before the beginning of the period of requisition," meaning its then physical condition immediately before requisition (post, p. 742).

Semble, that in making such valuation, regard must be had to the fact that the land at the relevant date was under requisition, with the result that the landowner could not develop for some five years after the relevant date (post, p. 742).

Per curiam. It was wrong that the proceedings should bear the title "The Trustees of the Estate of J. W. Routh," since the trustees were neither a body corporate nor incorporated by Royal Charter (post, p. 739).

APPEALS from the Lands Tribunal (John Watson, Esq., and J. R. Laird, Esq.).

These two appeals were heard, together with the motions by which the appellants sought leave to adduce further evidence.

Both appeals were against decisions of the Lands Tribunal affirming determinations of the Central Land Board of the development values for the purposes of the Town and Country Planning Act, 1947, of freehold interests in two areas of land situate at Church End Lane, Tilehurst, in the county borough of Reading.

The appellants in the first appeal were described in the title to the proceedings as being "Trustees of the Estate of J. W. "Routh." At the date of the hearing before the Lands Tribunal the land, the subject of the first appeal, was vested in Reginald Alan Routh and Wing-Commander E. J. D. Routh as trustees of the will of J. W. Routh. Before the appeal was heard by the Court of Appeal, Mrs. Routh, the wife of R. A. Routh, was appointed to be a third trustee of that estate, and she joined with her husband in conducting the appeal. R. A. Routh was the appellant in the second appeal, which related to adjoining land of which he was the sole owner. The respondent to both appeals was the Central Land Board.

The two parcels of land in question were on January 7, 1947, the relevant date for the purpose of estimating their development values, subject to requisition. The Lands Tribunal in determining their development value made some small deductions from such values for the fact that land was under requisition and that, accordingly, development would have to be postponed for a period.

The appellants appealed against the development values determined by the Lands Tribunal on a number of grounds which do

not call for report, and also on the ground that the tribunal should, in assessing values, have wholly disregarded the fact that the land was subject to requisition. The appellants asked for leave to call further evidence as to value.

The appellants appeared in person.

G. D. Squibb Q.C. and *William Glover* for the Central Land Board.

No cases were referred to in argument.

LORD EVERSHED M.R. These are appeals in the form of cases stated to the court pursuant to section 3 of the Lands Tribunal Act, 1949, though the points which have been taken are the same in both and the case stated and the decision was one common to both cases. In the one case the appellant is Reginald Alan Routh, the respondents being the Central Land Board, and in the other case the appellants are stated as being "the Trustees of "the Estate of J. W. Routh." I mentioned this matter earlier, and I wish to repeat it in the hope that some notice will be taken of it. It is not a point upon which I am placing any blame whatever on the appellants in this court, because this form of entitling the proceedings has been in use for some time, but I wish to say that it is quite wrong. The trustees of the estate of J. W. Routh are not a body corporate or incorporated by Royal Charter or otherwise. The phrase "the Trustees of the Estate of J. W. Routh" can only mean the individuals who, for the time being, may be the trustees of that estate, and it is wrong that proceedings should bear that title. It can be seen how possibly such a thing might be abused, for shortly before the appeal it would be possible by appropriate machinery to substitute for the previously existing trustees some one person who was a man of no substance whatever; and if he was entitled to continue the appeal, the other party might be put at considerable disadvantage. In the present case it appears that the present trustees are three in number, Reginald Alan Routh himself, Wing-Commander Routh and also Mrs. Routh, the wife of the first trustee, who (I gather) was made a trustee in December of last year after, in fact, the hearing before the Lands Tribunal. Strictly speaking, I am in some doubt whether she would be entitled to be heard as an appellant in this court without an amendment of the proceedings, but as obviously such an amendment, if asked for, would have been granted, nothing turns upon it. I refer to it again only to emphasise that this form of entitling proceedings (and we came across it recently in a revenue case) is quite wrong, and I hope it will not be repeated. In this case Mrs. Routh obviously has taken a very forceful part in the preparation and thinking out of this case, and it may, therefore, well be a good thing that she has been able to address the court on this occasion. So much for this matter of title.

C. A.
1960
ROUTH'S TRUSTEES v. CENTRAL LAND BOARD.
Lord Evershed M.R.

The matter comes before us by virtue of section 3, and in particular subsection (4) of section 3, of the Lands Tribunal Act, 1949. In view of the conclusion I have reached upon a great many of the points in this case I think it necessary that I should read the whole of that subsection. It is as follows: "A decision "of the Lands Tribunal shall be final: Provided that any person "aggrieved by the decision as being erroneous in point of law "may, within such time as may be limited by rules of court, "require the tribunal to state and sign a case for the decision "of the court," which means now this court, "and, where the "decision of the Lands Tribunal is given on a review by way of "appeal of the previous decision of another person, that person "if dissatisfied with the decision of the Lands Tribunal shall be "treated for this purpose as a person aggrieved thereby."

Ever since the foundation of the Court of Appeal by statute less than a century ago, it has been laid down as a principle that in the ordinary case a hearing in the Court of Appeal shall be a rehearing of the case. That does not, of course, mean that the witnesses are called again, but it does mean that, save where Parliament by statute otherwise directs, it is open to an appellant to challenge matters or findings of fact in this court, and it is the duty of this court to come to its own conclusion upon the facts; though, as is well known, this court is always slow to reverse the court below upon a finding of fact, particularly one which depends upon that court's estimation of the demeanour and so forth of the witnesses. I am going into this matter, elementary though it is, at a little length in the hope that it may be some consolation to the appellants, and that they may appreciate the limitations which are placed upon us by Parliament in the present case. For this is a case of a kind in which Parliament in its wisdom and by the terms of this Act has said in quite plain terms that there shall be no review of matters of fact in the Court of Appeal on a case coming from the Lands Tribunal. On matters of fact the decision of the Lands Tribunal, right or wrong, is final; but a person aggrieved, as the appellants in this case say they are aggrieved, may require a case stated which will raise questions of law and law only. In this case the vital question was one of valuation, arriving at an estimation in pounds, shillings and pence, of the development value of certain interests in land belonging to the appellants, and a matter of value and such a matter of estimation is one of fact.

[His Lordship considered the evidence, and continued:] I can find no misdirection of themselves anywhere as regards any of the matters complained of such as would justify our saying the tribunal's figures cannot stand.

I come, therefore, now to the point which involves a question of law, and it is this. We are concerned with two cases, one in which the appellants are the trustees of the estate of J. W. Routh, the land in which they are interested amounting to 60 acres and more, and, secondly, the case of R. A. Routh, he being interested

in adjoining land of about 18 acres—I am using round figures. In the cases of both these parcels of land, at the relevant date the greater part of the property was subject to requisition either by the War Department or another Minister of the Crown. In arriving at the figures which the expert witnesses for the Land Board put before the tribunal, it was indicated that the value attached to the property had been affected, and affected for the worse from the point of view of the appellants, by the fact of these requisitions still being operative.

The Town and Country Planning Act, 1947, came into effect on July 1, 1948, and upon its coming into effect it followed (by virtue of section 12) that permission was required for any development of land to be carried out thereafter. It is common knowledge that land in the hands of an owner without any restriction upon its use may be put to any kind of purpose the landowner desires; he may develop it for housing or industrial purposes. But that was changed by the coming into operation of the Act of 1947, which for the first time put the whole of the land of England under this restriction upon development. But by way of compensation for what the owner lost it was provided by Part VI of the Act that the landowner should get a payment for the depreciation of his land value in consequence of the operation of the Act. Section 58 (1) provides: "Subject to the provisions of this Part "of this Act, payments shall be made in accordance with a "scheme to be made by the Treasury under this section, in "respect of interests in land which are depreciated in value by "virtue of the provisions of this Act." Section 61 (5) provides: "For the purposes of this section, the restricted and the unre-"stricted values of interests in land shall be calculated by "reference to prices current immediately before the 7th day of "January, 1947, and for that purpose any such interest shall be "treated as if it had been subsisting immediately before that "date"—that is, January 7, 1947—"with all incidents to which "it is subject on the appointed day"—that is, July 1, 1948—"(being incidents which are relevant to the calculation of the "restricted or unrestricted value of that interest, as the case "may be), and the land shall be treated as having been imme-"diately before that date in the same state as it is on the "appointed day." The last line which I have read has to be qualified by virtue of section 89, which, in the case of land subject to requisition, provides: "(1) For the purposes of Part VI of this "Act, the development value of any interest in land which is "requisitioned land on the appointed day shall be calculated as "if the land had been on that day in the state in which it was "immediately before the beginning of the period of requisition," and it then goes on to provide that the reference to the appointed day at the end of subsection (5) of section 61 must be treated as being a reference to the beginning of the period of requisition. Therefore, in the case of requisitioned land, section 61 (5) tells you that you must calculate the values according to prices current

C. A.
1960
ROUTH'S TRUSTEES v. CENTRAL LAND BOARD.
Lord Evershed M.R.

immediately before January 7, 1947, and you have to treat the land as having been immediately before that date in the same state as it was on the date, not July 1, 1948, but the date when the requisition commenced.

The first problem of interpretation is not difficult. I do not think we have been told the actual dates of the requisition but I do not think that matters. There is no doubt whatever that the land or the bulk of it was subject to requisition on July 1, 1948, and had been for some time before. You are, therefore, required by subsection (5) of section 61, as interpreted by section 89, to arrive at your calculation of value as though the land had been immediately before the relevant date, January 7, 1947, in the same state as it was immediately before the requisition. The argument was put: What is meant by the phrase "in the same "state as it was"? The tribunal concluded that meant in the same physical state, the same condition, and I think it must mean that; it cannot, indeed, mean anything else. What you have to do is to disregard physical changes in the case of requisitioned land which may have occurred since the requisition. For example, in this case part of the land was used for the installation of certain hutments. You have got to ignore the fact that those hutments were in fact on the land at the valuation date, and you treat the land as it stood just before the requisition began.

But then there has been a second question. It has been suggested for the appellants that what you ought to do for the purpose of valuing development value is to ignore the requisition altogether. It may be that this is the first time this particular point has arisen. Mr. Squibb, who has great experience in these matters, said he did not recall any other case. I confess to having felt some sympathy with the appellants here because, since this Act is designed to enable landowners to get fixed, and when the Act was passed fixed for all purposes, the development value of their land, as distinct from its existing use value, it seems a little hard that their development value should be affected for worse by the accident of the fact that at the relevant date it was subject to a requisition; and if you are therefore to treat the land as though it was in the same state as it was before the appointed day, it was suggested you should take no notice of the requisition at all. I am by no means clear from the terms of the decision that in this case it could make any difference, and it may, therefore, strictly not be necessary to express a final view about it. But as at present advised, it seems to me that for better or worse, although you value the land, treating it on the valuation date as in the same condition physically as it was immediately before the requisition began, you cannot ignore, for the purposes of considering development value, the fact, the circumstance, the incident (to use the word in section 61 (5)), that being requisitioned and likely to remain under requisition for some time, development in fact would have had to be postponed for a little

time. After all, what is being valued is the particular interest in land. If it was a case of a freeholder, his interest would be limited, if there was a subsisting lease, to his reversionary interest as freeholder, and presumably the lessee's interest would be a separate interest to be valued. Here the interest of the appellants relevant at the date was that they had the freehold though it was subject to requisition. It is true, of course, that so far as the physical condition of the land is concerned you are to ignore the requisition: nonetheless what is here being considered by Part VI of the Act is an assessment of the depreciation in the value of the land by virtue of the provisions in the Act of 1947. It is quite clear that the requisition had nothing whatever to do with the Act of 1947. As I say, therefore, if it were necessary to state a conclusion I would be disposed to agree with the view of the tribunal that the valuation had to have regard to the circumstance that the land was at the relevant date under requisition. But I am by no means satisfied (and from this I take some comfort) that it could have made any difference. We do know that in the period with which we are here concerned, shortly after the last war, a landowner could not develop as he wished because of building licences and so on, and so it is stated in the decision that "apart "from any other consideration, a developer would have seen "little prospect of being able to begin operations until some five "years after the appointed day." That period would overlap the estimated length of time of the requisition. So when later the tribunal stated in their conclusion that, if this matter of requisition did have an adverse effect on the value, the result would, in their own language, "be small," I interpret that as meaning, in effect, negligible.

That disposes of the one point which does raise a question of law. I should have earlier stated, and I must add it now, that when these cases came on there were also applications by way of original motion before the court in both cases for leave to adduce further evidence. It was quite plain that what the appellants sought to do was to bring before us fresh evidence of the values at the relevant date of these properties. We were told in some instances that this fresh evidence was evidence which had not in truth been available to the appellants when the matter was before the Lands Tribunal. So far as the evidence had been available before the Lands Tribunal, though not in fact called, it is, of course, quite plain, upon general principles which apply to other cases, that we should not in this court, unless there was some very special reason which has not been indicated here, have allowed the additional evidence to be called. As regards evidence which came into the possession of the appellants later and which, therefore, they could not call, there might have been in an ordinary appeal a case in which such additional evidence might have been allowed; but, having regard to the terms of section 3 (4) of the Lands Tribunal Act, 1949, it is plain that no question of

C. A.
1960
ROUTH'S TRUSTEES v. CENTRAL LAND BOARD.
Lord Evershed M.R.

calling additional evidence in a case of this sort could be permitted. I repeat again the essential terms of the subsection, which are that the only matters which by statute this court can entertain are questions of law of a limited kind which are made the subject of a case stated by the tribunal raising the submission that their decision, as it stood and on the facts before them, was erroneous in some way in point of law. It is plain, therefore, that the attempt by the appellants to bring fresh evidence before this court could not possibly be substantiated, and we earlier indicated that we refused those applications accordingly.

I do not think it necessary to pursue the matter. I have, I hope, attended to the arguments which Mr. Routh and his wife have put with force before us. I have no doubt that they feel very strongly that the figures which this tribunal reached were unfairly low, but I have come to the conclusion that, if that is so, it is because, and only because, the tribunal came to a conclusion of fact which, on a review, might not have commended itself to this court or another tribunal. I am not saying they did so, but that is the highest it can be put, and that being so, the matter is clearly not open to the appellants for review in this court.

I therefore have to conclude that both appeals must be dismissed.

ORMEROD L.J. I agree.

DEVLIN L.J. I also agree.

Appeals dismissed with costs.

Solicitors: *Solicitor of Ministry of Housing and Local Government.*

B. A. B.

[CHANCERY DIVISION.]

1960
June 30.

* PRACTICE DIRECTION (GUARDIANSHIP OF INFANTS).

Infant — Custody — Appeal from justices — Practice — Guardianship of Infants Acts, 1866 *and* 1925, *R.S.C., Ord.* 55A.

Pennycuick J. has given the following direction, which supersedes the *Practice Direction*[1] given on March 16, 1949, by Romer J.:

Notices of appeal under the Guardianship of Infants Acts, 1886 and 1925, from a decision of a court of summary jurisdiction

[1] [1949] W.N. 156.

are to be intituled, as nearly as may be appropriate, in the form following:

"In the High Court of Justice
"Chancery Division
"Group A

"In the Matter of A.B. an Infant
"and

"In the Matter of an Appeal from an Order dated
"19 of the Justices of the Petty Sessional
"Division of in the County of
"and

"In the Matter of the Guardianship of Infants Acts, 1886
"and 1925."

The notice of appeal must comply with sub-rule (2) of rule 34 of Order 59 of the Rules of the Supreme Court and must be served and the appeal must be entered as provided by sub-rules (3) and (4) of that rule.

Within 10 days of the service of the notice of appeal the solicitors on each side shall notify the Cause Clerk whether or not they desire to adduce further evidence on the hearing of the appeal. If either party does so desire, an appointment will be given for the solicitors (with or without counsel) to attend the judge to obtain his directions on the matter. On this appointment the applicant must be prepared to indicate in outline what further evidence it is desired to adduce, whether it is to be oral or by affidavit, and why it was not given before the justices.

The date for the hearing of the appeal will normally be fixed when the solicitors (with or without counsel) are so before the judge.

It is the duty of the appellant's solicitors to notify the respondent's solicitors (or respondent if in person) of this direction upon service of the notice of appeal.

If neither party desires to adduce further evidence, the date fixed for the hearing of the appeal will be notified to the solicitors for the parties on application to the judge's clerk.

J. B. H. WYMAN,
Chief Registrar.

June 30, 1960.

[COURT OF APPEAL.]

C. A.

1960
May 21.

Lord Evershed M.R., Ormerod and Devlin L.JJ.

* DIXON *v.* CEMENTATION COMPANY LTD.

[1958 D. No. 1865.]

Negligence—Safe system of work—Pleading—Whether onus on servant to show alternative and safe system.

The plaintiff and a fellow workman were working in a low tunnel. The plaintiff had to hold a piece of wood in position immediately above his face. His fellow workman when driving nails into the wood struck a glancing blow and a nail flew out and struck the plaintiff's left eye which, as a consequence of the accident, had to be removed. The plaintiff claimed damages from his employers for negligence alleging that a safe system of work would have avoided the accident. Diplock J. gave judgment for the plaintiff for £2,580. The employers appealed:—

Held, dismissing the appeal, that it was not necessary in every case where an unsafe system of work was alleged for the plaintiff to undertake the burden of pleading and proving an alternative system of work which could have been adopted and which would have been safe; there were cases in which the plaintiff would not go far with an allegation of an unsafe system, unless he could show some practicable alternative, but there were cases, of which this was one, where the plaintiff could fairly say that the system of work was dangerous and some other way of doing it should be found by a prudent employer.

Dictum of Viscount Simon L.C. in *Colfar* v. *Coggins & Griffith (Liverpool) Ltd.* [1945] A.C. 197, 203; 61 T.L.R. 238; [1945] 1 All E.R. 326, H.L. considered.

Decision of Diplock J. affirmed.

APPEAL from Diplock J.

The plaintiff, Brian Peter Dixon, was employed by the defendants, the Cementation Company Ltd., as a sinker. On November 28, 1957, he was assisting in the erection of wooden shuttering in an arch formation for a new cement roof in a colliery at Royston. He was holding a piece of wood against the framework of the shuttering and a fellow servant of the defendants, one Beevers, was endeavouring to hammer nails to secure the board to the arch's framework when he struck a glancing blow and a nail flew out and struck the plaintiff in the left eye which had to be removed. At the time of the accident, owing to the confined space in which they were working, the plaintiff's face was about one foot below the point where the nail was being hammered in.

In this action the plaintiff claimed damages against the defendants for negligence. He alleged that a safe system of work would have avoided the accident.

Diplock J. held that the system of work was a negligent system of work and further that the plaintiff had not been guilty

of contributory negligence. The judge gave judgment for the plaintiff for £2,580.

The defendants appealed.

Marven Everett Q.C. and *A. G. Sharp* for the defendants.
Geoffrey Veale Q.C. and *H. G. Bennett* for the plaintiff.

The case of *Winter* v. *Cardiff Rural District Council* [1] was referred to in argument in addition to the case mentioned in the judgments.

LORD EVERSHED M.R. I will ask Devlin L.J. to deliver the first judgment.

DEVLIN L.J. This is an appeal from a judgment of Diplock J. given at Leeds Assizes on July 13, 1959, by which he awarded the plaintiff the sum of £2,580 damages against his employers, the defendants, for the loss of an eye.

In the course of the plaintiff's work he had to work with another man, a fellow workman, in an unusual position. He was holding a piece of wood in position and the other workman was holding a nail and was banging it in and doing so from on top of his work and leaning over. They were working in a tunnel and that was why they had to work in this position. I do not think it is really necessary to describe the nature of the work more than that. The essential thing which emerges from it is the odd position that had to be assumed.

The fellow workman, a man named Beevers, struck the nail he was holding twice and, thinking he had got it sufficiently in position so as to drive it in, struck it a hard blow. Unfortunately, he did not strike it directly and the nail flew out and flew into the eye of the plaintiff, who was below holding the wood in position.

Some suggestion was made that there was contributory negligence on the part of the plaintiff in that he had been told—obviously a wise precaution—to keep his head down while the hammering was going on, but he looked up. He said he looked up because he thought that the pause by Beevers meant that the job had been finished. The allegation of contributory negligence has not been pursued and there is really nothing in it. No allegation of negligence has been made against Beevers, so that the case against the employers must be whether or not they permitted an unsafe system of work to be in operation.

An unsafe system of work is rather a grandiose expression, although it is a traditional one to use, for a case of this type. It might be simpler to say—and I think it would be equally correct—that the employers allowed an unsafe practice to be adopted, one which they knew or ought to have known to be unsafe, and one

[1] [1950] 1 All E.R. 819, H.L.

C. A.
1960
DIXON
v.
CEMENTATION
CO. LTD.
Devlin L.J.

which they could have altered. That is the case and the only case against them.

The essence of the unsafety is the position in which the two men were and the fact that the plaintiff's face or head had to be a distance of about a foot or so from the nail which was being hammered in position, so that, if he did look up in the way in which he did, there was a danger that the nail would fly off. Most unfortunately, it hit the man in the eye, but there was at least a danger that it would fly off and do some facial injury to him, a danger which it is said on behalf of the plaintiff that the employers ought to have foreseen and guarded against.

Mr. Everett has based himself on the dictum of Viscount Simon L.C. in *Colfar* v. *Coggins & Griffith (Liverpool) Ltd.*,[1] that in a plea of this sort—that is, a lack of a safe system—it is essential for the plaintiff to set out what the proper system of work is and in what respect it has not been observed. Viscount Simon L.C. said this with regard to the plea of failure to provide and maintain a proper system of work: "To raise this issue, the "statement of claim ought to set out, so far as relevant, what "the proper system of work was, and in what relevant respects "it is alleged that it was not observed. Instead of this, there "is merely an allegation that the bag of salt 'fell out of the "'sling on the plaintiff owing to the negligence of the defendants,' "followed by particulars many of which cannot be regarded as "alleging defects of 'system' at all." It is clear that in the case with which Viscount Simon L.C. was dealing, there was no proper particularisation of the allegation of negligence that the bag of salt fell out of the sling. It is in relation to facts of that sort that Viscount Simon L.C.'s dictum must be considered. I do not think it means that, in every case where an unsafe system of working is alleged, it is necessary for the plaintiff to undertake the burden of pleading, and proving, an alternative system of work which could have been adopted and which would have been safe. That is for the employer to provide. There may be cases in which the plaintiff will not get very far with an allegation of unsafe system of work unless he can show some practicable alternative, but there are also cases—and I think this is one of them—in which a plaintiff can fairly say: "If this is dangerous, then "there must be some other way of doing it that can be found by "a prudent employer and it is not for me to devise that way or "to say what it is."

On behalf of the defendants it is said that this is a practice which has gone on for 20 years and no reasonable employer could be expected to have thought that there was anything dangerous about it. On behalf of the plaintiff there is a reply to that, namely, that the evidence shows that there had been cases where some facial injury had been caused; the fact that the plaintiff's face had to come into such close proximity to the nail meant that

[1] [1945] A.C. 197, 293; 61 T.L.R. 238; [1945] 1 All E.R. 326, H.L.

some precautionary measures ought to be taken. It may be that Beevers, who was only a general labourer, should not have been employed but that the precaution of employing a skilled workman to do the job, one who would be very much less likely to make a bosh shot, would have been sufficient. As against that, it is said that hammering a nail is a very ordinary thing and it is difficult to draw the line between the professional and the amateur in such a matter.

This is a case in which there are considerations to be borne in mind on both sides. They have been put effectively on one side by Mr. Marven Everett and on the other side by Mr. Veale. I have indicated some of them and I need not summarise them further. For my part, having considered them, and finding this to be a nicely balanced case, I am not disposed to disturb the finding on this point of the judge at the trial, and, therefore, I would dismiss the appeal.

Ormerod L.J. I agree and I would also dismiss this appeal for the same reasons.

Lord Evershed M.R. I am also of the same opinion. The arguments presented to us, as my brother has pointed out, have been factual and forceful, but I agree with my brethren that on the whole it would not be right to disturb the judge's view.

Appeal dismissed with costs.

Solicitors: *Bingham & Co. for James Chapman & Co., Manchester; Golding, Wellington & Co. for Morrish & Co., Leeds.*

B. A. B.

[COURT OF CRIMINAL APPEAL.]

* REGINA *v.* KEELEY.

C. C. A.
1960
May 2.
Lord Parker C.J., Gorman and Ashworth JJ.

Crime—Sentence—Probation order—Breach—New probation order while former order not discharged—Subsequent breach of both probation orders—Preventive detention imposed in respect of breach of first probation order—Whether sentence valid—Whether and for what purposes first probation order effective after making of second probation order.

The appellant was put on probation for three years. Six months later he was convicted before another court and again put on probation. Three months later he was convicted of an offence before a third court. He was brought before the second court for breach of the probation order imposed by that court and sentenced to a term

[Reported by Grove Hull, Esq., Barrister-at-Law.]

C. C. A.

1960

REG.
v.
KEELEY.

of imprisonment. He was then brought before the first court and sentenced to preventive detention for breach of the order made by that court. He appealed:—

Held, dismissing the appeal, that the first probation order remained effective for the purposes of recalling and punishing the appellant for the offence in respect of which it was made.

Reg. v. *Havant Justices, Ex parte Jacobs* [1957] 1 W.L.R. 365; 41 Cr.App.R. 62; [1957] 1 All E.R. 475, D.C. distinguished.

APPEAL against sentence.

The following statement of the facts is taken in substance from the judgment.

The appellant, Jack Keeley, was convicted of housebreaking and larceny at Oxford City Sessions on November 28, 1958, and was sentenced to eight years' preventive detention. On March 23, 1959, the Court of Criminal Appeal allowed his appeal against sentence and substituted a probation order for three years. On September 30, 1959, he was convicted of housebreaking and larceny at Hertfordshire Quarter Sessions, and was again put on probation for three years. On January 5, 1960, he was convicted of housebreaking, larceny and false pretences at East Sussex Quarter Sessions and was sentenced to 18 months' imprisonment. He was brought before Hertfordshire Quarter Sessions and sentenced to 12 months' imprisonment for breach of the probation order made by that court. He was then brought before Oxford City Quarter Sessions to be dealt with for his breach of the probation order made by the Court of Criminal Appeal. The recorder imposed a sentence of seven years' preventive detention. The appellant, contending that the probation order made by the Court of Criminal Appeal was superseded and rendered ineffective by that made by Hertfordshire Quarter Sessisons, appealed.

Gordon Hardy for the appellant.

Peter Crawford for the Crown.

No case, other than that referred to in the judgment, was cited in argument.

LORD PARKER C.J., giving the judgment of the court, observed that the appellant fully deserved the sentence imposed on him, stated the facts, and continued: The sole point in the appeal is whether the original probation order made by Oxford City Quarter Sessions was still effective and alive once Hertfordshire Quarter Sessions had imposed a second probation order for three years. Mr. Hardy, who has said all that is possible for the appellant, points out, what I think is quite clear, that under the scheme of the Criminal Justice Act, 1948, a man cannot be under supervision in two districts by two different probation officers. Accordingly, so far as supervision at any rate is concerned—and to that presumably would have to be added any particular conditions or requirements of the respective orders—the only effective

order would be the second one, that is that made by Hertfordshire Quarter Sessions. But that is a long way from saying that the original probation order has become ineffective for all purposes. If it were, it is to be observed that a prisoner would go unsentenced, unpunished, for the original offence the subject of the first probation order. It would mean that the statement made to every prisoner pursuant to section 3 (5) of the Act, that, if he commits another offence, he will be liable to be sentenced for the original offence, is of no effect at all. Prima facie, therefore, it seems to this court that, though the original probation order may be ineffective for supervision purposes, it should remain of full effect to enable the court to impose a punishment for the original offence.

Reference has been made to *Reg.* v. *Havant Justices, Ex parte Jacobs.*[1] It is unnecessary to go into the facts of that case, save to say that there the two probation orders were for one and the same offence; in other words, the court had made a probation order in respect of an offence, there was a breach of that probation order and, when the probationer was brought up to be punished for the original offence, a second probation order was made. In those circumstances, the Divisional Court held that once the second probation order had been made the previous probation order could no longer be of effect. It is to be observed that they did not say that it had become ineffective for all purposes, but, whether that was intended or not, the facts there were quite different because the probationer was being brought up and punished by the second probation order for the original offence.

If the argument in the present case prevails, the prisoner will go unpunished for the original offence. In the judgment of this court, the original probation order remained effective for the purpose of having the prisoner brought back and punished for the original offence. Accordingly, the recorder was fully justified in imposing the sentence he did, and this appeal must be dismissed.

Appeal dismissed.

Solicitors: *Registrar, Court of Criminal Appeal; Sharpe, Pritchard & Co. for Oxford City prosecuting solicitor.*

[1] [1957] 1 W.L.R. 365; 41 Cr.App.R. 62; [1957] 1 All E.R. 475, D.C.

[QUEEN'S BENCH DIVISION.]

1960
May 2, 3, 9.

Paull J.

* GARDNER *v.* BLAXILL AND ANOTHER.

[1958 G. No. 548.]

Landlord and Tenant — Option to extend term — Notice of exercise— Tenant remaining in premises and paying rent after expiry of original term—Rent accepted by landlords—Whether option validly exercised by tenant—"Option for continuing for an extension of "seven or fourteen years" — Provided tenant "has reasonably "fulfilled covenants."

Landlords granted a tenant a lease of a shop and premises for seven years from June 24, 1947. The lease contained, inter alia, a clause which read as follows: " . . . provided that the tenant has "reasonably fulfilled the covenants hereinbefore mentioned he has "the option of continuing for an extension of seven or fourteen "years . . ." When the seven years granted by the lease expired on June 24, 1954, the tenant remained in the premises and paid rent for the following quarter which was accepted by the landlords. Thereafter the tenant remained in the premises and paid rent from quarter to quarter. There was no express provision in the lease that the tenant had to give notice to the landlords if he desired to exercise the option.

By a notice dated December 21, 1957, the landlords served a notice to quit expiring on June 24, 1958. The tenant sued for a declaration that he had validly exercised the option by, inter alia, his conduct in remaining in the premises and paying rent therefor: —

Held, that the words "option of continuing for an extension of "seven or fourteen years" must be interpreted as though they read: "the choice of not ceasing to be the tenant for an extension of four-"teen years with a break at seven years." Construing this clause, and in the absence of an express provision in the lease to the contrary, no notice in writing was necessary before the option was exercised by the tenant. Having remained in the premises the tenant indicated that he was exercising the option as soon as he sent the landlords the rent for the quarter following the expiry of the original seven-year term granted by the lease; by accepting such rent the landlords must be deemed to have accepted it on the terms that the tenant had exercised the option; accordingly, the tenant was entitled to the declaration sought.

Hersey v. *Giblett* (1854) 18 Beav. 174 applied.

ACTION.

By an assignment dated June 26, 1947 (hereinafter called "the "lease"), the landlords, Wilfred Charles Blaxill and Edith Margaret Blaxill, his wife, demised to the tenant, Cecil Reginald Gardner, and one Charles Straker, a shop and premises known as 251, Dartmouth Road, Sydenham, London, S.E.26, for a term of

[Reported by A. D. RAWLEY, Esq., Barrister-at-Law.]

seven years from June 4, 1947. The tenant and Straker covenanted, inter alia, "at all times during the said term to keep "the premises in good and substantial repair and deliver up to the "lessors [the defendants] at the expiration or sooner determina-"tion of the said term . . ." The last paragraph of the lease read as follows: " . . . provided that the tenant [sic] has reasonably "fulfilled the covenants hereinbefore mentioned he has the option "of continuing for an extension of seven or fourteen years . . ." The tenant and Straker entered and paid the rent reserved by the lease until May 12, 1950, when Straker died. Thereafter the tenant, as surviving joint tenant, continued to occupy and pay the rent reserved by the lease. When the date arrived upon which, apart from an exercise of the option to continue, the seven-year lease expired by effluxion of time, namely, June 24, 1954, the tenant remained in the premises and paid rent for the following quarter, which was accepted by the landlords. Thereafter, from quarter to quarter the rent was paid and the tenant continued to occupy the premises. In 1957 the landlords sought to increase the rent, contending that there had been no exercise of the option by the tenant but a holding over from year to year. The tenant then by this action sued for a declaration that the option was exercised (a) by notice in writing dated February 20, 1958, alternatively (b) by his conduct in remaining in occupation of the premises after June 25, 1954, and paying the rent reserved under the lease and observing the covenants contained therein.

By their defence the landlords (a) denied that the tenant had observed the covenants contained in the lease in that he was in breach of the repairing covenants; (b) denied that the option had been validly exercised, contending (i) that it was an implied term of the option to continue that the tenant should give to the landlords notice in writing of his desire to exercise the option within a reasonable time before the expiry of the term of the lease; (ii) that the notice of February 20, 1958, was of no effect because it was not given within a reasonable time before, alternatively after the expiry of the said term, and because the tenant had not reasonably fulfilled the covenants contained in the lease; and (iii) that the tenant remained in occupation of the premises upon a tenancy from year to year subject to the observance of the covenants contained in the lease, in so far as they were not inconsistent with a tenancy from year to year, determinable by the giving of six months' notice in writing determining the same on June 24 in any year subsequent to the year 1954. By a notice dated December 21, 1957, the landlords purported to give the tenant notice to quit the premises expiring on June 24, 1958.

The facts are more fully stated in the judgment.

David Hirst for the tenant.
J. T. Plume for the landlords.

In addition to the cases referred to in the judgment, the

1960

GARDNER v. BLAXILL.

following were cited in argument: *Buckland* v. *Papillon* [1]; *Simons* v. *Associated Furnishers Ltd.*[2]

Cur. adv. vult.

May 9. PAULL J. read the following judgment: This is an action by the tenant for a declaration that he has validly exercised the option contained in a lease dated June 26, 1947, and made between the landlords of the one part, and the tenant and one Charles Straker of the other part, in respect of the shop and premises known as 251, Dartmouth Road, Sydenham, in the County of London.

The premises are at least 100, and may be 150, years old. They were originally built as one dwelling-house in a terrace of dwelling-houses, but during the course of their existence their character has changed. At some time before the First World War the ground-floor front was extended so as to form a shop in front of the original premises, and the ground floor of the original premises was turned into one big room to be used in connection with whatever business was to be carried on on the premises. A room on the half-landing can be used as an office, and the three rooms on the first floor, which were originally bedrooms, have clearly long ceased to be used for that purpose. There is no doubt that the premises show their age. The brickwork and woodwork at all material times were in a poor condition, and the roof at all material times has been in the sort of condition one would expect in the case of premises of this age. Even the zinc roof over the shop premises has, as one surveyor expressed it, "lost its life," meaning thereby that, whatever repairs are carried out at places where leaks develop, other leaks will inevitably develop at other places in the roof. Further, while the premises were not actually blitzed during the war, bombs had fallen close enough to blow out the windows, and by 1947 the windows were covered with corrugated iron. Clearly in 1947 the premises could not be called other than dilapidated.

The tenant is a carpenter and cabinet-maker. After the war he started carrying on a small business from his private address. He then met one Straker and they decided to go into partnership together as cabinet-makers. Straker got into touch with the defendants, who at all material times were, and are, the landlords of the premises to which I have referred. The period being just after the war, the tenants were in the difficulty that they could not obtain a licence for the essential repairs to the premises. However, that difficulty was overcome by the tenant and Straker obtaining a licence, and the landlords then carried out certain repairs. These repairs were enough to make the premises water-tight but did not at that moment go very far beyond that. The difficulty of obtaining accommodation in 1947 was such that the

[1] (1866) 2 Ch.App. 67.

[2] [1931] 1 Ch. 379; 47 T.L.R. 118.

tenant and Straker were prepared to take the premises once they were watertight, dilapidated though they were. They therefore moved into the premises and shortly after that, on June 26, 1947, they entered into the lease which is the subject-matter of the dispute before me. At about that time the tenant and Straker obtained a further licence and the landlords did further repairs to the premises. They repaired the shop window and the roof, and they cleaned out the gutters; in addition, they did a considerable amount of interior decoration, but that interior decoration did not include, for instance, repairing and cleaning floors or stairs, work which was subsequently done by the tenant.

I should say here that Straker, very shortly after signing the lease, left the partnership and disappeared. He is now dead, and both parties agree that if the lease gave the rights claimed in this action to the tenants, this action is properly constituted by Mr. Gardner being the sole plaintiff.

The lease is a home-drawn lease, at any rate, so far as the tenant is concerned. From the form of it, it is clear that, at any rate in respect of the provisions other than that contained in the last paragraph, either the terms of the lease were obtained from a form or some lawyer had something to do with drawing it up. The habendum clause to the lease states that the lease shall be for a term of seven years from June 24, 1947, at a yearly rental of £80 payable by four equal quarterly instalments, the rent always to be paid one quarter in advance. One of the covenants of the lease is that the tenants will at all times during the said term keep the premises in good and substantial repair. The last paragraph of the lease reads as follows: "Provided that the "tenant has reasonably fulfilled the covenants hereinbefore "mentioned he has the option of continuing for an extension of "seven or fourteen years providing the premises have not been "taken by the housing authorities." It is the interpretation of this clause which is the matter in dispute between the parties in this action. Since the housing authorities have not taken the premises, the words "providing the premises have not been taken "by the housing authorities" can be disregarded.

If there was no exercise of the option, the lease came to an end on June 24, 1954. By the time that date had arrived, certainly the tenant and probably the landlords (who have not given evidence) had forgotten all about the proviso concerning the option. When June 24, 1954, arrived, the tenant stayed on in the premises and duly paid his rent for the following quarter. That rent was accepted. Thereafter from quarter to quarter the rent was paid and the tenant continued to occupy the premises.

In the summer of 1957 the landlords approached the tenant and informed him that the time had come when he must pay more rent for the premises. The tenant told the landlords that he did not think that they could do that, as his lease was still in existence. Each of the parties consulted solicitors, with the result that a letter was written by the solicitors instructed by the

1960

GARDNER v. BLAXILL.

Paull J.

landlords stating that there had been no exercise of the option contained in the lease but a holding over from year to year; and a letter was written by solicitors instructed by the tenant to say that he had exercised his option by continuing his occupation of the premises and paying the rent. Since each of the parties stoutly maintained that his view of the position was the correct view, the writ in the present action was issued. It is for me to determine whether or not the option to which I have referred has in fact been exercised by the tenant.

Looking once more at the vital clause, it will be seen that it can be divided into a main clause and a proviso. The main clause gives the tenant the option of continuing for an extension of seven or fourteen years; the proviso is that before such an option is exercised the tenant must have reasonably fulfilled the covenants of the lease. I propose to consider the main clause first.

Both Mr. Hirst and Mr. Plume, who have argued this case extremely well, agree that they have been unable to find any authority which can help me to construe the words "the option "of continuing for an extension of seven or fourteen years," except that Mr. Hirst has been able to refer me to *Hersey* v. *Giblett*.[1] In that case there was an agreement that the tenant should take a house as a yearly tenant at the rent of £36, with a proviso that should the tenant wish for a lease of the premises the landlord would grant the same for seven, fourteen or twenty-one years at the same rent on the condition that the tenant should pay the same and perform all the covenants by which the tenant held the premises. Later the landlord's assignee gave the tenant notice to quit, whereupon the tenant applied to take up the lease and, that being refused, a bill was filed for specific performance. The case was tried before Sir John Romilly M.R. One of the arguments of counsel for the landlord was that there was no certainty as to the duration of the lease: whether it should be one for twenty-one years determinable at seven and fourteen years, or should be one for seven years, or one for fourteen years, or one for twenty-one years. Counsel also contended that if it was to be determinable there was no reason why both sides should not have the right of determining it. Romilly M.R. said[2]: "I concur with the plaintiff in thinking, that it is "sufficiently clear what was intended between the parties, which "was a tenancy from year to year, with an option given to the "lessee to ask for a lease from the beginning, for twenty-one "years, determinable, at his option, at seven or fourteen. It "appears to me to be sufficiently plainly expressed by the terms "of the contract, and sufficiently clear to enforce against the "parties, if there are no other ingredients in the case to prevent "it."

That statement by Sir John Romilly has, so far as I am

[1] (1854) 18 Beav. 174. [2] Ibid. 177.

aware, always been considered to be an accurate statement of the law. In Foa on Landlord and Tenant, 8th ed., at p. 97, para. 160, it is stated: "The continuance of the term may depend "on the acts of the parties after the tenancy has commenced, "as where a demise is made for a term of years (twenty-one, for "instance) and power is given 'to break' (usually at seven, or "fourteen, or both) upon a notice of specified length being given "by one of the parties to the other. The legal effect of a demise "'for seven, fourteen or twenty-one years' is exactly the same."

One of the points taken by Mr. Plume, for the landlords in the present case is that in any event before the option under the lease can be exercised the tenant must state whether he desires the lease to be continued for seven years or for fourteen years, as otherwise the length of the extension of the lease is uncertain. At first I was impressed by this argument. There is a very practical difference between a lease for seven years and a lease for fourteen years with a break at seven years. In the former case, if, as so often happens, and indeed has happened in this case, the tenant forgets the passage of time and pays an extra quarter's rent after the seven years has expired, he thereby becomes a tenant from year to year and can get out of his obligation to continue as tenant by giving the requisite six months' notice. In the latter case, so soon as he has paid rent for the quarter following the expiration of the seven years and stays on over the seven years, he has contracted to remain a tenant of the premises for a further seven years. Apart, therefore, from authority, I should have felt inclined to hold that there could be no exercise of the option by merely continuing on in the premises and paying rent, since even if the tenant had sent a letter stating "Take notice that I exercise my option under "the lease," that would have been an equivocal act, since he would not have made it plain whether he meant that he was opting to be a tenant for a further seven years or for a further fourteen years or for a further fourteen years with a break at seven years. In the light of *Hersey* v. *Giblett*,[3] however, I think I am bound to hold that this particular point must fail, and that if, for instance, the tenant had sent a letter in the terms I have just stated, that would have meant that he opted to remain on as tenant for the full fourteen years with the right to break at seven years. In other words, the words "the option of continu-"ing for an extension of seven or fourteen years" must be interpreted as though they read "the option of continuing for an "extension of fourteen years with a break at seven years."

Reading the clause in this way, I have to decide whether the option is exercised merely by the tenant staying on and paying rent after the first seven years have elapsed, or whether the effect of his so doing is to constitute him a tenant holding over from year to year. Mr. Hirst contends for the former; Mr. Plume contends

[3] 18 Beav. 174.

1960

GARDNER
v.
BLAXILL.

Paull J.

for the latter, adding that in any event the act of staying on and paying rent is at least an equivocal act and, therefore, the effect must be construed against the tenant.

One starts, of course, from the fact that normally the effect of staying on and paying rent is undoubtedly to constitute the tenant a tenant holding over from year to year. As against that, one has to look carefully at the precise words of the option, and primarily it is difficult to see how an option to continue can be exercised except by continuing. The usual provision in a lease for an option for an extension of time contains some such words as "renew," which imports "making afresh." There is no such word in this lease. Further, an option to extend the time usually has some provision for the giving of a notice by the tenant stating that he desires to take advantage of the option. There is no such provision in this lease. The plain meaning of the word "option" is "choice." Reading "choice" for "option," the clause means that the tenant has the choice of continuing his tenancy. The plain meaning of "continuing" is "carrying on" or "not ceasing "to be," and reading "carrying on" for "continuing," the clause reads "the tenant has the choice of carrying on for an extension of fourteen years with a break at seven years"; or, reading "not ceasing to be," the clause reads "the tenant has "the choice of not ceasing to be the tenant for an extension of "fourteen years with a breach at seven years."

The precise wording of the clause is, I think, important, and it is to be noticed that the word after "continuing" is "for" and not "by." It may well be that if the parties had used the word "by," the use of that word would have imported that something had to be done by the tenant in order to extend the tenancy. The lease must be construed according to the exact words which the parties chose to use, and at least one of the parties had the idea that the landlords could not terminate the lease in 1958. In my judgment, no notice was necessary before the option was exercised.

The next question is when precisely is the option exercised. Is it exercised if the tenant stays on for a day over the seven years, or is it exercised only when the tenant pays to the landlords the rent due in respect of the quarter following the seven years and the landlords accept that rent? In my judgment, it is the latter. It does not follow that, if a tenant stays on for a day over his period, he has any intention other than making a final clearing up before he actually leaves. It is true that the phrase "tenant "on sufferance" is used in such circumstances, but I do not think that his action is sufficient to show an intention of exercising a choice or option. So soon, however, as he sends the rent for the following quarter, whether it be in advance or in arrear, he is definitely indicating to the landlords that he desires to remain a tenant after the seven years are over, and, reading the words of the lease in the way in which I have read them, I think that he

definitely indicates that he is exercising his option unless he expressly avers to the contrary. If the landlords accept that payment, then, in my judgment, they must be deemed to have accepted it on the terms that the tenant has exercised his option, unless, indeed, there are facts proving the contrary.

I now turn to the other part of the clause, that is, the proviso. If I am right in my interpretation of the main part of the clause I am considering, I do not think that any question under the proviso arises. If a tenant indicates to his landlord that he is exercising an option to continue his tenancy, and the landlord takes no objection with regard to the condition of the premises, and the tenant thereafter remains on as a tenant, it seems to me plain that the landlord cannot thereafter raise the question whether the tenant was entitled to exercise his option by reason of the condition of the premises. He has waived that right. The reply in this action did not raise waiver, although Mr. Hirst contended that it was raised by implication. Mr. Hirst ex abundanti cautela applied to amend his defence in order to plead waiver, and Mr. Plume did not object to this course being taken. The pleading was therefore amended. If I am right in my interpretation of the main clause, in my judgment the landlords are precluded from raising any question of lack of repair in 1954.

In view of the fact that I may be held to be wrong in my interpretation of the main clause, and in view of the fact that if I am wrong the tenant would have to rely upon a notice to exercise the option given by him on February 20, 1958, in which event the question as to repair would become very material, I think it is my duty to express a view both about the interpretation of the proviso to the clause and also about the facts arising thereunder.

Once again a word is used in the proviso which is not usually found in leases, and counsel have been unable to find any authority to assist in its interpretation. The proviso is not that the tenant must have fulfilled the covenants in the lease, but that the tenant must have reasonably fulfilled the covenants in the lease. Two interpretations of the word "reasonably" have been put before me. Mr. Plume, for the landlords, says that the word governs "fulfilled" and, therefore, one starts with the fact that the tenant must fulfil his obligations under the lease. The result is, says Mr. Plume, that before the tenant can extend his lease he must show that he has done that work which would be necessary to fulfil the covenant. If he has done that work, then the word "reasonably" comes into play and the landlords may not be able to complain if the work is not quite up to the standard necessary strictly to fulfil the covenant. Mr. Plume has referred me to *Finch* v. *Underwood*[4] and *Robinson* v. *Thames Mead Park Estate Ltd.*,[5] both of which cases point out that the onus of showing that the proviso has been strictly fulfilled before the

[4] (1876) 2 Ch.D. 310, C.A.

[5] [1947] Ch. 334; [1947] 1 All E.R. 366.

1960

GARDNER
v.
BLAXILL.

Paull J.

option is exercised is on the tenant who exercises it. Mr. Hirst, on the other hand, says that that is not the right way of looking at the matter. The insertion of the word "reasonably" means that the parties have agreed that the tenant may exercise his option provided that he has behaved as a reasonable tenant might have behaved in relation to his covenants. The difference between the two points of view may best be illustrated in this way. It may well be necessary, in order to keep the premises in good and substantial repair, to repaint the premises every three years, or, indeed, at even shorter intervals, but a reasonably minded tenant might well come to the conclusion that the premises will come to no harm if the repainting is left over for a further year. In those circumstances, could a tenant exercise his option halfway through the fourth year? Mr. Hirst would say, Yes; Mr. Plume would say, No. I have come to the conclusion that Mr. Hirst is right, and that by inserting the word "reasonably" the parties not only intended to mean, but must be deemed to have meant, that the tenant can exercise his option provided that he behaves during his tenancy in a way in which a reasonably minded tenant might well behave.

When the tenant, without prejudice to his contention that the option had already been exercised, served his notice dated February 20, 1958, the landlords had the premises surveyed by Mr. Norman, employed by a firm of surveyors called Dunsmore Bros. As a result of that survey, a schedule of dilapidations was served upon the tenant on March 17, 1958. The landlords contended before me, first, that the condition of the premises when they were so surveyed was such that the tenant certainly had no right to exercise his option in February, 1958; and secondly, that the condition found in 1958 shows that in June, 1954, there must also have been a breach of the covenant to repair. There is no dispute that the work indicated in the schedule was work necessary to be carried out in March, 1958, in order that the tenant should fulfil the full repairing clause in his lease. Mr. Austin, the surveyor called by the tenant, agreed that the schedule was a fair and reasonable one. I am happy to say that this case is one in which the surveyors on both sides have been most reasonable in their evidence, and also in the attitude which they took at the time of the making of the schedule.

If one looks at the schedule in this case, it is clear that the vast majority of it consists of work of redecoration. There are only three or four items of structural repair. Mr. Norman stated in his evidence that, in his view, the tenant had let the premises go, so far as repair was concerned, and that the premises were in a worse condition than he would expect for that type of premises. He drew the conclusion that no redecoration work had been done externally for five to seven years, and internally for, at any rate, two or three years. Mr. Austin, on the other hand, said that his view was that the tenant had taken reasonable steps to maintain

the premises within the conception of the purpose for which they were to be used. He disagreed with Mr. Norman about the length of time which had elapsed since decorative work had been done. He took the view that, externally, one window at the back was definitely bad, but that this was because of the condition of the woodwork due to the age of the premises. Indeed, so far as that window is concerned, he advised a new frame, and the tenant put in a new frame. He said that the rest of the exterior looked as though it had been painted comparatively recently, although the weather and the atmosphere had taken toll. He said that his view was that the premises could not be said to have deteriorated during the tenant's tenancy: in other words, that the tenant had acted as a reasonable tenant with regard to his obligations under the covenant.

On the whole, I prefer the evidence of Mr. Austin. I think that Mr. Norman took rather too strict a view, having regard to the type and age of the premises. The tenant struck me as being an extremely honest type of witness, and he assured me that he had repainted the premises, both externally and internally, several times since he became the tenant of the premises. Mr. Plume tried to tie him down as to when these decorations were done, but, rather naturally, the tenant said that they were carried out when he had men to spare to do the work, and he could not tie himself down to precise times, but that he thought that he had decorated the outside within something like six months of the date of the schedule. I am inclined to think that he is wrong with regard to this, but I do think that he has, while he has been the tenant, acted reasonably in fulfilling his obligations to keep the premises in repair.

So far as structural work is concerned, I do not think that I need say more than that the work called for by the schedule was quite small, and that the situation, so far as structural repair is concerned, is that the tenant has done everything a reasonable tenant would do.

It follows from my findings of fact that there is clearly no evidence to show that the tenant was in breach of his covenant to repair in 1954, and, in so far as the onus is upon the tenant to show that he had fulfilled his covenant at that date, he has done so by his evidence. If it is necessary for me to make a finding with regard to the condition of the premises in 1958, I hold that, while at the time of the notice exercising his option the tenant was in breach of his covenant that he should keep the premises in good and substantial repair, to the extent that the work called for by the schedule was reasonably necessary in order strictly to fulfil that covenant, he had reasonably fulfilled the condition upon which he could exercise the option and was, therefore, entitled to exercise the option. As I have indicated, this finding only becomes material if it is found that I am wrong in my interpretation of the main clause. If I am wrong in that interpretation, and

1960

GARDNER v. BLAXILL.

if I am wrong in my interpretation of the word "reasonably," then I think that the tenant would fail in this action. For the reasons that I have given, I think that he succeeds, and I shall make the declaration asked for.

Judgment for the plaintiff with costs.

Solicitors: *Coulson & Coulson; E. F. Iwi for Armstrong & Co., Forest Hill.*

[ELECTION COURT.]

1960
April 4, 5, 6.

Streatfeild and Slade JJ.

* *In re* KENSINGTON NORTH PARLIAMENTARY ELECTION.

Parliament—Election—Petition—Validity of election—Petition alleging breaches of Parliamentary Elections Rules—Whether election conducted substantially in accordance with law—Act or omissions not affecting result—Onus of proof—Representation of the People Act, 1949 (12 *&* 13 *Geo.* 6, *c.* 68), *s.* 16 (3).

Burden of Proof—Parliamentary election—Breach of rules—Whether burden rests on respondent to prove compliance.

Section 16 (3) of the Representation of the People Act, 1949, provides: "No parliamentary election shall be declared invalid by "reason of any act or omission by the returning officer or any "other person in breach of his official duty in connection with the "election or otherwise of the parliamentary elections rules if it "appears to the tribunal having cognisance of the question that the "election was so conducted as to be substantially in accordance with "the law as to elections, and that the act or omission did not affect "its result."

The petitioner alleged and the court found that there had been certain breaches of the Parliamentary Elections Rules during the conduct of a parliamentary election in that (i) in the case of three, or possibly four, voters who did in fact vote no marks were placed against the numbers allotted to them in the register of electors to denote that ballot papers had been received by them, contrary to rule 38 (1) (*d*); (ii) persons other than those specified in rule 45 (2) attended the counting of the votes; and (iii) persons other than those who had taken the declaration of secrecy required by rule 32 in respect of the election attended the counting of the votes:—

Held, that, notwithstanding the breaches of the rules, the election had been conducted substantially in accordance with the law and the acts or omissions did not affect its result. In deciding these questions under section 16 (3) of the Act of 1949, the court looked at the evidence as a whole and the burden of proof did not rest on the respondent.

Islington, West Division Case, Medhurst v. *Lough & Gasquet* (1901) 17 T.L.R. 210, 230; 5 O'M. & H. 120 distinguished.

[Reported by A. D. RAWLEY, Esq., Barrister-at-Law.]

PETITION.

A parliamentary election petition, dated October 28, 1959, was presented by Sir Oswald Ernald Mosley, Baronet, who was a candidate for the North Division of Kensington at the general election held on October 8, 1959. The first respondent to the petition, George Henry Roland Rogers, was the candidate returned to Parliament at the election. The second respondent was the returning officer, Arthur Newton McHaffie.

By paragraph 3 of his petition the petitioner stated that in the holding of the election divers illegal practices and breaches of the statutory rules governing the conduct of the election were committed by the returning officer and/or his servants or agents in that: "(i) when numerous persons who were qualified to vote in "the said election did in fact vote therein, no marks were placed "against the numbers allotted to the said persons in the register "of electors to denote that ballot papers had been received by "them.

"(ii) No proper arrangements were made for the transporting "of the ballot boxes and packages from the polling stations to the "place appointed for the count.

"(iii) The returning officer failed to make any or any proper "arrangements for ensuring that the ballot boxes were opened "and/or the votes were counted in the presence of the counting "agents and/or the election agents entitled to be present thereat.

"(iv) The ballot boxes were opened and/or the returning officer "proceeded to count the votes in the absence of counting agents "and/or election agents entitled to be present thereat.

"(v) Persons other than those specified in rule 45 (2) of the "Parliamentary Elections Rules contained in Schedule 2 to the "Representation of the People Act, 1949, attended the counting "of the votes.

"(vi) Persons other than those who had taken the requisite "declaration of secrecy in respect of the said election attended the "counting of the votes."

The petitioner prayed that (a) there might be a scrutiny of the votes recorded as having been cast in the election, and (b) that it might be determined that the first respondent was not duly elected and that his election and return were void.

At the hearing of the petition, the petitioner, who appeared in person, referred to a canvass which had been made in four of the sixteen polling districts by his supporters to inquire whether or not certain electors had actually voted although no marks were placed against their numbers in the register of electors. On the question of the admissibility of evidence of the result of the canvass by the persons who had conducted it, the court ruled that as the election court was not bound by the ordinary rules regarding hearsay evidence, it was open to the petitioner to

1960

KENSINGTON NORTH PARLIAMENTARY ELECTION, *In re.*

adduce evidence of the result of the canvass, for what it was worth, although it was based on hearsay.[1]

The facts are more fully stated in the judgment.

The petitioner appeared in person.

J. A. Grieves Q.C. and *Henry Summerfield* for the first respondent.

E. H. Blain and *Sheila Cameron* for the second respondent.

J. R. Cumming-Bruce for the Director of Public Prosecutions.

In addition to the case referred to in the judgment, the following were cited in argument: *Gribbin* v. *Kirker*[2]; *Hackney Case, Gill* v. *Reed & Holms*[3]; *Birmingham Case, Woodward* v. *Sarsons*[4]; *Clare, Eastern Division Case*[5]; *Pickering* v. *Startin*[6]; *Phillips* v. *Goff*.[7]

STREATFEILD J. This is an election petition brought by Sir Oswald Mosley, Baronet, who was one of the candidates at the general election for the North Kensington Division. This resulted in the return to Parliament of Mr. Rogers (the first respondent), who received 14,925 votes. Mr. Bulbrook came second with 14,048 votes; Mr. Hydleman came third with 3,118 votes, and Sir Oswald Mosley next with 2,821 votes. In this petition the petitioner alleges a number of illegal practices and breaches of the statutory rules governing the conduct of the election, alleged to have been committed by the returning officer, who is the second respondent to this petition. We have already ruled that there is no case to answer in regard to the matters stated in paragraph 3 (ii), (iii) and (iv) of the petition, although I shall have a word to say presently with regard to one or two of these matters.

The first item of complaint under paragraph 3 (i) of the petition is that there was a breach of rule 38 of the Parliamentary Elections Rules,[1] whereby numerous persons who were qualified to vote in the election did in fact vote therein, but no marks were

[1] By virtue of s. 137 (2) of the Representation of the People Act, 1949, the election court observes the principles, practice and rules of evidence on which the committees of the House of Commons used to act. For petitions presented after April 1, 1960, the position is now governed by the Election Petition Rules, 1960 (S.I. 1960, No. 543).

[2] (1873) I.R. 7 C.L. 30.

[3] (1874) 31 L.T. 69; 2 O'M. & H. 77.

[4] (1875) L.R. 10 C.P. 733; 32 L.T. 867.

[5] (1892) 4 O'M. & H. 162, I.R.

[6] (1873) 28 L.T. 111.

[7] (1886) 17 Q.B.D. 805.

[1] Parliamentary Elections Rules, r. 38 (1): "A ballot paper shall be "delivered to a voter who applies "therefor, and immediately before "delivery—(*a*) the ballot paper shall "be stamped with the official mark, "either embossed or perforated; (*b*) "the number, name and description of "the elector as stated in the copy of "the register of electors shall be called "out; (*c*) the number of the elector "shall be marked on the counterfoil; "(*d*) a mark shall be placed in the "register of electors against the number of the elector to denote that a "ballot paper has been received but "without showing the particular ballot "paper which has been received; and "(*e*) in the case of a person applying "for a ballot paper as proxy, a mark "shall also be placed against his name "in the list of proxies."

placed against their numbers in the register of electors to denote that ballot papers had been received by them. It is laid down in the rules that a person tendering himself as a voter must identify himself. He is checked from the register of voters; he is given a ballot paper and the counterfoil is marked with his number on the back in case thereafter it is necessary to have a scrutiny of the vote. He has, or should have, his name ticked off or otherwise struck out in the voting register in order to indicate that he has received a ballot paper, otherwise, of course, there would be a danger that someone might come a second time and might get another ballot paper, perhaps from another clerk at the polling station, and so record his vote twice. The object of the rule is to prevent that danger.

We were told that a number of persons from various polling stations had been interviewed and that some 111 of them had indicated that they had voted; and that there were no marks against their names in the relevant register of electors. We were told that some twenty of such persons were to be called as witnesses. In fact ten of them were called and it transpired that five out of ten had not voted at all—a very good reason for no marks being put against their names. Of the remaining five who did vote, it is, I think, quite clear from examining the register of voters, that one of them did in fact have his name struck out, together with that of his wife. The clerk had obviously struck them both out together, and the mark rather tailed off when it came to this particular voter, but I think it was struck off. Another one of the five was more doubtful, because the name was struck off but the word " stet " was written opposite. The other three were not marked, and they did vote. All of those five witnesses who said that they did vote, voted only once. There is not a shred of evidence that any of them took advantage of the fact, if indeed they knew of the fact, that their names had not been ticked off.

It was a breach of rule 38 (1) (*d*) of the Parliamentary Elections Rules that, when the ballot papers were delivered to these three witnesses—and possibly to four of them—who in fact recorded their votes, no mark was made against their names in the register of electors. The court has to determine what is the result of that breach.

The section which particularly concerns the court is section 16 of the Representation of the People Act, 1949. Section 16 (3) provides that " No parliamentary election shall be declared invalid " by reason of any act or omission by the returning officer or any " other person in breach of his official duty in connection with the " election or otherwise of the parliamentary elections rules if it " appears to the tribunal having cognisance of the question that " the election was so conducted as to be substantially in accord- " ance with the law as to elections, and that the act or omission " did not affect its result." It seems to me that the election was

1960

KENSINGTON NORTH PARLIAMENTARY ELECTION, *In re.*

Streatfeild J.

conducted substantially in accordance with the law, and that the act or omission did not affect the true result. The question of the burden of proof does not, on the strict wording of section 16, really arise. If it did arise it seems that under the wording of the corresponding section of the Ballot Act, 1872, that is section 13, the burden rested upon the respondent: see *Islington, West Division Case, Medhurst* v. *Lough and Gasquet.*[2] I think that with the changed wording under section 16 (3) of the Act of 1949 it is for the court to make up its mind on the evidence as a whole whether there was a substantial compliance with the law as to elections or whether the act or omission affected the result.

Even if the burden rested upon the respondent, speaking for myself I have come to the conclusion that the evidence is all one way. Here, out of a total voting electorate of 34,912 persons who recorded their votes, three or possibly four are shown by the evidence to have voted without having their names marked off on the register, and each of them only voted once. Even if one were to assume in favour of the petitioner that some proportion of the remainder of 111 persons, whom we have not seen, were in somewhat similar case, there does not seem to be a shred of evidence that there was any substantial non-compliance with the provision requiring a mark to be placed against voters' names in the register; and when the only evidence before the court is that the only three, or possibly four, people who are affected by having recorded their votes without having a mark placed against their names, each only voted once, one cannot possibly come to the conclusion that, although there was a breach of the statutory rules, the breach can have had any effect whatever on the result of the election. Even if all the 111 were similarly affected, it could not possibly have affected the result of this election; therefore, as it seems to me, although there was a breach of the sort alleged in paragraph 3 (i) of the petition in that marks were not placed against certain names on the register, I should be prepared to say that there was a substantial compliance with the law in this respect governing elections, and that the omission to place a mark against the names did not affect the result.

The second matter, upon which we have already ruled that there is no case to answer, was the allegation in paragraph 3 (ii) of the petition that no proper arrangements were made for transporting the ballot boxes and papers from the polling stations to the place appointed for the count. The petitioner in his concluding remarks has invited the court, although he bows to its ruling, to include in the recommendations which the court will make to the Speaker of the House of Commons, a recommendation that what he describes as a hiatus should now be filled in. He drew the court's attention to rule 44 of the Parliamentary Elections Rules, which lays down elaborate precautions which are to be taken in the polling stations as to the sealing of ballet boxes. In

[2] (1901) 17 T.L.R. 210, 230; 5 O'M. & H. 120.

rule 45 there are also provisions for the returning officer at the other end of the journey to open the ballot boxes, having given notice and given facilities to counting agents to be present during that operation. The petitioner contended that it is a gap in the law that although elaborate precautions are taken before the journey and at the end of the journey, there is no provision for the safeguarding of ballot boxes on the journey itself.

It does appear that formerly it was the law that a police constable should accompany the ballot boxes from the polling station to the place of the count, but Parliament, in its wisdom, repealed the provision with regard to constables. In 1949, the Representation of the People Act received the Royal Assent and there is no provision in that Act for a constable to accompany voting papers. Of course, there is nothing to prevent anyone from conjuring up in his own mind all sorts of hazards and difficulties, which might beset ballot boxes on their way to and from the polling station and the counting place. One can, of course, imagine all sorts ofdangers which may ring them about, but if Parliament, in its wisdom, as lately as 1949 has seen fit to make rules regulating these matters and has not thought it was necessary to enact or to re-enact any requirements that a constable should accompany the ballot boxes, I do not, speaking for myself, feel that it would be correct for this court to recommend Parliament to reconsider that situation, particularly in the present case, because there is no evidence at all that the provisions of rule 44 as to the closing of these ballot boxes and sealing them up in the presence of the polling agents was not fully carried out. There is no evidence at all that the ballot boxes, when they were opened at the place of the count had in any way been tampered with. There is not a shred of evidence from beginning to end that there might have been, or still less that there was, any substitution of some completely different ballot box or boxes with completely false or forged voting papers therein. Of course, as I have said, one can imagine these things if one wants to. One can believe that something like that did happen or did not, and I have no doubt that the petitioner does genuinely believe it. The fact remains that there is not a shred of evidence to support it and he admits that he could not possibly prove it. Under those circumstances this court ruled that there was no case to answer, and having ruled that there was no case to answer, I go further; I do not feel that there is evidence to call for this court to make any special recommendation to Parliament with regard to the future escorting of ballot boxes from the place of the poll to the place of the count.

With regard to paragraph 3 (iii) and (iv) of the petition again we ruled that there was no case to answer. I need not go into those matters now. They concerned simply the question whether proper facilities were given to the counting agents to be present when the poll commenced. As it seems to me, the difficulty which the petitioner pointed out is this: if a counting agent is

1960

KENSINGTON NORTH PARLIAMENTARY ELECTION, *In re.*

Streatfeild J.

appointed, who is also a polling agent, or if he is a person who is employed in the constituency rounding up late voters in the last few moments of the poll, of course he cannot be in two places at once and it takes a little time to get to the place of the count. But the plain answer is, that if one desires to attend and one has notice that the count is to begin at nine o'clock or immediately afterwards, one must appoint a counting agent who will be able to be there, and provided that the facilities were given, which, we think, they were, it does not seem that there can be any breach of the rules in those respects, and that is why we ruled that there was no case to answer on paragraph 3 (iii) or (iv) of the petition.

Paragraph 3 (v) and (vi) of the petition can be taken together. They concern the actual proceedings at the count and it is alleged that there was a breach of rule 45 (2) of the Parliamentary Elections Rules in that persons attended the count other than those who were entitled to be present, and it is said that those persons included persons who had not made the requisite declaration of secrecy in respect of the election, and that they attended the counting of the votes at any rate for some part of the time. Rule 45 (2) provides that "no person other than (*a*) the returning officer and his clerks; (*b*) the candidates and their wives or husbands; (*c*) the election agents; (*d*) the counting agents; may be present at the counting of the votes, unless permitted by the returning officer to attend." There is also provision made by rule 32 that people who do attend must make a declaration of secrecy. In the case of people who are permitted to attend, they can make a declaration of secrecy at the time immediately before they are admitted. In some particulars which were given by the respondents, there are set out eleven categories of persons who did attend the counting of the votes of the North Kensington election. They included people who were clearly entitled to be there under the provisions of rule 45 (2). They also included certain other people who were obviously people who had been given permission to attend. Now those names did not include the name of Mr. Richard, who was the Labour candidate for the South Kensington division. There was also a gentleman called Mr. Rennie who, it appears, was a counting agent for the South Kensington division. The count of the poll of the South Kensington division was also going on in the Kensington Town Hall at the same time, but, of course, in another room, as the count for the North Kensington division, and Mr. Blain, appearing for the returning officer, has admitted that Mr. Richard and Mr. Rennie apparently did attend the count at some time during the period when the count was taking place. Neither of those persons, so far as the court knows, took an oath or made a declaration of secrecy qua the North Kensington division. No doubt they had both done so with regard to the South Kensington division. For my part, I am prepared to assume for these purposes, without having heard full argument from Mr. Blain, that that again was a breach of the rules,

inasmuch as two persons, not having been given permission to attend and not having taken the oath of secrecy qua the North Kensington division, apparently were allowed to be present. Whether it was because they were recognised as being persons concerned with the South Kensington division and a policeman on the door inadvertently let them in, I know not, but it is conceded by the petitioner that, even though they were present and were unauthorised and had not made a declaration or taken any oath of secrecy, in fact there was no interference with the count. He does not contend that their mere presence had any effect on the result of the election. Obviously the reason for the rules concerning the persons who are authorised to attend is in order to safeguard the count, so as to make quite sure that only reliable people are there who can be trusted not to walk off with packets of voting papers and so on, but there is not a shred of evidence to suggest—and the petitioner does not contend—that there was anything wrong with the count.

The petitioner says that he would not seek to suggest that the mere presence of those two gentlemen had any effect on the result of the election. Accordingly, with regard to those matters, that is, on the assumption for these purposes that the presence of those two gentlemen constituted a breach of the rules, it appears to me to be inevitable that we must find that, although it was a breach, nevertheless the rules relating to the count were substantially observed and were in accordance, substantially, with the law, and that the act of admitting those people and the omission of the declaration of secrecy did not affect the result of the election.

That brings me to the end of the matters of complaint by the petitioner in this case. For my part, therefore, I come to the conclusion that there is no case to answer on paragraph 3 (ii), (iii) and (iv) of the petition, and with regard to paragraph 3 (i), (v) and (vi), although there was under (i), and there may have been under (v) and (vi), a breach of the rules relating to elections, I have come to the conclusion that there was substantial compliance with the law and rules governing elections, and that none of those acts or omissions affected the result of the election. For those reasons, therefore, I must refuse the remedy which the petitioner has asked for in this case.

SLADE J. I agree.

STREATFEILD J. The court will order that the petition should stand dismissed and in due course we will report. Section 124 (1) of the Act of 1949 provides that "At the conclusion of the trial "of a parliamentary election petition, the election court shall "determine whether the member whose election or return is "complained of, or any and what other person, was duly returned "or elected or whether the election was void, and shall forthwith "certify in writing the determination to the Speaker. . . ." It

1960

KENSINGTON NORTH PARLIAMENTARY ELECTION, *In re.*

Streatfeild J.

follows, from that that this court themselves determine that Mr. Rogers was duly returned and that there is no other person who should have been returned, and it will be certified to the Speaker accordingly. I ought to add that none of the breaches of the rules are an illegal practice within the meaning of the Act, so that no direction need be given by this court in that respect.

[Having heard argument on costs, their Lordships awarded costs to the first and second respondents, but made no order as to the costs of the Director of Public Prosecutions.]

Petition dismissed.

Solicitors: *Amphlett & Co.; Town Clerk, Kensington; Director of Public Prosecutions.*

[COURT OF APPEAL.]

C. A.

1960 *May* 19, 20, 23; *June* 1.

Sellers, Willmer and Harman L.JJ.

* MAYER *v.* HARTE AND OTHERS.

[Plaint No. N. 1557.]

Costs—"Bullock" order—"Bullock" or "Sanderson" order—Discretion of court — County court — Action against three defendants—Judgment against insolvent defendant—Whether unsuccessful defendant should pay costs of successful defendants—Whether plaintiff should pay costs of successful defendants with right to recover from unsuccessful defendant.

Where a plaintiff reasonably brings proceedings against two or more separate defendants and succeeds against one defendant but fails against the others, it is a matter entirely within the judge's discretion whether he makes a *Bullock* form of order as to costs under which the plaintiff is ordered to pay the costs of the successful defendants and allowed to add those costs to the costs recoverable from the unsuccessful defendant, or a *Sanderson* form of order under which the unsuccessful defendant is ordered to pay directly the costs of the successful defendants.

The plaintiff and the first defendant were adjoining householders. During the course of repairs to the first defendant's roof, carried out for the first defendant by the second defendant, a builder, the third defendant, a plumber employed as a sub-contractor by the second defendant, trespassed on the plaintiff's roof whereby the plaintiff suffered damage.

In an action against the first two defendants for £20 10s. damages, the second defendant paid £15 into court with a denial of liability, and disclosed to the plaintiff that it was the third defendant who had been on the plaintiff's roof. The plaintiff did not take out the money that had been paid in, but joined the third defendant as a party to the action without any inquiry as to his means. The third defendant was an undischarged bankrupt.

The plaintiff obtained judgment against the third defendant for £20 10s. with costs, but failed in her claim against the first and second defendants. The judge ordered the plaintiff to pay the costs

of the first and second defendants and add them to the costs recoverable from the third defendant:—

Held, (Harman L.J. dissenting) (1) that the matter being one entirely within the judge's absolute discretion, which had not been shown to have been improperly exercised, the court could not interfere with his order (post, pp. 778, 779, 783.).

Donald Campbell & Co. Ltd. v. *Pollak* [1927] A.C. 732; 43 T.L.R. 495, H.L. applied.

Statement in the Annual Practice (1960), p. 1842 approved.

(2) That even if the Court of Appeal could substitute its discretion for that of the judge, it would make the same order as he did; for the plaintiff joined the third defendant without inquiry, and by proceeding with a four-party action for the sake of £5 10s. incurred costs wholly disproportionate to the amount in issue (post, pp. 781, 783).

Dicta of Jessel M.R. in *Rudow* v. *Great Britain Mutual Life Assurance Society* (1881) 17 Ch.D. 600, 607, 610, C.A. explained.

Per Harman L.J. In a case not tried with a jury prima facie the *Sanderson* form of order should be followed, particularly where the insolvency of the defendant on whom the costs will fall make the injustice to the plaintiff a glaring one (post, p. 776).

APPEAL from Judge Potter, sitting at Bloomsbury County Court.

The following facts are taken substantially from the judgments of Harman and Willmer L.JJ.: Adele Mayer, the plaintiff, and Irving Harte, the first defendant, were next-door neighbours, occupying houses having adjoining roofs with dormer windows in them. These were covered with asphalt. The plaintiff's roof had been recently renewed, but the first defendant's was old and he determined to have it repaired, and for this purpose he employed James Kane, the second defendant, a builder, but instructed the second defendant to recover his part of the roof and dormer with zinc instead of asphalt. For this job the second defendant employed W. J. Brassett, the third defendant, a plumber, and he, apparently after some demur, was instructed by the second defendant to join up the zinc on the first defendant's side with the asphalt on the plaintiff's side by turning back the asphalt and tucking the zinc underneath. This the third defendant did, and in the course of it he trespassed on the plaintiff's roof and pulled the asphalt covering back six inches or so in order to tuck the zinc underneath. This was not a satisfactory job and a leak soon started at the joint, but on the plaintiff's side where her asphalt had been cracked, with the result that water came into her room below. The plaintiff, discovering this in July, 1957, called in her builder, who reported that the roof repairs alone would cost £17 10s. In September, 1957, she wrote to the first defendant complaining of the damage, to which the first defendant replied that he had communicated with his builder, that is to say, the second defendant; for himself he disclaimed all responsibility. Solicitors' letters followed, and a demand was made against the second defendant for £17 10s. and, in addition, £15 for consequential damage to the room below. The plaint

C. A.
1960
MAYER
v.
HARTE.

was issued on November 5, 1957, against the first and second defendants claiming the sum of £32. The first defendant delivered his defence on November 15, 1957, and on December 9, 1957, the second defendant paid £15 into court with a denial of liability. The plaintiff was ill-advised enough to decline this offer, the reason being that it would have involved paying the first defendant's costs. On January 29, 1958, the particulars of claim were amended, reducing the damages claimed to £20 10s. For some reason which cannot be understood, the second defendant did not deliver his defence until May 2, 1958, when for the first time he disclosed the fact that he had employed the third defendant as a sub-contractor to do the work in question, and pleaded that he was an independent contractor. On July 16, 1958, in response to a request, further and better particulars of the second defendant's defence were delivered, giving information as to the address of the third defendant, and as to the nature of the business which he carried on. The plaintiff, therefore, had every opportunity of ascertaining what sort of man the third defendant was. At this point, the action went to sleep for about a year, but on July 10, 1959, the plaintiff joined the third defendant as a party to the action and delivered reamended particulars of claim claiming damages of £20 10s. against all three defendants. The third defendant, who appeared in person, put in a defence blaming the second defendant, and wrote a letter to the registrar explaining the circumstances as he saw them. There followed cross-notices of contribution between the defendants, and, in the end, the pleadings were far more elaborate than is usual in a High Court action involving half a million pounds.

The action came on for trial on October 19, 1959. The trial was not completed on that day, but was adjourned and finally concluded on November 25, 1959. At the trial, the third defendant, who was known at any rate to the second defendant, though not to the plaintiff, to be a man of straw, appeared in person. Judgment was given on November 25, 1959, in favour of the first and second defendants against the plaintiff on the ground that each of them had employed an independent contractor, but judgment was given in favour of the plaintiff against the third defendant for the amount of the claim, £20 10s., on the ground of trespass.

The judge then awarded costs in favour of the plaintiff against the third defendant on scale 2, and costs in favour of the first and second defendants on scale 3, and made a *Bullock* form of order, that is, the plaintiff should add to the costs recoverable from the third defendant the costs payable by her to the first and second defendants. The third defendant then disclosed that he was an undischarged bankrupt. There then followed argument as to the form of order to be made in respect of costs, and the judge, after hearing argument, struck out the order that he had originally made. It was contended for the plaintiff that the judge should make a *Sanderson* form of order (the other type of *Bullock* order),

that is, the third defendant should pay the costs of the first and second defendants, in view of the third defendant's insolvency and the consequent injustice of the plaintiff bearing the whole brunt of the costs. The judge, arguendo, said that he could not take into account the third defendant's bankruptcy when making his order for costs, and that the plaintiff could have searched before joining the third defendant.

No formal judgment on costs was given, the judge making the order that he had originally made, namely, that the plaintiff pay the costs of the first and second defendants and add them to the costs recoverable from the third defendant. The plaintiff appealed.

John Wilmers and *A. T. Hoolahan* for the plaintiff.
Leonard Halpern for the first defendant.
John Nevin for the second defendant.

The following authorities were cited in argument, in addition to those referred to in the judgments: *Ottway* v. *Jones* [1]; *Evans* v. *Bartlam* [2]; Yearly Practice (1938), p. 1424.

Cur. adv. vult.

June 1. SELLERS L.J. I will ask Harman L.J. to deliver the first judgment.

HARMAN L.J. stated the facts and continued: After some changes of mind, the judge made what is commonly known as a *Bullock* order. *Bullock* v. *London General Omnibus Co.*[1] was an action tried with a jury, being a claim in tort against two defendants, one of whom was held liable and the other not, and Bray J. ordered that the plaintiff should pay the costs of the successful defendant, but allowed the plaintiff to add these costs to the sum recoverable from the unsuccessful defendant.

When the judge first said he would make such an order, this was the only form of order in such cases that he had in mind. He was, however, reminded by counsel for the plaintiff that there was another form of order more properly called the *Sanderson* v. *Blyth* order.[2] No authorities were cited to the judge, but a passage was read to him from the County Court Practice (1959, p. 270) where the position is stated in these words: "Where "defendants are joined or sued alternatively there is power in a "proper case to order an unsuccessful defendant to pay the costs "of a successful one, or to order the plaintiff to pay the costs of a "successful defendant and to add them to his costs against the "unsuccessful defendant." The judge, as so instructed, saw the

[1] [1955] 1 W.L.R. 706; [1955] 2 All E.R. 585, C.A.
[2] [1937] A.C. 473; 53 T.L.R. 689; [1937] 2 All E.R. 646, H.L.

[1] [1907] 1 K.B. 264; 23 T.L.R. 62, C.A.
[2] *Sanderson* v. *Blyth Theatre Co.* [1903] 2 K.B. 533; 19 T.L.R. 660, C.A.

C. A.
1960
MAYER
v.
HARTE.
Harman L.J.

matter as one on which he could exercise his unfettered discretion either one way or the other, and he chose to exercise it in the *Bullock* form and not the *Sanderson* form. It is said, and with much force, that this was an exercise of the discretion as to costs always vested in the judge, and one with which this court cannot interfere.

When, however, the matter is more carefully examined, it appears that the first pronouncement on this subject is that of Jessel M.R. in *Rudow* v. *Great Britain Mutual Life Assurance Society*.[3] A passage in the headnote reads: "In cases where "under the old practice in Chancery the court would have ordered "the plaintiff to pay the costs of one defendant and have them "over against another defendant, an order will now be made at "once for the one defendant to pay them to the other." Jessel M.R., in the course of the argument, said[4]: "I think it right "to state, for I have the concurrence of the Lords Justices, that "under the Judicature Acts it is no longer necessary or proper to "order a plaintiff to pay the costs of a defendant and have them "over against another defendant, so that if the second defendant "is insolvent the plaintiff loses them. The proper form of order "now is to order the defendant who is liable to them as between "himself and his co-defendant to pay them to the co-defendant." In the course of his judgment, after speaking of the order which had been made, he said[5]: "The result, therefore, was, that by "virtue of that order the plaintiff became liable to pay Wurth's "costs in full and was to have them over against the company. "The order employed the machinery which was adopted by the "old Court of Chancery and which is no longer either necessary or "useful, but is mischievous, and, as this court has already laid "down today, is no longer to be used." In that case, the company in question was a company in liquidation and, therefore, would not be able to pay costs in any event.

These are strong words. Before the Judicature Act, 1873, it was not permissible to order a party to pay costs to another party on the same side of the record, and the Court of Chancery therefore devised the expedient of ordering the plaintiff to pay one defendant's costs but to add them to his costs recoverable against another defendant. Sir George Jessel M.R. was pointing out that this expedient was no longer necessary since the Judicature Act, 1873, and should no longer be adopted. It was, however, still maintained in actions tried with a jury, having regard to the language of R.S.C., Ord. 65, r. 1. This, indeed, is why in *Bullock's* case[6] there was no discussion as to the exact form of the order, it being a jury case. Jessel M.R. pointed out that the old form of order might be mischievous in a case where a defendant from whom costs were recoverable by a plaintiff was insolvent, as was the respondent company in *Rudow's* case.[7]

[3] (1881) 17 Ch.D. 600, C.A.
[4] Ibid. 607, 608.
[5] Ibid. 610.
[6] [1907] 1 K.B. 264.
[7] 17 Ch.D. 600.

Jessel M.R.'s decision was affirmed by the Court of Appeal in *Sanderson* v. *Blyth Theatre Co.*,[8] where the headnote reads as follows: "In an action in the King's Bench Division, claiming "relief against the defendants in the alternative, the court has "jurisdiction in a proper case to order the unsuccessful defendant "to pay the costs of the successful defendant, or to order the "plaintiff to pay the costs of the successful defendant and then "to add those costs to the costs which the unsuccessful defendant "is ordered to pay to the plaintiff." The leading judgment was delivered by Romer L.J. and he pointed out that it is, of course, a matter in which the judge has a discretion. He said this in one passage[9]: "The modern practice, in order to avoid circuity, has "been in such cases, where there has been no jury, to order the "unsuccessful defendant to pay directly to the successful defen-"dant his costs: se *Rudow* v. *Great Britain Mutual Life Assur-"ance Society*.[10] But, of course a judge has jurisdiction to follow "the old practice if he thinks fit to do so, and ought to do so "when necessary, as, for example, when, having regard to "Order LXV, rule 1, difficulties would otherwise arise by reason "of the trial being with a jury." Stirling L.J. carried the matter somewhat further. He said[11]: "Now in suits where persons "were made defendants for the purpose of complying with the "rule just stated, the Court of Chancery had full jurisdiction, "when disposing of a suit on its merits, to deal with the costs of "such parties and to decide by whom they should be borne. If "the court was of opinion that their costs ought to be borne by a "co-defendant, the ordinary practice was to direct the plaintiff to "pay them in the first instance, and then to add them to his own, "and to have them over against the defendant who was to bear "them. . . . Where, however, a suit was instituted by the "Attorney-General ex officio, the practice was different, for, as "the Attorney-General could not be ordered to pay costs, costs "were ordered to be paid directly by one defendant to another. ". . . After the Judicature Acts came into operation this practice "was altered by the Court of Appeal in *Rudow* v. *Great Britain "Mutual Life Assurance Society*,[12] and it was laid down that "the proper form of order was to order the defendant liable to "costs as between himself and his co-defendant to pay them to "the co-defendant. Jessell M.R. said that the machinery which "had been adopted by the Court of Chancery was no longer "either necessary or useful, but was mischievous. I understand "this to mean that it was no longer necessary, because under "the Judicature Acts and rules the court had full power to "order one defendant to pay costs to another, and that it was "mischievous because the plaintiff who was ordered to pay costs "in the first instance, and then to have them over against a "defendant, ran the risk of losing them if the defendant proved

[8] [1903] 2 K.B. 533.
[9] Ibid. 539.
[10] 17 Ch.D. 600.
[11] [1903] 2 K.B. 533, 542.
[12] 17 Ch.D. 600.

C. A.
1960
MAYER
v.
HARTE.
Harman L.J.

"to be insolvent. The change of practice appears to me, if I "may be allowed to say so, to be perfectly proper, and I think "that the new practice ought to be adhered to wherever it is "practicable to do so."

No doubt these last pronouncements were obiter dicta because, the case being a jury case, the judgment of Grantham J. in the *Bullock* form was approved. Nevertheless, the two cases in the Court of Appeal seem to me to lay it down that, in a case not tried with a jury, prima facie the *Sanderson* form of order should be followed, and that this is particularly so where the insolvency of the defendant on whom the costs will fall makes the injustice to the plaintiff a glaring one. It is unfortunate that in the note to R.S.C., Ord. 65, r. 1, in the Annual Practice (1960), p. 1842, under the heading of "Co-defendants," where this matter is discussed, it is stated that it is the plaintiff's insolvency that matters, and *Rudow's* case [12] is cited for that proposition. This appears merely to be the usual mistake of writing "plaintiff" for "defendant."

The practice also appears to be followed in the Admiralty Division—as witness the judgment of Bargrave Deane J. in *The Esrom and the Hopper Wills No. 66.*[13] *Besterman* v. *British Motor Cab Co. Ltd.*[14] shows that it is not necessary to justify such an order that one defendant should blame another. "it is" (says the headnote) "a question in all cases whether it was a "reasonable and proper course for the plaintiff to join both the "defendants in the action." *Besterman's* case [14] was cited in *Hong* v. *A. & R. Brown Ltd.*,[15] which shows that the practice was still followed at that date. The headnote in the latter case reads in these terms: "Where a plaintiff reasonably brings pro-"ceedings against two separate defendants and fails against the "one but succeeds against the other, there is no rule of law "compelling the judge to make a *Bullock* order under which the "unsuccessful defendant is ordered to pay the successful defen-"dant's costs. That is a matter within the judge's discretion "and having regard to the Judicature Act . . . no appeal will lie ". . . unless it can be established that the judge has failed to "exercise any real discretion, because either he failed to act "judicially or had purported to exercise his discretion without "the proper materials on which to exercise it."

Both Romer L.J.'s judgment [16] (which I have cited) and the headnote to the last-cited case show that the judge has a discretion in the matter, as indeed is always the case in questions of costs, but this discretion, like all others, must be exercised in a judicial manner and all proper circumstances must be taken into account.

Turning back to the present case, the judge could only decide to make a *Bullock* order, whether in one form or the other, on

[13] [1914] W.N. 81.
[14] [1914] 3 K.B. 181; 30 T.L.R. 319, C.A.
[15] [1948] 1 K.B. 515; 64 T.L.R. 132; [1948] 1 All E.R. 185, C.A.
[16] [1903] 2 K.B. 533, 539.

the footing that the plaintiff was justified in bringing both the first and second defendants before the court even though he had not succeeded against them. It must also mean that he had decided that it was just that the third defendant ought to bear, whether directly or indirectly, the costs of his co-defendants. There is no appeal on either of these two points. If all the parties were solvent it would not much matter in which form the order was couched; the eventual result would be the same and in such a case the advantage of making the *Sanderson* form of order is confined to avoiding circuity, as Romer L.J. said; but directly it turns out that the third defendant is an insolvent person the *Bullock* form of order will work a great injustice to the plaintiff, who not only recovers nothing from the third defendant but has to pay the costs of the first and second defendants and is thus very far out of pocket though she had a good cause of action. This, it seems to me, is why both Jessel M.R.[17] and Stirling L.J.[18] pointed out that the insolvency of the defendant to be made liable is the strongest reason for making the order in the *Sanderson* form. No doubt this will in itself produce some injustice to the first and second defendants, who are successful litigants and will have to bear their own costs, but they were each of them at least indirectly responsible for the wrong done to the plaintiff and should therefore suffer rather than she.

Here the judge did not have the cases cited to him, and he was evidently unaware that the Court of Appeal had twice indicated the proper practice. Moreover, he expressly refused to take into account the third defendant's bankruptcy, which is the very circumstance to which he was by the authorities directed to have regard, and this seems to me altogether to vitiate the exercise of his discretion. I cannot but think that if the cases had been put before him he must have arrived at the conclusion that this is eminently a case for a *Sanderson* order and that this was the order which he would have made.

I, therefore, would allow the appeal.

WILLMER L.J. I confess that I have found the present case one of no little difficulty, and I have not found it easy to make up my mind which way our decision should go. The plaintiff and the first and second defendants are "innocent" parties, in the sense that they have all vindicated their respective rights. The question to be determined is which of these innocent parties is the one who ought to suffer from the unfortunate fact of the third defendant's insolvency.

By her notice of appeal, the plaintiff put forward the contention that the judge had erred on a question of legal principle. The principle alleged to have been violated is that said to have been laid down by Jessel M.R., with the concurrence of the other members of the Court of Appeal, in *Rudow* v. *Great Britain*

[17] 16 Ch.D. 600, 607, 610.

[18] [1903] 2 K.B. 533, 542.

C. A.
1960
MAYER v. HARTE.
Willmer L.J.

Mutual Life Assurance Society[19]: see his statement in the course of the argument,[20] repeated in substance in his judgment.[21] My Lord has already read the passages referred to, and I do not, therefore, pause to read them again. The circumstances that have arisen in the present case, it is contended, are precisely those envisaged by Jessel M.R. It is, accordingly, argued that his direction as to how the costs ought to be borne in such a case (namely, that the successful defendants should recover their costs direct from the unsuccessful defendant) is one which ought to be followed, especially as no case can be found in which any adverse comment has since been made upon what was said by Jessel M.R. in *Rudow's* case. Reliance was also placed on *Sanderson* v. *Blyth Theatre Co.*,[22] and, more particularly, on the judgment of Stirling L.J.,[23] where he said that the practice laid down by Jessel M.R. in *Rudow's* case is one that "ought to be adhered "to wherever it is practicable to do so."

I find it impossible to extract from these cases any inflexible principle which requires that, in a case such as the present, the judge must necessarily direct that the successful defendants shall recover their costs direct from the unsuccessful defendant. Any such principle would be contrary to the decision of the House of Lords in *Donald Campbell & Co. Ltd.* v. *Pollak*,[24] whereby it was laid down once and for all that costs are in the absolute and unfettered discretion of the court, subject only to the requirement that the discretion must be judicially exercised. It is to be remarked, moreover, that the actual decision in *Sanderson's* case,[25] as appears from the headnote, was to the effect that the court has jurisdiction either to order the unsuccessful defendant to pay the successful defendant's costs direct, or to order the plaintiff to pay the successful defendant's costs and add them to the costs which the unsuccessful defendant is ordered to pay to the plaintiff. Romer L.J., who gave the leading judgment, made it clear[26] (in the passage which my Lord has already read) that the matter is one for the discretion of the court. I should be content to adopt the statement contained in the note in the Annual Practice (1960), p. 1842, which is in the following terms: ". . . the court has a discretion to order the unsuccessful defen- "dant to pay the successful defendant's costs. This it may do "either by ordering payment of these costs direct by the unsuc- "cessful to the successful defendant, or by ordering the plaintiff "to pay the latter's costs, and allowing him to include these "costs in the costs payable to him by the unsuccessful defendant. "Each of these two forms of order is commonly known as a "*Bullock* order (from *Bullock* v. *London General Omnibus Co.*[27]). "Where the plaintiff may be insolvent, the first-mentioned order

[19] 17 Ch.D. 600.
[20] Ibid. 607.
[21] Ibid. 610.
[22] [1903] 2 K.B. 533.
[23] Ibid. 542.
[24] [1927] A.C. 732; 43 T.L.R. 495, H.L.
[25] [1903] 2 K.B. 533.
[26] Ibid. 539.
[27] [1907] 1 K.B. 264, C.A.

"is generally the more appropriate." As authority for the last proposition the statement of Jessel M.R. in *Rudow's* case [28] is, perhaps rather inappropriately, cited. But I do not think the proposition is any the less correct for that.

In these circumstances I cannot regard the present case as raising any question of principle, and this much was eventually conceded, or virtually conceded, by Mr. Wilmers in the course of his argument for the plaintiff. The real question is whether it can be shown that the judge failed to exercise judicially the discretion which was undoubtedly his. If he did so fail, the further question would arise as to what order should now be made by this court. In exercising his discretion as to costs it was without doubt the duty of the judge to take into consideration all the circumstances of the litigation. One of those circumstances was the fact of the insolvency of the third defendant—a fact which was known to the second defendant before trial, but of which the plaintiff was unaware. If it can be shown that the judge completely ignored this fact, and wholly omitted to take it into consideration, there would, I think, be good ground for concluding that he did not exercise his discretion judicially. The position is somewhat unsatisfactory, because the record of what took place at the trial—for which we are indebted to the note made by counsel for the plaintiff—is necessarily scanty, and the judge appears to have given no reasons for the decision at which he ultimately arrived. The record shows, however, that during the course of the argument the judge did say that he could not take into account the third defendant's bankruptcy when making his order for costs. This observation has not unnaturally been seized upon by the plaintiff as showing that the judge failed to exercise his discretion judicially. It was, however, merely an observation made during the argument, and it is an observation that is not altogether free from ambiguity. The judge may have meant no more than that he could not regard the third defendant's bankruptcy as such an overriding consideration as would force him to make the order for which the plaintiff asked. Mr. Halpern has told us that, according to his recollection, the judge did in fact weigh up the risks of loss in relation to the recovery of costs due to the third defendant's insolvency, and decided that those risks ought more fairly to fall upon the plaintiff than upon the successful defendants. Mr. Halpern says that he did not understand the judge to be ruling out of consideration altogether the fact of the third defendant's insolvency.

In this rather unsatisfactory state of affairs, I cannot say I am satisfied that the judge failed to give any consideration whatsoever to the fact of the third defendant's insolvency. If he did take it into consideration, the weight that he attached to it would be a matter entirely for his discretion. Even if we, or any of us, sitting in this court were disposed to attach a greater degree

[28] 17 Ch.D. 600, 607, 610.

C. A.
1960
MAYER v. HARTE.
Willmer L.J.

of weight to this particular circumstance, that would not be a sufficient ground for interfering with an order made in the exercise of the judge's discretion.

That is sufficient to dispose of this appeal. But in case I am wrong, and if it be the fact that the judge did refuse to take into account at all the third defendant's insolvency, then the position, as I see it, would be that it would be for this court to consider the whole of the circumstances de novo, and arrive at its own conclusion as to how the discretion as to costs ought to be exercised. I have thought it right, therefore, to consider the matter from this point of view, and I have come to the conclusion that in the particular circumstances of the present case the right order to make would, in any event, be that which the judge did make. In coming to this conclusion I have not, I hope, underrated the strength of the argument that can be, and has been, put forward on behalf of the plaintiff. It is, no doubt, a circumstance of great significance that the judge did see fit to make some form of *Bullock* order. It is a necessary inference from this circumstance that the judge was satisfied that the plaintiff was justified in continuing the action against all three defendants. Why, then, should she be in effect deprived of the fruits of her victory by the misfortune of the third defendant's insolvency, which was no concern of hers? So far as the plaintiff was concerned, it was the first and second defendants between them who selected the third defendant to do the work upon the roof which caused the damage. Having thus, as it were, brought him on the scene, why should not they bear the risk of loss consequent upon his insolvency?

These are, no doubt, powerful considerations, but they do not by any means include all the circumstances that should be considered. When regard is had to the history of this unfortunate litigation, and to the amount at stake, there are, in my judgment, even more powerful reasons for concluding that the risk of loss consequent upon the third defendant's insolvency should be borne by the plaintiff rather than by either of the successful defendants. [His Lordship set out the facts relating to the history of the action and continued:] The position was that at any time after July 16, 1958 (that is, during a period of 15 months before trial), the plaintiff could have found out for herself that the third defendant was not a man of substance. At any time after December 9, 1957, she could have had £15 without incurring any further risk as to costs. Yet, for the sake of £5 10s., she elected to go on with what was bound to be an expensive piece of litigation against three defendants, one of whom (as she could have ascertained) was not a man of substance. That she was legally entitled to pursue her remedy and exact her full pound of flesh cannot be doubted. It cannot be said that her action was an abuse of the process of the court, for it was proved in the event that she was entitled to her £20 10s. But equally the first and second defendants were entitled to defend themselves against a claim which

the event proved to be unjustified as against them. Prima facie, having successfully resisted the plaintiff's unjustified claim, they could expect to be able to look to the plaintiff for the payment of their costs. The plaintiff, as dominus litis, called the tune, and the innocent defendants could but dance to it.

In my judgment, the plaintiff, having for the sake of £5 10s. elected to invoke the costly machinery of a four-party contested action, without apparently making any inquiry as to the financial standing of the defendant against whom she succeeded, took the risk both of incurring herself, and of exposing other innocent parties to, costs which were only too likely to be irrecoverable, and which would in any case exceed by many times the amount at stake in the action. In these circumstances, if the matter were one for my discretion, I should be disposed to make the same order with regard to the costs as was made by the judge. On this ground also, therefore, in my judgment, this appeal should be dismissed.

SELLERS L.J. My Lords have stated the facts and the issues fully and clearly; and as I find my brethren at variance as to the result of this appeal, it remains for me briefly to add my own conclusion on the matters involved.

Since I have sat in this court, I have observed that no issue seems to excite quite such vigour and duration of argument as an issue of costs on appeal. Unfortunately, in the present case, as in *Hanak* v. *Green*,[29] the costs of so elaborate a discussion outweigh too far the amount in issue in the action.

In such circumstances as have arisen here, if no question of the insolvency of any party (including the plaintiff) arises, it has long been the practice for a judge in his discretion to make one of the two orders set out in the headnote to *Sanderson* v. *Blyth Theatre Co.*,[30] which Harman L.J. has already read. The main dispute on appeal in *Sanderson's* case was whether there was jurisdiction in the court to order the payment at all by the unsuccessful defendant of the costs of the successful defendant. Romer L.J.[31] made an interlocutory remark to the effect that "such an "order is constantly made in the Chancery Division." Both the orders approved in *Sanderson* are nowadays frequently referred to, it appears, as *Bullock* orders, from *Bullock* v. *London General Omnibus Co.*[32] That was an action in tort tried by a jury, and judgment was entered for the plaintiff against the first defendant, and judgment for the successful defendant against the plaintiff, with costs in each case; and the judgment further ordered that the costs so payable by the plaintiff to the successful defendant should be included in the costs recoverable from the first defendant. Unless my recollection is very faulty, that order to recover over was always referred to—and it seems accurately—as a

[29] [1958] 2 Q.B. 9; [1958] 2 W.L.R. 755; [1958] 2 All E.R. 141, C.A.

[30] [1903] 2 K.B. 533.

[31] Ibid. 534.

[32] [1907] 1 K.B. 264.

C. A.
1960
MAYER v. HARTE.
Sellers L.J.

Bullock order. It was the same kind of order as was in fact made by Grantham J. in *Sanderson*,[33] a case with a jury, but as *Sanderson*, while upholding the order made, stated that a direct order could now be made, the direct order used to be referred to as the *Sanderson* order in contradistinction to the *Bullock* order.

Either of these orders was in the entire discretion of the judge, who most frequently was guided by counsel as to which the parties preferred or which was most convenient. If there were a likelihood of an appeal between a plaintiff and an unsuccessful defendant without either party contemplating or wishing to appeal in respect of a successful defendant, the true *Bullock* order was the more desirable as there would then be no need for the unsuccessful defendant to bring a co-defendant before the appellate court to rid himself of a direct liability for the costs of that defendant.

As these two forms of order have stood for over 50 years, and have been regularly applied as alternatives in a judge's discretion, I cannot think that they can be disturbed now, whichever order the judge thinks fit to make. It may well be, as counsel stated, that under modern conditions with defendants so often covered by insurance, the direct order has become the more common. But, as I have said, it is undesirable in some circumstances where an appeal is contemplated.

It is said now that the direct order must be made as a matter of legal principle if it is found that an unsuccessful defendant is insolvent or an undischarged bankrupt. Reliance has been placed on the judgment of Jessel M.R. in *Rudow* v. *Great Britain Mutual Life Assurance Society*,[34] which had been relied upon in *Sanderson's* case[35] as justifying a direct order between defendants "in order to avoid circuity," as appears in the extract from the judgment of Romer L.J.[36] already cited in the judgment of Harman L.J. The main contest in *Rudow*[37] was whether only the old order could be made—that is, to order a plaintiff to pay a successful defendant's costs and that the plaintiff should recover those costs against the unsuccessful defendant—or whether a direct order could be made. The court decided that an order could be made at the trial for one defendant to pay costs to the other direct. In the course of the argument Jessel M.R.[38] made the observation to which my Lord has referred in his judgment as a strong pronouncement. But it is significant, in my view, that the matter of insolvency of one of the parties affecting the other is referred to as a consequence of the order, and so indeed it can be, if that order can be made, a matter to be taken into consideration. A passage from the judgment of Stirling L.J. in the *Sanderson* case[39] has also been read and I do not repeat it. In my view, his judgment as a whole does not treat this as a

[33] [1903] 2 K.B. 533.
[34] 17 Ch.D. 600.
[35] [1903] 2 K.B. 533.
[36] Ibid. 539.
[37] 17 Ch.D. 600.
[38] Ibid. 607.
[39] [1903] 2 K.B. 533, 542.

principle of law or an obligation which it is imperative for the judge to invoke. I would regard what was said by Jessel M.R. as a guide, not a rule—certainly, if there were any doubt, after the decision and pronouncement of the House of Lords in *Donald Campbell & Co. Ltd.* v. *Pollak.*[40]

C. A.
1960
MAYER v. HARTE.
Sellers L.J.

No cases were cited to us (I invited counsel to cite if possible), and I know of none where the observations of Jessel M.R.[41] as far back as 1881 have been applied, either as a matter of obligation or of discretion. The observation in the Annual Practice may be, as my Lords think, a slip, and indeed it is not strictly accurate, but it seems to me to be a more appropriate application of the direct order than in the case of an insolvent unsuccessful defendant. The passage in the Annual Practice (1960), p. 1842, is: "Where the plaintiff may be insolvent, the first-mentioned "order [that is, a direct order] is generally the more appropriate" —and of course for obvious reasons if the order for costs would have to go through an insolvent plaintiff.

The first and second defendants in the present case were sued and successfully resisted the claim. The plaintiff can apparently pay their costs. She seeks to avoid that and asks for an order which probably would mean that the costs would not be paid. Why the successful defendants should be the losers and not the unsuccessful plaintiff I cannot see, and I would agree, if discretion lies in this court, with the views of Willmer L.J., as I do with his views generally in his judgment, but, like him, I think the matter was entirely for the judge and that the judge has not erred in law.

The appeal, therefore, will be dismissed.

Appeal dismissed, with costs.

Solicitors: *R. Edler & Co.; Philip Mills & Co.; Walford & Co.*

N. P.

[40] [1927] A.C. 732.

[41] 17 Ch.D. 600, 607, 610.

[COURT OF APPEAL.]

* BUXTON AND ANOTHER *v.* JAYNE AND OTHERS. (INTENDED ACTION).

[1959 B. No. 3640.]

C. A.
1960
April 27, 28; *May* 19.
Ormerod and Devlin L.JJ.

Mental Deficiency — Leave to bring action — Reasonable care — Urgent removal — Whether substantial ground for contention that officer acted without reasonable care — Whether reasonable belief that patient of unsound mind—Meaning of "unsound mind"—Lunacy Act, 1890 (53 *&* 54 *Vict. c.* 5), *s.* 14 (1) (*a*) (*as substituted by the*

C. A.

1960

BUXTON
v.
JAYNE.

National Health Service Act, 1946 (9 *&* 10 *Geo.* 6, *c.* 81), *s.* 50 *and Sch.* 9, *Pt. I*) *and s.* 330 (*as amended by Mental Treatment Act,* 1930 (20 *&* 21 *Geo.* 5, *c.* 23), *s.* 16 (1)).

By section 330 of the Lunacy Act, 1890, as amended by section 16 (1) of the Mental Treatment Act, 1930, no proceedings shall be brought against any person doing anything in pursuance of the Act of 1890, or the amending Acts, except with the leave of the High Court, which is to be refused unless the court is "satisfied "that there is substantial ground for the contention that the person ". . . has acted . . . without reasonable care."

The plaintiffs applied for leave to bring proceedings against J., a duly authorised officer of a local authority, who had removed the second plaintiff, Mrs. B., to a mental hospital against her will under the emergency procedure contained in section 20 of the Lunacy Act, 1890 [1] (as substituted). In January, 1959, Mrs. B. became mentally ill as a result of domestic troubles, and on January 9 her medical adviser decided that she ought to go to hospital for observation and treatment. He informed J. that he should visit Mrs. B. as soon as possible. J. called the next day and found her in a distressed condition. The doctor arrived later. As Mrs. B. refused to go to hospital voluntarily, J., with the doctor's agreement, had her removed compulsorily to the hospital, where she remained for four days and was then discharged.

The plaintiffs sought to proceed against J. (and the hospital management committee) on the ground that J. had acted without reasonable care in deciding whether there was reasonable ground for believing that Mrs. B. was a person of unsound mind. The affidavit evidence before the court at the hearing of the application contained no allegation that Mrs. B. was of unsound mind and it was not suggested that either of the defendants had at any time said so. Leave to bring the action was given and J. appealed:—

Held, that the proper exercise of the compulsory power was dependent on whether the defendants had had reasonable grounds, as required by section 14 (1) (*a*) of the Act of 1890,[1] for believing

[1] Lunacy Act, 1890, s. 14 (substituted by the National Health Service Act, 1946, s. 50 and Sch. 9, Pt. I): "(1) If a duly authorised officer of "the local health authority—(*a*) has "reasonable ground for believing that "a person in the area of the authority "is a person of unsound mind and a "proper person to be sent to a mental "hospital; and (*b*) is satisfied that "he is not under proper care and con-"trol, or that there are no relatives "or friends who intend and are able "to take proceedings by petition for a "reception order under the foregoing "provisions of this Act; he shall, "within three days, give notice thereof "to a justice having jurisdiction in "the place where the said person is."

S. 20 (substituted by the National Health Service Act, 1946, s. 50 and Sch. 9, Pt. I): "Removal of person "of unsound mind in urgent cases.—"If a duly authorised officer of the "local health authority or any con-"stable is satisfied that it is necessary "for the public safety or the welfare "of a person alleged to be of unsound "mind with regard to whom it is his "duty to take any proceedings under "this Act, that the said person should, "before any such proceedings are "taken, be placed under care and "control, the officer or constable may "remove the said person to any hos-"pital or part of a hospital vested "in the Minister (whether a mental "hospital or not) which is designated "by the Minister for the purposes "of this section, and the person in "charge of the said hospital or part "shall receive and detain the said "person therein, but no person shall "be detained under this section for "more than three days."

S. 330 (as amended by s. 16 (1) of "the Mental Treatment Act, 1930): "Protection to persons putting the "Act in force.—(1) Where a person "has presented a petition for a recep-"tion order, or signed or carried out, or "done any act with a view to signing "or carrying out, an . . . application, "recommendation, . . . or certificate

that Mrs. B. was a person of unsound mind. There were substantial grounds for the contention that J. had acted without reasonable care in failing to apply his mind to the requirements of section 14 (1) (*a*) (post, pp. 788, 796), and leave to proceed against him should, accordingly, be given.

Per Ormerod L.J. *Semble*, the term "unsound mind" is now used in the Acts in reference to persons in regard to whom the word "lunatic" would hitherto have been used (post. p. 788).

Decision of Thesiger J. affirmed.

APPEAL from Thesiger J.

The appeal was brought by the first of two defendants, one Eric M. Jayne, against an order of Thesiger J. made on January 21, 1960, giving leave to a Mr. and Mrs. Buxton to institute an action against the defendant and against the South West Middlesex Hospital Management Committee. The hospital management committee did not appeal. At all material times the defendant was the duly authorised officer of the local health authority and the complaint related to his conduct in removing the second proposed plaintiff, Mrs. Buxton (hereinafter called the "patient"), to a mental hospital in purported pursuance of the provisions of section 20 of the Lunacy Act, 1890.

The following statement of facts is taken substantially from the judgment of Ormerod L.J.: It appeared from the affidavits that the patient was a woman of 57 years of age, living with her husband and family at 21, Glamis Crescent, Hayes. It is clear that at the end of the year 1958 there were unfortunate differences between the patient and her son. The son was determined to marry a girl regarded by the patient as unsuitable. As a result of these differences of opinion and consequent arguments there is no doubt that the patient became emotionally upset, and on Tuesday, January 6, 1959, the husband called in the doctor, who examined the patient and prescribed rest in bed and sleeping tablets. It appears from the affidavits that the sleeping tablets were not very effective and on the following nights the patient slept restlessly. Matters came to a head on the following Saturday morning when, according to the evidence of the patient, after a perfectly normal night she had a further dispute with her son at about 8.30 a.m. As a result she was very much upset, and she cried for a time and felt faint, so that her son telephoned for the doctor to come. He was unable to come at once, but about 11 a.m. the defendant arrived and, according to the patient,

"under this Act, or any Act, amending this Act, or has done anything in pursuance of this Act, or any Act amending this Act, he shall not be liable to any civil or criminal proceedings whether on the ground of want of jurisdiction or on any other ground unless he has acted in bad faith or without reasonable care.

"(2) No proceedings, civil or criminal, shall be brought against any person in any court in respect of any such matter as is mentioned in the last preceding subsection, without the leave of the High Court, and leave shall not be given unless the court is satisfied that there is substantial ground for the contention that the person, against whom it is sought to bring the proceedings, has acted in bad faith or without reasonable care."

C. A.
1960
BUXTON
v.
JAYNE.

produced "some kind of warrant card" and insisted that she should go to hospital. She protested that she did not want to go, and eventually the defendant left the house, to return about 12.15 with the doctor. There were further protests but eventually three ambulance men entered the room and she allowed herself to be led outside the house where she was put into an ambulance and taken to the West Middlesex Hospital, Isleworth, and placed in an observation ward. This account as given by the patient was substantially confirmed by her husband and daughter.

The defendant in his affidavit gave his version of what happened that morning. He said that when he went into the room where the patient was she was "shouting and screaming to "such an extent that it was quite impossible to carry on normal "conversation with her. She was obviously greatly disturbed and "acting in a quite abnormal manner and was highly excited." He added that it was quite clear to him that for her own protection removal to hospital was the only sensible and proper step as she could be looked after there but could no longer be properly cared for at her home. He said that he thought that she was in real danger unless she was removed to a place where proper care could be given to her.

The patient was discharged from the hospital on January 14 after the magistrate had refused to make a reception order.

At the hearing of the application for leave to bring an action against the two defendants, affidavits were filed which indicated a conflict of evidence on many points, some of which are referred to in the judgment of Devlin L.J. The judge did not state any opinion on these disputed matters but decided that there was substantial ground for the contention that the defendant had acted without reasonable care, and he, accordingly, gave leave to bring the action.

The first defendant, Jayne, appealed.

John Wilmers for the defendant officer.

M. D. P. Croom-Johnson Q.C. and *G. Gordon Hardy* for the proposed plaintiffs.

In addition to the cases referred to in the judgments, the following were cited in argument: *Reg.* v. *Whitfield*[2]; *Everett* v. *Griffiths*[3]; *Reg.* v. *Board of Control, Ex parte Rutty*[4]; *Shackleton* v. *Swift*[5]; *Harnett* v. *Bond*[6]; *In re Frost.*[7]

Cur. adv. vult.

May 19. ORMEROD L.J. stated the facts, read section 20 of the Lunacy Act, 1890, and continued:] It is to be observed that

[2] (1885) 15 Q.B.D. 122, C.A.

[3] [1920] 3 K.B. 163, C.A.; [1921] A.C. 631; 37 T.L.R. 481, H.L.

[4] [1956] 2 Q.B. 109; [1956] 2 W.L.R. 822; [1956] 1 All E.R. 769, D.C.

[5] [1913] 2 K.B. 304, C.A.

[6] [1925] A.C. 669; 41 T.L.R. 509, H.L.

[7] [1936] 2 All E.R. 182, C.A.

before the duly authorised officer can act there must be a person alleged to be of unsound mind with regard to whom it is his duty to take any proceedings under the Act, and he, the officer, must be satisfied that it is necessary for the public safety or the welfare of that person that such person should be placed under immediate care and control. In considering who is a person with regard to whom it is the duty of the officer to take proceedings under the Act regard must be had to sections 14 and 15. It is unnecessary to consider section 15 here as it deals with matters outside the scope of this appeal. [His Lordship read section 14 (1) (*a*) and (*b*) and continued:] It follows, therefore, that before the provisions of section 20 can come into operation the duly authorised officer must (1) have reasonable ground for believing that a person is of unsound mind and a proper person to be sent to a mental hospital, and (2) be satisfied that he is not under proper care and control.

[His Lordship read section 330 of the Lunacy Act, 1890, as amended by section 16 (1) of the Mental Treatment Act, 1930, and continued:] It will be seen that leave will not be given unless the court is satisfied that there is substantial ground for the contention that the person against whom it is sought to bring the proceedings, in this case the duly authorised officer, has acted in bad faith or without reasonable care. There is no suggestion here of bad faith, and the question therefore which the judge had to decide, and which he decided in the affirmative, was whether there was substantial ground for the contention that the defendant had acted without reasonable care.

It is clear from the authorities that under section 20 it is only necessary that the duly authorised officer should be honestly satisfied that it was necessary for the public safety or the patient's welfare that she should be removed to a place of safety. It is not necessary that there should be reasonable grounds for his opinion: see *Harward* v. *Hackney Union Guardians of the Poor*.[1] But that is not the position under section 14. Under that section the officer must have reasonable ground for believing that the patient is a person of unsound mind, and therefore the question has to be considered whether he acted with reasonable care.

It was contended on behalf of the plaintiff that there could be no reasonable ground on the evidence before the court for belief that the patient was of unsound mind, and in these circumstances there was substantial ground for the contention that the defendant had acted without reasonable care. The evidence before the court was contained in a number of affidavits sworn by the plaintiffs and their daughter and by the defendant and Dr. Singer and his wife. Dr. Singer was at the relevant time the medical attendant to the patient. [His Lordship stated the facts set out above and continued:]

There were a number of matters in the affidavits of the

[1] (1898) 14 T.L.R. 306, C.A.

C. A.
1960
BUXTON
v.
JAYNE.
Ormerod L.J.

defendant and the doctor which were disputed by the husband plaintiff. The defendant said that he explained the procedure to the husband, who was quite satisfied that the course being taken was the right one. He also said that the husband told him that the trouble had been going on since 2 a.m. These matters were denied by the husband, who said that he had had little or no conversation with either the defendant or Dr. Singer. The doctor in his affidavit said that he saw the husband on the Friday and explained to him the necessity of calling in the duly authorised officer, but this the husband denied.

The judge formed the view that on the affidavits, without coming to any conclusion as to the truth of the matters in dispute, there was substantial ground for the contention that the defendant had acted without reasonable care. I have come to the same conclusion. The defendant did, I think, establish in his affidavit that he was satisfied that it was necessary for the welfare of the patient that she should be placed under immediate care, but there is nowhere in his affidavit any evidence that she was alleged to have been of unsound mind. Further, although he described her condition as "greatly disturbed" and "highly excited," he does not say that he had reasonable ground for believing that the patient was of unsound mind or that in fact he did so believe. It is to be noted that although the doctor was present when the patient was taken away, he does not appear to have expressed the view to the defendant or anyone else that she was of unsound mind, and in his affidavit he goes no further than to say: "I "formed the clear opinion that Mrs. Buxton required observation "and psychiatric treatment and skilled attention which clearly "she could not get if she remained at home." Mr. Wilmers argued on behalf of the defendant that as he was called in to see the patient he was entitled to assume that she was alleged to be of unsound mind, and that he must be taken in the circumstances to have had reasonable grounds for belief that she was of unsound mind at the time. Whether the defendant acted without reasonable care is a matter to be decided at the trial of the action. But it does not appear necessarily to follow that because a person is in a highly excited condition, or a condition of considerable emotional upset, such a person is of unsound mind. There is no definition in the Mental Treatment Act, 1930, of the term "of unsound mind," but it is to be noted that section 20 (5) provides that the word "lunatic" shall cease to be used in relation to persons of unsound mind, and that expressions such as "person of unsound mind," "patient of unsound mind" or other similar expressions should be used. It would appear, therefore, that the term "of unsound mind" is now used in the Acts in reference to persons in regard to whom the word "lunatic" would hitherto have been used.

I have come to the conclusion that the appeal should be dismissed. There is, in my judgment, substantial ground for the contention that the defendant acted without reasonable care.

There are disputes on questions of fact which cannot be satisfactorily resolved by evidence on affidavit, and there is above all the question whether the defendant had reasonable ground for the belief that the patient was of unsound mind, or indeed whether he ever directed his mind to the question. These questions are substantial ones which can only be determined satisfactorily by hearing the evidence, and I am satisfied that this is a case where leave to proceed should be given.

DEVLIN L.J. The matter before us is an application by Mr. and Mrs. Buxton under section 330 (2) of the Lunacy Act, 1890, for leave to bring proceedings against the defendant, who was at the material time the duly authorised officer employed by the Middlesex County Council under the Lunacy and Mental Treatment Acts, 1890 to 1930. They complain of the act of the defendant on January 10, 1959, in causing the patient to be removed against her will to the West Middlesex Hospital, Isleworth, which is an institution for persons of unsound mind.

It appears that in January, 1959, there were troubles in the plaintiffs' family to which it is unnecessary to give any further publicity. They were such as might cause a woman of no more than average sensibility to be deeply distressed, and the patient, I should judge, is more prone to emotional upsets than most women. It is clear that she made herself ill over the whole affair. She was seen by her doctor, Dr. Singer, on January 6, and he prescribed a nerve tonic and sedative tablets. There is a conflict of evidence as to what happened after that. According to the doctor, on the evening of January 9 the husband came to see him and said that his wife was exhibiting persistently violent behaviour and that his, the husband's, health had suffered owing to lack of sleep. The husband denies that there was any conversation of this sort. It is at any rate clear that the doctor decided on January 9 that it would be best to send the patient into hospital for observation and treatment. It is clear that by hospital he meant a mental hospital; and it is clear also that he decided to call in the duly authorised officer.

Entry into a mental hospital can be obtained in one of two ways. Any person who is desirous of submitting himself to treatment for mental illness and who makes a written application for the purpose may be received as a voluntary patient under the Mental Treatment Act, 1930, s. 1. A person who is not so willing and who is not merely suffering from mental illness but is also of unsound mind may have made against him a reception order under the Lunacy Act, 1890. A reception order may be made by a justice of the peace under section 16 of the Act of 1890 after the person alleged to be of unsound mind has been brought before him and after he has taken the steps and made the inquiries prescribed by the section. One of the ways in which a person alleged to be of unsound mind can be brought before the justice for this purpose is by the action of a duly authorised officer

C. A.
1960
BUXTON
v.
JAYNE.
Devlin L.J.

under section 14 of the Act. This section plays an important part in the argument. [His Lordship read the section and continued:] It will be seen that under this section there may be a short delay in bringing the patient before a justice; and there is therefore another section, section 20, which is of equal importance in this case, which provides for urgent cases. [His Lordship read section 20, as amended, and continued:] Thus the duly authorised officer is a person who is authorised to initiate proceedings which can lead to the making of a compulsory order. Whether he has any part to play in the case of a voluntary patient does not appear from the affidavits; he has no statutory duty but it may be that in practice he is the person who makes the necessary arrangements. It would be surprising if, before seeing his patient again, the doctor had made up his mind that a compulsory order was necessary; but on the material we have I do not think that it is possible to say whether or not he intended the duly authorised officer to act compulsorily.

What is certain is that on the morning of January 10 the defendant as the duly authorised officer went to the plaintiffs' house. He had at that time no information from the doctor except a message that the doctor wanted him to visit the patient as soon as possible. Earlier that morning the patient had had a conversation with her son which had upset her considerably. According to her account, which is generally supported by other members of the family, she was, when the defendant arrived, in a distressed condition, sitting in an armchair in the sitting room and being comforted by her husband. According to the defendant's affidavit, her husband appeared to be holding her down in the chair and she was shouting and screaming to such an extent that normal conversation was impossible. He said further, which is denied, that the husband told him that this sort of behaviour had been going on since 2 a.m. After about half an hour during which, the defendant says, the patient remained in the same state, the doctor arrived. The doctor told the defendant that he had already seen the patient on January 6, when he found her greatly distressed and subject to emotional outbursts. The patient was asked to sign the application form as a voluntary patient and refused to do so. With the doctor's agreement the defendant summoned an ambulance and had her removed to hospital. She remained there until January 14, when she was discharged because the magistrate refused to make a reception order.

This is a very cursory account of what took place on the morning of January 10 and omits many matters about which there is a conflict of evidence. But it is sufficient to indicate the nature of the question which the judge at chambers had to consider when he was invited to grant leave to the plaintiffs to proceed against the defendants. He did grant leave and it is from this order that the defendant appeals.

The effect of section 330 of the Lunacy Act, 1890, upon the

patient's right of action is twofold. But for that section she could initiate proceedings in the form of a simple claim for false imprisonment, leaving it to the defendant to set up the defence of statutory authority. Section 330 protects in two ways a person who "has done anything in pursuance of" the statute. First, as a matter of substance, it requires that the plaintiff should prove that the defendant was not merely acting without authority, which would ordinarily be enough for the action of false imprisonment, but was also acting in bad faith or without reasonable care. Secondly, as a matter of procedure, the proposed plaintiff may not begin the action at all unless he can satisfy a judge that there is substantial ground for the contention that the proposed defendant was acting in bad faith or without reasonable care. It may not be easy for a plaintiff to discharge this burden before he knows what parts of the statute the defendant is going to rely upon. But that difficulty is usually avoided, as in this case, by the defendant giving the necessary particulars. In this case we know that the defendant intends to defend the action by relying upon section 20 and upon that alone. As the action has not yet been begun, there is not as yet any statement of claim; but we know also, because we have been told by counsel, that the plaintiffs do not intend to allege bad faith.

Accordingly, the act which is done pursuant to the statute and which gives rise to the cause of action is the act of the defendant in removing the patient to hospital; and the question will be whether in so doing he acted without reasonable care. It will be alleged against him that in removing the patient he exceeded the jurisdiction given to him by section 20 and that he was negligent in not taking proper steps to make sure that the patient was a person who fell within the section.

It is convenient, therefore, to begin by ascertaining what are the conditions laid down by section 20 as those under which the defendant has power to act. They fall under two heads. First, the patient must be "a person alleged to be of unsound mind "with regard to whom it is his duty to take any proceedings "under this Act." Secondly, the defendant must be satisfied that it was necessary for the public safety or the welfare of the patient that she should be placed under care and control. The first requirement postulates two things about the patient. The first of them is that she should be alleged to be of unsound mind; for reasons that I shall give later I think that that is of little importance in this case. The second, the important one, is that she should be a person with regard to whom it was his duty to take proceedings under this Act. The defendant will, therefore, have to show a duty of the sort described; and we have been informed by his counsel that he will seek to do so only under section 14. Thus, to summarise the matter, the patient must be a person who comes within the requirements of section 14, which enables the duly authorised officer to initiate proceedings; and also comes within the special requirements of section 20,

C. A.
1960
BUXTON
v.
JAYNE.
Devlin L.J.

which enables him to detain the patient while proceedings are being instituted on the ground that it is necessary in the public safety or for her own welfare.

Now, the fulfilment of the special requirements of section 20 is not an issue in this case. In *Harward* v. *Hackney Union Guardians of the Poor* [2] this court held that the word "satisfied" in section 20 meant no more than that the officer should be honestly satisfied and did not import any need for reasonable grounds for his opinion. Since the plaintiff is not alleging bad faith, she will be bound to concede that, if she is a person within section 14, then a good defence can be made out under section 20.

It may be observed that in *Harward* v. *Hackney Union Guardians of the Poor* [2] no question arose under section 14 and the only matter which the jury was invited to consider was whether the defendant was honestly satisfied that it was necessary for the public safety or the plaintiff's welfare that he should be removed to the infirmary. The court held that there was no evidence to support a finding that the defendant was not honestly satisfied, and, accordingly, the jury's verdict for the plaintiff was set aside. At one time Mr. Wilmers appeared to be arguing that the plaintiffs in this case could not succeed at all in the absence of an allegation of bad faith. In his reply, however, he conceded that *Harward* v. *Hackney Union Guardians of the Poor* [2] has only a limited effect upon the issues in this case and, in particular, does not touch the question that arises under section 14. Notwithstanding this concession, it is, I think, desirable that I should indicate why *Harward* v. *Hackney Union Guardians of the Poor* [2] has this limited effect. It is because at the time of that case, and until an amendment was made by the National Health Service Act, 1946, section 14 was in a different form to that which it now has. As originally enacted, it did not require the duly authorised officer to hold any belief about a plaintiff, nor to be satisfied that he was not under proper care and control. It required simply that he should have "knowledge that a pauper "resident within the district of the officer is or is deemed to be a "lunatic and a proper person to be sent to an asylum." In *Harward's* case [2] it was not disputed that the officer knew the plaintiff as a person who was deemed to be a lunatic.

The only help, therefore, which *Harward* v. *Hackney Union Guardians of the Poor* [2] brings to the question under section 14 is upon the construction of the word "satisfied," which is used in section (1) (*b*). Mr. Croom-Johnson did not make any express concession about this, but I assume that he would not argue that in the absence of an allegation of bad faith, he can succeed under section 14 (1) (*b*). Thus the crucial question in this case arises under section 14 (1) (*b*) and is whether the defendant believed, and had reasonable ground for believing, that the patient was a person of unsound mind and a proper person to be sent to a

[2] 14 T.L.R. 306.

mental hospital. I put the question as a double one because I think it is implicit in the language of section 14 that the duly authorised officer must, in fact, hold the belief for which he is required to have reasonable grounds.

I have already noted that the person who is to be removed under section 20 must be "alleged to be of unsound mind" as well as within section 14. But I do not think that the section contemplates any formal allegation; and since the amended section 14 requires the officer to believe on reasonable grounds that the person is of unsound mind, it would be pedantic to investigate as a distinct matter whether the person was alleged to be in that condition. That is why I have said that the crucial question arises under section 14.

At this stage of the matter it is not for the defendant to satisfy us on this issue. It is for the plaintiffs to satisfy us that there is substantial ground for their contention that the defendant either did not hold the requisite belief or, if he did, had no reasonable grounds for it. But there are limits to which the plaintiffs can be expected to prove a negative. They cannot give evidence about what was in the defendant's mind. All that they can do is to depose to circumstances which give substantial ground for thinking either that the defendant never applied his mind to the question of whether the patient was of unsound mind, or if he did, that he came to an unjustifiable conclusion. If a case of this sort is made out and left unanswered on some material point, the plaintiffs should succeed in this application. If the case is answered, then the question is whether the defendant's evidence robs the plaintiffs' contention of substantial ground.

I have no doubt that the evidence filed on behalf of the plaintiffs gives substantial ground for thinking, unless explained or contradicted, that the defendant either did not think or could not reasonably have thought the patient to be a person of unsound mind. It is not now suggested that she was in fact of unsound mind at the time when the defendant caused her to be removed. I do not think it is seriously suggested that, on the material contained in the plaintiffs' affidavits, the patient exhibited any symptoms of unsoundness of mind which would justify the defendant in the course he took.

The affidavits filed on behalf of the defendants set up a very different story, and contain the matter upon which the defendant relies as justifying him in the course which he took. But they are subject to one extraordinary omission. Nowhere does the defendant state—nor, indeed, does the doctor or anyone else—that he believed the patient to be of unsound mind. We have listened to a great deal of discussion about whether the defendant might have had reasonable ground for thinking the patient to be a person of unsound mind; and to much argument whether for this purpose, there being a conflict of evidence, we should have regard to the version given by the plaintiffs or the version given by the defendant and his witnesses, or to an amalgam of both.

C. A.
1960
BUXTON
v.
JAYNE.
Devlin L.J.

But it seems to me to be fruitless to argue about whether the defendant might reasonably have believed the patient to be a person of unsound mind if the defendant himself does not assert that he did.

Mr. Wilmers has put up for our consideration a number of ways in which the defendant's omission to state in terms that he believed the patient to be of unsound mind might be accounted for. They are all different ways of saying much the same thing, which is that the defendant's belief, though not put into words, emerges clearly from his affidavit. First, Mr. Wilmers says that the defendant must have believed the patient to be of unsound mind because he must be presumed to be aware of the limitation on his powers and he would not, therefore, have caused the patient to be removed unless he thought she was of unsound mind. This is to apply to the section the principle omnia praesumuntur rite esse acta. In a matter which touches the liberty of the subject, this is not permissible. Moreover, the argument is open to the obvious rejoinder that, if the defendant was, when he acted, clearly aware of the limitations on his powers, he must have been even more clearly aware of them when he made his affidavit; this makes it difficult to account for the omission except on the hypothesis that it was deliberate.

Secondly, Mr. Wilmers suggests that from the fact that Dr. Singer asked him to visit the plaintiffs' house the defendant would have inferred that the doctor intended him to act under section 20; and, therefore, would properly presume that the doctor had come to the conclusion that the patient was of unsound mind. This suggestion requires us to assume that all general practitioners—for there is no evidence that the doctor was exceptionally well-informed in this respect—are familiar with the sections of the Lunacy Act, 1890, which authorise the making of compulsory orders. I do not think that there is any ground for this. If a doctor thinks that his patient needs hospital treatment, his natural anxiety is to get him there; it is the business of the duly authorised officer, rather than that of the doctor, to see that statutory powers are not used for the purpose unless the circumstances warrant it. The argument requires us also to assume that the duly authorised officer has no function in this type of case except to act compulsorily; and that that fact was known to the doctor. If this were so, it is surprising, as I have already commented, that the doctor should have made up his mind about the case without seeing the patient again; and the fact that the defendant tried to get the patient to enter as a voluntary patient suggests that he was not merely equipped to act compulsorily. On any view, I do not see how it can be said that the doctor's supposed views must have been so obvious to the defendant, and his reliance on them so complete, that it did not occur to him even to ask the doctor, when he came to the house, whether he considered his patient to be of unsound mind. According to the defendant, the only information that the doctor

when he arrived at the house, gave him about her condition was that when he had seen her on January 6 he had found her greatly distressed and subject to emotional outbursts. The defendant does not say that he asked for any further statement. But if he had, he would not have got much more, for the only opinion that Dr. Singer expresses in his affidavit is that the patient was suffering from a prolonged and serious emotional disturbance, and that she required observation and psychiatric treatment and skilled attention which clearly she could not get if she remained at home.

Thirdly, Mr. Wilmers argues that what the defendant says in his affidavit is tantamount to saying that the patient was of unsound mind, and that he does not use that expression because it is not one which is in common use in the medical profession. While it is much better that the witness should testify, if he can, in the terms of the Act itself, I agree that it is sufficient, at any rate at this stage, for him to use any language that amounts to the same thing. I am not going to attempt a definition of just what is meant by unsound mind, an expression which the Act itself leaves undefined, nor am I going to search for equivalent language. It is enough to say that unsoundness of mind is plainly something more radical than an emotional disturbance requiring psychiatric treatment. The unsoundness of mind, whose presence is essential to justify a compulsory order, manifestly means something more than mental illness which qualifies a person to be a voluntary patient. No doubt, the phrase "unsound mind" is not one which is in ordinary use; in ordinary language "certifiable" is perhaps more likely to be used to express the same idea. The word originally used in the Lunacy Act was "lunatic." The Mental Treatment Act, 1930, section 20, required the use of that word to be discontinued and substituted for it "person of unsound mind." The language of this section does not suggest an intent to alter the sense of the Lunacy Act, 1890, but rather to substitute a word with less disagreeable associations.

The only passage in his affidavit in which the defendant expresses his own opinion about the patient's condition is in paragraph 6. He there says that it was clear to him that the patient held very strong views about the family troubles, and he adds: "The strength of these views was such that I formed "the impression that she had become emotionally unstable and "unbalanced." For a person to be of unsound mind there must, I think, be some impairment of some faculty. "Unbalanced" is the nearest that the defendant comes to suggesting that. I do not think that any court which has a duty, as we have, to see that the requirements of a statute granting power to detain an individual against his will are strictly complied with, ought to treat the word "unbalanced" in the context in which I have quoted it, as expressing a belief in unsoundness of mind.

Mr. Wilmers' last point is a variant of the one which I have just considered. He submits that the circumstances set out in

C. A.
1960
BUXTON
v.
JAYNE.
Devlin L.J.

the defendant's affidavit show clearly that the patient was behaving as if she were of unsound mind; and, since the defendant set out the circumstances in his affidavit, it is unnecessary that he should go on and state his conclusion about them. If the defendant's evidence is to be believed, the patient was certainly exhibiting some symptoms of mental derangement. But where the deponent fails to express his own opinion about it, an assumption about what his opinion was can safely be made only if the facts permit of no alternative view; and even accepting all the facts stated by the defendant that would be putting it much too high.

The result is that the inference which should properly be drawn from the plaintiffs' evidence have in one vital particular at least not been displaced. It is hardly a question of whether there are substantial grounds for the plaintiffs' contention. The blunt fact is that unless at the trial the defendant can make good or explain away the gap in his affidavit, the plaintiffs' contention is bound to succeed. In saying this I am not prejudging the ultimate issue. The defendant may convince the court that he was omitting only what he thought to be obvious; or he may defeat a charge of negligence on the lines acceptable in *Richardson* v. *London County Council*.[3] Since there is going to be a trial, it would not be helpful if I were to explore these or any other possibilities any further. Many things may take on a different appearance after they have been dealt with in viva voce evidence. But we have to act on the material we have got, and from that I think only one conclusion can be drawn, and that is that there is substantial ground for thinking that the defendant was lacking in care in that he failed to apply his mind properly to the requirement of the section.

In the course of his argument Mr. Wilmers applied for leave to file a further affidavit from the defendant to make good the defect in the one he had made. In my judgment, this application should be refused. No reasons such as are ordinarily required for the admission of fresh evidence in this court were advanced in support of it. Further, I do not think that an affidavit by the defendant at this stage would by itself be worth much unless it were accompanied by an explanation of how the omission occurred. The plaintiffs might properly wish to test that explanation, and the proper time for that is in cross-examination at the trial.

Finally, Mr. Wilmers submitted that the leave granted under section 330 should be limited to a claim for damages in respect of three days' detention. The basis for this submission is that under section 20 a person should not be detained for more than three days and, accordingly, any detention after that was not the defendant's responsibility. The submission shows a misapprehension of the court's task under section 330 (2). The court has

[3] [1957] 1 W.L.R. 751; [1957] 2 All E.R. 330, C.A.

there to inquire in respect of a particular act—in this case, the act of the defendant in ordering the removal of the patient on the morning of January 10—whether there is substantial ground for the contention that the defendant acted in bad faith or without reasonable care. The court is not concerned with the consequences of the act. Where the act in question is detention over a period, different considerations may apply to different parts of the period; in respect of one part a defendant may have acted without due care, and in respect of another with due care. It might then be proper to give leave to proceed in respect of a part only of the period of detention. But in the present case the act in question is not the act of detention but the act of removal. What damages flow from that act, if it is proved to be wrongful, will be a question of causation to be dealt with on ordinary principles; the procedure under section 330 is not concerned with it.

For these reasons I think that the judge came to the right conclusion, and that this appeal should be dismissed.

Appeal dismissed with costs.

Solicitors: *Kenneth Goodacre; Brecher & Co., Hayes, Middlesex.*

E. D.

[QUEEN'S BENCH DIVISION.]

* D. (AN INFANT) *v.* PARSONS.

1960
May 19.

Lord Parker C.J., Donovan and Davies JJ.

Road Traffic — Taking and driving away motor-vehicle — Aiding and abetting — Whether riding on pillion some hours after taking sufficient to constitute offence—Road Traffic Act, 1930 (20 *&* 21 *Geo.* 5, *c.* 43), *s.* 28 (1).

Road Traffic — Third party insurance — Aiding and abetting offence — Vehicle taken and driven away without owner's consent—Riding on cycle subsequently as pillion passenger — Whether sufficient evidence to justify conviction — Road Traffic Act, 1930 (20 *&* 21 *Geo.* 5, *c.* 43), *s.* 35 (1).

Crime — Aiding and abetting — Evidence — Offences by driver of motor-cycle—Sitting on pillion—No evidence of joint enterprise—Road Traffic Act, 1930, *ss.* 28 (1), 35 (1).

A motor-cycle was taken and driven away without the owner's consent. Later the same day F. was seen riding the motor-cycle with the appellant on the pillion. Both F. and the appellant were 15 years of age and had been friends for four years. They were stopped by the police and the appellant said that he knew nothing about the motor-cycle being stolen. Both were charged with taking and driving away a motor-vehicle without the consent of the owner contrary to section 28 (1) of the Road Traffic Act, 1930, and with using a motor-vehicle on a road without there being in force a policy of insurance in respect of third party risks, contrary to section 35

[Reported by A. D. RAWLEY, Esq., Barrister-at-Law.]

1960

D. (An Infant) v. Parsons.

(1) of the Act. F. pleaded guilty. The appellant pleaded not guilty, and his evidence was that F. had told him that he, F., was the owner of the cycle, and that F. had offered him a ride. The appellant was convicted of both offences and appealed to the County of London Quarter Sessions. His appeal was dismissed, the appeals committee being of the opinion that the evidence clearly established that both F. and the appellant were acting in concert in together taking and driving away the motor-cycle, and in together using it without the requisite policy of insurance. On appeal:—

Held, allowing the appeal, (1) that the fact that a man was found sitting on the pillion seat of a motor-cycle which had been illegally taken might be evidence from which a jury could infer that he was a party to the original taking, but it did not of itself prove it. Here there was no evidence of a joint enterprise, and no evidence that the appellant had been a party to the original taking by F.; accordingly, the appellant had been wrongly convicted of an offence against section 28 (1) of the Road Traffic Act, 1930.

Reg. v. *Stally* [1960] 1 W.L.R. 79; [1959] 3 All E.R. 814 (C.A.) applied.

(2) That the fact that the appellant accepted a lift from F. was not evidence sufficient to justify the conviction of the appellant for knowingly aiding and abetting F. in the commission of an offence under section 35 (1) of the Act.

Case stated by the appeals committee of the County of London Quarter Sessions.

On March 10, 1959, at the North London Juvenile Court, on informations laid by the respondent, the appellant was convicted (1) of taking and driving away, on March 1, 1959, a motor-cycle without the consent of the owner or other lawful authority contrary to section 28 of the Road Traffic Act, 1930, and (2) of unlawfully using a motor-cycle on a road without there being in force in relation to the user of the vehicle a policy of insurance or such other security in respect of third-party risks as complied with Part II of the Road Traffic Act, 1930, contrary to section 35 of the Act. The appellant appealed to the appeals committee of the County of London Quarter Sessions. The appeals committee found the following facts: A Triumph motor-cycle, the property of one Barnett, was unlawfully taken and driven away between 3.30 a.m. and 7 a.m. on March 1, 1959, from a house in Mount Pleasant Lane, E.5. At 4 o'clock that same afternoon the motor-cycle was seen being driven by one F., with the appellant as pillion passenger. A police officer on a motor-cycle gave chase and the motor-cycle was left at the side of a road and F. and the appellant were seen walking away. The police accosted F. and the appellant about the matter. F., in the presence of the appellant, said: "A friend lent it to me," and also said that he thought borrowing the motor-cycle meant that no insurance was necessary. There was no policy of insurance covering the driving of the motor-cycle since both F. and the appellant, who were friends of four years' standing, were 15 years of age. They were told that they would be detained and the appellant said: "I don't know "anything about it being a stolen motor-cycle." Later F., who pleaded guilty, said: "The motor-cycle belongs to Bob Parker."

He could not give Parker's address. The appellant said: "I "don't know anything about a stolen motor-cycle." In his evidence before the appeals committee the appellant said that F. had told him that he (F.) was the owner of the motor-cycle and had parked it in Hillside Road (a place about one mile from F.'s home) while he had his dinner, and that F. had offered the appellant a ride when they met at about 1.30 p.m. on March 1. It appeared that F. did not know the way to Hillside Road, and he and the appellant had to ask the way when returning to the motor-cycle at about ten minutes to three o'clock on the afternoon of March 1.

On that evidence the finding of the appeals committee was expressed in these terms: "(i) Being of the opinion that the "evidence clearly established that both F. and the appellant were "acting in concert in together taking and driving away the said "Triumph [motor-cycle] without the owner's consent and in "together using the same without there being in force the neces-"sary policy of insurance, and (ii) not believing the appellant's "story to us that he thought that F. was the owner of the said "Triumph [motor-cycle] or that he was merely an innocent "passenger without any control over F.'s movements, dismissed "the said appeal. The committee were satisfied that the appel-"lant had committed these offences through sheer stupidity and "that his behaviour could not be described as criminal." The appellant appealed.

Samuel Lincoln for the appellant.
Paul Wrightson for the respondent.

In addition to the cases referred to in the judgments, the following were cited in argument: *Shimmell* v. *Fisher* [1]; *Ross* v. *Rivenall* [2]; *John T. Ellis Ltd.* v. *Walter T. Hinds.* [3]

LORD PARKER C.J. Davies J. will deliver the first judgment.

DAVIES J., having stated the facts and the opinions of the appeals committee as set out in the case stated, continued: The submission on the part of the appellant in this court, so far as it concerns the first charge of taking and driving away the motor-cycle is that there was no evidence before the appeals committee upon which they could come to the conclusion that, whatever F. did with regard to this cycle, the appellant was a party to the taking and driving away of it. The contention, as I understand it, on behalf of the Crown, is that F. must have been guilty of taking and driving away this cycle, not necessarily perhaps between 3.30 a.m. and 7 a.m.— possibly somebody else may have taken it; but whenever he did take it away without the consent of the owner or other

[1] [1951] 2 T.L.R. 753; [1951] 2 All E.R. 672, D.C.
[2] [1959] 1 W.L.R. 713; [1959] 2 All E.R. 376, D.C.
[3] [1947] K.B. 475; 63 T.L.R. 181; [1947] 1 All E.R. 337, D.C.

1960

D. (AN INFANT) v. PARSONS.

Davies J.

lawful authority, F. must have been guilty of that offence. Then, when the appellant is found to be riding on the cycle in company with F. in circumstances in which the appellant must have known, not only that the cycle was improperly come by, but that it had been taken away without the consent of the owner, that fact is a fact upon which the appeals committee were entitled to convict the appellant of the offence. I am unable to subscribe to that proposition. The authority principally relied upon in support of it is a decision of the Court of Criminal Appeal, *Rex* v. *Richardson*.[1] The facts of that case were entirely different from the present facts. In that case there were three men found in possession of a motor-car which had been taken away without the consent of the owner. In the motor-car there was what Lord Goddard C.J. described as "a regular arsenal of housebreaking implements." When the appellant was tackled about the matter he said: "We didn't nick "it. We got it from another bloke." Lord Goddard went on to say: "What does that matter? Here were three men out on a "housebreaking expedition and were found, as I have said, with "a whole arsenal of housebreaking tools. They were driving a "car they had no business to be driving, and it was shown that "the car had been taken away from the owner's house or from the "street without the owner's consent, and these men were found "driving it. Whether man (1), man (2) or man (3) took the car "does not matter in the least; nor does it matter whether they "took it from some friend whom they had met in the street. All "three knew, as the jury found, that the car was being driven "without the owner's consent."

It is said, therefore, that that decision is authority for the proposition that a man who was not actually a party to the original illegal taking of a car is, if he subsequently gets into it and partakes of the use of it, guilty of taking the car. That, in my judgment, is not right. The fact that a man is found riding in a car that has been illegally taken, or sitting on the pillion seat of a motor-cycle which has been illegally taken, may be evidence from which a bench of magistrates or a jury can infer that he was a party to the original taking, but it does not of itself prove that he was a party to the original taking and is guilty of the offence. That proposition is, I think, clearly laid down in *Reg.* v. *Stally*,[2] another case in the Court of Criminal Appeal decided after the decision of the appeals committee in the present case. It is sufficient if I read the last paragraph in the judgment of Barry J., who gave the judgment of the court[3]: "In the opinion of this court the two passages "to which I have referred state the law in very much too broad "a way and, in fact, amount to a misdirection. If the learned "deputy chairman had made it clear that once the jury were "satisfied that the appellant was a party to the taking in the

[1] [1958] Crim.L.R. 480.

[2] [1960] 1 W.L.R. 79; [1959] 3 All E.R. 814; 44 Cr.App.R. 5.

[3] [1960] 1 W.L.R. 79, 81.

"sense that the taking had been a joint enterprise, even though "he himself was not present when the vehicle was actually "removed, no complaint could possibly have been made. The "difficulty, as we see it, is that the learned deputy chairman "indicated to the jury that they would be entitled to find the "appellant guilty of this offence on the mere ground, and the "sole ground, that he entered the vehicle some time after it had "been taken knowing that the driver of the vehicle had in fact "taken it and driven it away without the consent of the owner. "In very many cases the fact that a man entered a car which "he knew had been stolen and then drove in it, might well lead "the jury to the conclusion that that man had been a party to the "original taking, in the sense that the taking had been a joint "enterprise between him and the driver of the car. In the "passages to which I have referred the learned deputy chairman "does not direct the jury that on the evidence they must be "satisfied that the appellant was in fact a party to the taking. "It might well have been on this evidence that the jury would "have so found if so directed, but it is also possible that the "jury took the view here that Stally played no part at all in "the taking of the van, and that although when he came up "to the van, which had already been taken by Wise, he was "aware that Wise had taken it without the owner's consent, but "nonetheles he had been quite unaware that Wise was going to "take it, then, in those circumstances, to say that the mere fact "of entering the van and being driven in it would constitute a "taking and driving away, seems to this court to be an inaccurate "statement of the law."

Applying that to the facts of the present case, it is perfectly true, as the appeals committee have found, that the appellant told lies when he was challenged by the police, but giving the strongest weight to evidence of that kind against the appellant, it seems to me that it is impossible here to say that there was any real evidence that this present appellant had anything to do with this taking or knew in advance or knew at the time that F. was going to take or was taking or took the cycle. The highest, as it seems to me, that it can be put against the appellant on that charge is that at some time—we do not know when—F. having taken the cycle, the appellant being in company with F. had very good reason to believe that there was something wrong with it; he might even have realised that F. had taken it without the owner's consent, but that is all that the evidence proves. In my judgment, following the decision of the Court of Criminal Appeal in *Reg.* v. *Stally*,[4] that would not be enough to constitute the offence, and there was no evidence on which the appeals committee could come to the decision which they did on that charge. It is to be observed that throughout the case stated the committee approached this case on the basis that it was a joint undertaking

[4] [1960] 1 W.L.R. 79.

1960

D. (AN INFANT) v. PARSONS.

Davies J.

throughout, and there was not really, as I have said, any evidence that the appellant was concerned in the original taking by F.

So far as the second charge is concerned, the position may be a little different. The charge there was using the motor-cycle without there being in force a valid third-party insurance. It was F. who was driving it and the appellant, if guilty, would be guilty as aiding and abetting F. to drive it. As I understand it, the way the case is put is this: here were these two boys, old acquaintances of four years' standing, each being 15 years old. It must, therefore, be taken that the appellant would know that F. could not have a driving licence, could not have a third-party insurance policy, and, therefore, going on the cycle when he went, he must be taken to be guilty of aiding and abetting the driving without an insurance policy. I think that that is really straining matters in this case. I suppose that technically the appellant, a boy of 15, must be taken to know the law, but really all the evidence against him on this charge is that he was riding as a passenger on a motor-cycle driven by F. Returning to the decision of the appeals committee, their opinion is based on the footing that this was a joint enterprise throughout. Supposing the fact be, and there was really no evidence to the contrary, that this was merely an offering of a lift by F. to the appellant, it seems to me that the evidence would not justify the conviction of the appellant for knowingly aiding and abetting the commission of this offence by F.

In these circumstances I am of opinion that on neither of these charges was there evidence before the appeals committee upon which, properly directing themselves, they could arrive at the decision they did, and I would allow the appeal.

DONOVAN J. I agree. I add a word only on the second charge on which the appeals committee found the appellant guilty, again on the ground that the evidence established a joint venture. Since the evidence did not do so, the basis of the finding on that charge goes also, and in those circumstances I do not think that the court ought, even if it could, to convict the appellant on some ground relating to this second charge not apparently put forward at the trial, namely, that in any event by merely riding on the pillion the appellant was guilty of an offence under section 35. I therefore say no more.

LORD PARKER C.J. I agree, and I only add a word on the first charge. There are two possibilities: the appeals committee may be saying in the case stated that they were satisfied that the appellant had been acting in concert with F. when F. originally took and drove away the motor-cycle. If that is what they intended to find, I can see no evidence which would justify that conclusion. On the other hand, they may have found, and I think that this is more likely, that F. at some time took and drove away the motor-cycle, and that at a later stage the appellant joined with him, knowing full well that the motor-cycle had

been take away without the owner's consent. I think on that basis the appeals committee held that the appellant himself was guilty of taking and driving away. It is to be observed that the decision in the present case was given before *Reg.* v. *Stally*[5] was heard in the Court of Criminal Appeal. Applying the law as they conceived it to be before *Reg.* v. *Stally*,[5] the appeals committee may well have thought that the mere joining up of the appellant with F. after the original taking and driving away made him, the appellant, also guilty of taking and driving away. I accept the decision in *Stally's* case,[5] and, accordingly, the evidence here was not enough to show that this appellant was guilty of the offence.

Appeal allowed with costs incurred in this court and before the appeals committee to be taxed out of court. No order as to costs incurred before the juvenile court.

Solicitors: *Burnett L. Elman; Solicitor, Metropolitan Police.*

[5] [1960] 1 W.L.R. 79.

[QUEEN'S BENCH DIVISION.]

* HORWITZ *v.* ROWSON AND ANOTHER.

[1958 H. No. 3053.]

1960
May 23, 24, 25; *June* 3.

Havers J.

Town and Country Planning—Development—Material change of use—Business premises—Basement used by horticulturists on appointed day for storing and grading bulbs for retail sale and for making and repairing boxes and seed trays—Class of use—Whether "shop," "repository" or "light industrial building"—Subsequently used by printers' engineers for repairing and reconditioning type—Installation of machinery—Whether material change in use—Town and Country Planning Act, 1947 (10 *&* 11 *Geo.* 6, *c.* 5), *s.* 12 (1) (2) (*f*)—*Town and Country Planning* (*Use Classes*) *Order,* 1950 (*S.I.* 1950, *No.* 1131), *art.* 2 (2) *and Sch.*

The defendants, tenants of the ground floor and basement of business premises had covenanted, inter alia, not to make or suffer to be made any material change in the use of the premises demised. The tenants sublet the basement to printers' engineers, who installed machinery and used the basement for reconditioning and repairing type. It was agreed that the use of the basement for such purpose was as a "light industrial building" within the meaning of article 2 (2) of the Town and Country Planning (Use Classes) Order, 1950,[1] made pursuant to section 12 (2)

[1] Town and Country Planning Act, 1947, s. 12: "(1) Subject to the provisions of this section and to the following provisions of this Act, permission shall be required under this Part of this Act in respect of any development of land which is carried out after the appointed day [July 1, 1948]. (2) In this Act, except where the context otherwise requires, the expression 'development' means the carrying out of building, engineering, mining or other operations in, on, over or under land, or the making of any material change in the use of any buildings or other land: Provided that the following operations or uses of land shall not be deemed

1960

HORWITZ
v.
ROWSON.

of the Town and Country Planning Act, 1947. On July 1, 1948 (the appointed day), and for some years prior thereto, the basement had been used by horticulturists in summer for sorting, grading and storing bulbs for sale in a retail shop on the other side of the road, and in winter for making and repairing boxes and seed trays, no machinery other than a handsaw being used for the latter purposes.

In an action for possession the landlord claimed that there had been a breach by the tenants of the covenant not to suffer or permit a material change in the use of the land or buildings or any part thereof without consent, as the basement was being used by their subtenants as a "light industrial building," whereas its use previously had been as a shop or repository within the meaning of the Order of 1950:—

Held, (1) that on July 1, 1948, the basement alone was not a "shop" within the definition in the Order of 1950, as no retail sales took place therein; nor was it a shop if taken in conjunction with the retail shop also occupied by the horticulturists, as (a) the boxes and trays repaired therein did not come within the definition of "the reception of goods to be . . . repaired" within the meaning

"for the purposes of this Act to involve "development of the land, that is to "say:— . . . (*f*) in the case of build-"ings or other land which are used "for a purpose of any class specified "in an order made by the Minister "under this section, the use thereof "for any other purpose of the same "class."

Town and Country Planning (Use Classes) Order, 1950, art. 2 (2): "In "this Order unless the context other-"wise requires, the following expres-"sions have the meanings respectively "assigned to them, namely:— . . .

"'shop' means a building used "for the carrying on of any retail "trade or retail business wherein the "primary purpose is the selling of "goods by retail, and . . . includes a "building used for the purpose of "a hairdresser, undertaker or ticket "agency or for the reception of goods "to be washed, cleaned or repaired, "or for any other purpose appropriate "to a shopping area, but does not "include a building used as a funfair, "garage, petrol filling station, office, "or hotel or premises (other than a "restaurant) licensed for the sale of "exciseable liquors for consumption "on the premises;

"'industrial building' means a "building (other than a building in "or adjacent to and belonging to a "quarry or mine and other than a "shop) used for the carrying on of "any process for or incidental to any "of the following purposes, namely:— "(*a*) the making of any article or of "part of any article, or (*b*) the alter-"ing, repairing, ornamenting, finish-"ing, cleaning, washing, packing or "canning, or adapting for sale, or "breaking up or demolition of any "article, or (*c*) without prejudice to the "foregoing paragraphs, the getting, "dressing or treatment of minerals, "being a process carried on in the "course of trade or business other "than agriculture, and for the pur-"poses of this definition the expres-"sion 'article' means an article of "any description, including a ship or "vessel.

"'light industrial building' means "an industrial building (not being a "special industrial building) in which "the processes carried on or the "machinery installed are such as could "be carried on or installed in any "residential area without detriment "to the amenity of that area by reason "of noise, vibration, smell, fumes, "smoke, soot, ash, dust or grit; . . .

"'general industrial building' "means an industrial building, other "than a light industrial building or a "special industrial building;

"'special industrial building' means "an industrial building used for one "or more of the purposes specified in "classes V, VI, VII, VIII, IX and X "referred to in the schedule to this "Order [classes of special user of an "offensive type]."

The schedule sets out the classes of uses and includes the following:

"Class I.—Use as a shop for any "purpose except as:—(i) a fried fish "shop; (ii) a tripe shop; (iii) a shop "for the sale of pet animals or birds; ". . .

"Class III.—Use as a light indus-"trial building for any purpose.

"Class IV.—Use as a general indus-"trial building for any purpose. . . .

"Class XI.—Use as a wholesale "warehouse or repository for any "purpose."

of article 2 (2), as they were not repaired for the use or benefit of customers, and (b) the purposes for which it was mainly used were not purposes which were appropriate to a shopping area (post, p. 810).

(2) That the basement was not a "repository," namely, a building wherein goods were kept or stored in the course of trade or business as, although it was used partly for that purpose, its main use was for processes carried on in the course of a trade or business, which were purposes appropriate to a light industrial building. Accordingly, its user on July 1, 1948, was as a "light industrial "building" within the meaning of article 2 (2), and therefore there had been no material change in the use of the land within the meaning of the covenant in the underlease of October 18, 1954, and no breach thereof, and the plaintiff's claim failed (post, p. 811).

ACTION.

By a lease made by the plaintiff, David Horwitz, of premises at Farringdon Road, London, on October 18, 1954, between him and the defendants, Benjamin Rowson and his wife, Margarita Rowson, the plaintiff demised to the defendants the ground floor and basement of the building for a term of 22¾ years at a rent of £600 per annum, payable quarterly. The lease contained a proviso for re-entry on non-payment of rent and also a proviso for forfeiture in the event of any breach or non-observance of the covenants therein. By clause 2 (9) the defendants covenanted, inter alia, not to do or permit to be done any act or thing which might be or become a nuisance, annoyance, grievance, injury, danger, trouble or disturbance, or might be objectionable to the owners or occupiers of the property adjoining thereto or to the neighbourhood, to use the ground floor as a café and restaurant only and the basement as a store or workshop or café and restaurant only. By clause 2 (15) they covenanted, inter alia, not at any time during the continuance of the term without the previous consent in writing of the lessor to make or suffer to be made any material change or addition whatsoever in or to the use of the land demised or any building or buildings or erection thereon or any part thereof, and also if the lessor should consent in writing would duly apply to the local planning authority as defined by the Town and Country Planning Act, 1947, for any necessary permission to make such material change on behalf of the lessor and would give to the lessor notice of such permission within three months of the receipt of the same from the planning authority.

By an underlease dated May 9, 1955, made between the defendants and a company, Excelsior Printers Supply Co. Ltd., the defendants sublet the basement to that company for 21 years from March, 1955, and by clause 2 (13) of that underlease the company covenanted, inter alia, to use the basement for the purpose of a store, workshop and warehouse in connection with their business of printers' engineers only, and further, by clause 2 (17) not without the consent of the defendants in writing to make any material change in the use of the basement or any part

1960

Horwitz
v.
Rowson.

thereof. As part of their user of the basement as a workshop in connection with their business the company installed in the basement a portable tank containing caustic soda solution used for degreasing type and other equipment for repair or reconditioning and a similar portable tank of water for rinsing the articles after degreasing.

On July 1, 1948 (the appointed day under the Town and Country Planning Act, 1947), and the material date for the purposes of this action, the basement had been occupied by J. J. Mack Ltd., a company which carried on business as horticulturists. That company, which had occupied the basement since 1939, also had a shop on the other side of Farringdon Road where they sold flowers, bulbs and seeds. During the occupation of J. J. Mack Ltd. the basement had been used during the season as a store for storing bulbs and plants some of which were imported from Holland, the bulbs being delivered to the basement where they were unloaded and unpacked and put into trays. They were then sorted, graded and prepared in the basement for display and sale in the shop, and the packing and dispatching of bulbs in accordance with orders received by the company was also done in the basement. No retail sale took place there, all such sales being from the retail shop. In winter the basement was used for the making and repairing of boxes and seed trays, quantities of wood of the proper dimensions being bought by the company for that purpose. No machinery was used in the basement in making and repairing boxes and trays, but a handsaw was used.

On November 20, 1958, the plaintiff served a notice on the defendants, pursuant to section 146 of the Law of Property Act, 1925, alleging that they had broken the covenants contained in clause 2 (9) of the underlease of October 18, 1954, by permitting the Excelsior Printers Supply Co. Ltd. to use the basement of the demised property for the purpose of cleaning printers' type, machinery and other equipment and for the purposes of keeping and using in the basement tanks containing caustic liquid; and, further, that they had broken the covenant under clause 2 (15) as they had not obtained the consent of the plaintiff, whether written or unwritten, to the user of the basement by the company for those purposes, which user involved a "material change of "user" within the meaning of those words as used in clause 2 (15), and, further, had not applied to the local planning authority for any permission to make such material change of user. The plaintiff required the defendants to remedy the breaches within 21 days from the date of the notice.

On December 24, 1958, the plaintiff issued a writ against the defendants claiming possession of the premises and £150 arrears of rent due on September 29, 1958, alleging breaches of the two covenants, claiming that the defendants had failed to comply with the requirements of the notice served under section 146 of the Law of Property Act, 1925, within the time limited thereby.

The defendants denied that the plaintiff was entitled to possession, or that they were in breach of or had failed to observe any of the covenants contained in the underlease of October 18, 1954. They admitted receiving the notice purporting to have been served under section 146 of the Act of 1925 but made no further admissions with regard thereto. They denied that the lease had at any time become or was forfeited to the plaintiff, and claimed that if they were at any time in breach of any of the covenants contained in clause 2 (15), such breach occurred before June 24, 1958, and that on July 8, 1958, they had paid to, and the plaintiff with full knowledge of every such breach had accepted, rent due under the lease on June 24, 1958, and thereby waived his right to rely on any such breach as a forfeiture.

By a counterclaim they claimed that, if it be held that they had committed the alleged or any breach or breaches, they were ready and willing to remedy such breach or breaches and to be relieved from forfeiture under section 146 of the Act of 1925.

In relation to the claim based on an alleged breach of covenant under clause 2 (9), which does not call for report, Havers J., applying the test laid down in *Fox* v. *Jolly*,[1] held that the notice served by the plaintiff did not comply with the requirements of section 146 of the Law of Property Act, 1925, because it did not state with sufficient particularity the breaches of which the landlord complained, and therefore in so far as the action was based on an alleged breach of clause 2 (9) of the underlease of October 18, 1954, the plaintiff was not entitled to maintain the action even if there had been a breach; and that although the hanging of pieces of machinery on the wall pipes which had been done by the Excelsior Printing Supply Co. Ltd. might become a nuisance or annoyance to other occupiers of the building within the meaning of the covenant in clause 2 (9), the defendants were not liable, because there was no evidence that they ever knew of or authorised such acts and could not be held to have permitted it. The action failed in so far as it was based on a breach of the covenant in clause 2 (9).

David C. H. Hirst for the plaintiff.
R. J. S. Thompson for the defendants.

No cases were cited in argument on the point on which this case is reported.

Cur. adv. vult.

June 3. HAVERS J. Now I have to deal with the remaining cause of action, which is based upon a breach of clause 2 (15) of the lease. In respect of this no point arises with regard to the sufficiency of the notice. It is conceded that the notice was sufficient with regard to that, and it is also conceded that, if

[1] [1916] A.C. 1.

1960

Horwitz
v.
Rowson.

Havers J.

there was a material change in user, there was a suffering by the defendants of it. [His Lordship stated the facts relating to the user of the basement on and prior to July 1, 1948, and continued:] The plaintiff alleges that there had been since the date of the underlease to the Excelsior Printing Supply Co. Ltd., and at the date of the writ, a material change in user, in that the user by the company was that of a light industrial building, whereas it was contended that the user by J. J. Mack Ltd. was either that of a shop or a repository, or that it did not come within any of the classes within the Town and Country Planning (Use Classes) Order, 1950, which has been made by the Minister.

According to the covenant, the duty of the defendants as underlessees, if a material change was made, was to ask the lessor for consent, and not to make any such change without the previous consent in writing of the lessor. If the lessor gave his consent, then there was a duty to apply to the town planning authority for a licence. The question, therefore, I have to decide is: Was there a material change of user within the meaning of the Town and Country Planning Act, 1947? It is agreed for the purpose of this case by both counsel that the user by the Excelsior Company was that of a light industrial building.

[His Lordship read section 12 (1) and (2) of the Town and Country Planning Act, 1947, and continued:] The Minister made the Town and Country Planning (Use Classes) Order, 1950, which came into operation on July 21, 1950. The effect of this is that a person is entitled to change his actual user if he keeps within a certain class. If he makes a change within that class, it is not a material change and does not require permission. Under this Order it is necessary to refer to the definition article, which is article 2. [His Lordship read the definitions of "shop," "light "industrial building" and "special industrial building" contained in article 2 (2) of the Order, and classes I, II, III, IV and X of the schedule and continued:] It is common ground that the user by the Excelsior Company is that of a light industrial building, and the problem, therefore, I have to determine is: What was the user by J. J. Mack Ltd. on July 1, 1948? If there was a material change of user, then, of course, there has been a breach of the covenant.

It was contended by Mr. Hirst, for the plaintiff, first, that this basement, if one looks at it alone without regard to the shop on the other side of the road, was a shop inasmuch as it was used for carrying on the retail trade of horticulture. I am unable to accept that argument, because on the facts there was no retail trade carried on in the basement at all. The retail trade was carried on exclusively by J. J. Mack Ltd. in a shop over the other side of the road. The second point that was taken by Mr. Hirst was that, if the basement alone was not a shop, the shop over the way plus the basement were together a shop within the meaning of the definition in article 2 (2) of the Order of 1950.

"Shop" means "a building used for the carrying on of any

"retail trade or retail business wherein the primary purpose is "the selling of goods by retail"—and the shop over the way was obviously that—"and includes a building used for the purposes "of a hairdresser, undertaker or ticket agency or for the reception "of goods to be washed, cleaned or repaired." A witness said that there were goods that were brought into the basement to be repaired and were repaired. The basement was used partly for the reception of things to be repaired, and for boxes and trays; but I have to consider whether the boxes and trays that were repaired in the basement come within the definition of "the "reception of goods to be . . . repaired" within the meaning of the Order of 1950.

I think the word "goods" must have an analogous meaning to the meaning which it bears in the earlier part of the definition, "'shop' means a building . . . wherein the primary purpose is "the selling of goods by retail." These boxes and trays which were repaired were not repaired for the use or the benefit of customers; they were repaired where necessary for the purpose of displaying the goods.

The only thing that is left, therefore, is if the plaintiff can bring himself within the words of the definition, "or for any "other purpose appropriate to a shopping area." I assume for the purpose of this argument that these words are not to be construed ejusdem generis, if there is a genus hairdresser, undertaker and ticket agency. I have then to consider what is the meaning of the words "or for any other purpose appropriate to "a shopping area." I confess I find this difficult to determine. The test is not whether the purpose is ordinarily incidental to the carrying on of a retail trade. It is something entirely different, namely, user for a purpose appropriate to a shopping area.

I think, therefore, as that is the test, I have to have regard to the object of the Act of 1947 and the classification of the uses in the Order. The Act, of course, was to control the development all over this country. The idea was that there should not in future be all sorts of buildings of different characters built up without any sort of control, but that each planning authority should prepare a development plan and should allocate areas for the different kinds of user and development, agriculture, residential, industrial buildings, shops, offices, and so on. If one looks at the Order itself, it appears that there are really some broad distinctions between user. There is a user for shop, user for office and user for industrial building, and industrial buildings are classified within themselves as light, general and special. It seems to follow from that that, if a building is used either for an office or an industrial building, it would not be deemed to be appropriate for a shopping area.

The main test, really, for considering whether a building is an industrial building is whether there is any process carried on therein for or incidental to the making of any article or part of an article, or the altering, repairing or adapting for sale of any

1960

HORWITZ v. ROWSON.

Havers J.

article being a process carried on in the course of a trade or business other than agriculture. It is to be observed that horticulture has not been excluded from that.

There is no dispute that this basement was used for making boxes and trays in the winter. It was also used for adapting bulbs for sale and grading and sorting them out. Those, in my view, within the tenor of this Order, are not purposes which are appropriate to a shopping area. They are purposes which are appropriate to user as an industrial building. I hold, therefore, that this basement alone was not a shop, nor was it a shop if included with the shop over the road, within the meaning of this Order.

Then it was contended that this basement was a repository. Class X in the Order is: "Use as a wholesale warehouse or "repository for any purpose." It is clearly not a wholesale warehouse. Whether the word "wholesale" qualifies "reposi- "tory" is not perhaps too clear. If it does, of course, this obviously was not a wholesale repository. I will assume that the word "wholesale" does not qualify the word "repository," and consider whether or not the basement was a repository within the meaning of the Order.

"Repository," I think, means a building wherein goods are kept or stored, and I think it must be in the course of a trade or business. In this particular case, in the season the basement was partly used for this purpose, but not exclusively. In the winter it was not used for this purpose at all. The main, if not the exclusive, user in the winter was for making and repairing boxes and trays. I hold, therefore, that it was not a repository within the meaning of Class X of the Order.

It was contended also by Mr. Hirst that, if the basement did not fit into either of those two classes, it did not come within the Order at all, and then I should have to decide as best I could whether or not there had been a material change of user. But there is one more class which I have to consider, and that is the one which Mr. Thompson says it does belong to, namely, Class III, that of a light industrial building. "'industrial build- "'ing' means a building (other than a building in or adjacent to "and belonging to a quarry or mine and other than a shop) used "for the carrying on of any process for or incidental to any of "the following purposes, namely:—(*a*) the making of any article "or of part of any article, or (*b*) the altering, repairing . . . "cleaning . . . packing . . . or adapting for sale . . . of any "article . . . being a process carried on in the course of trade "or business other than agriculture . . ."

I have come to the conclusion that the user of this basement on July 1, 1948, was that of an industrial building, and it comes within the definition of a light industrial building, which is "an "industrial building (not being a special industrial building) in "which the processes carried on or the machinery installed are "such as could be carried on or installed in any residential area

"without detriment to the amenity of that area by reason of "noise, vibration, smell, fumes, smoke, soot, ash, dust or grit."

The basement on July 1, 1948, was used for carrying on a process for or incidental to the making of an article, namely, boxes and trays, also for repairing boxes and trays, also for adapting for sale bulbs. They were sorted and graded and prepared for display. That, in my view, was a process carried on in the course of a trade or business. It is quite clear, if it was an industrial building, it comes within the terms of "light industrial "building" within the meaning of article 2 (2) of the Order. In those circumstances, it being common ground that the user since 1955 and the date of the writ was as a light industrial building, I hold that there has not been any material change of user within the meaning of the covenant and, therefore, there has been no breach of covenant.

Other interesting questions were ventilated before me as to whether, assuming that there had been a breach, there had been a waiver by reason of the fact that the plaintiff, with knowledge of the facts—and it was contended that he had full knowledge of the facts—had demanded rent and had been paid and accepted payment of rent. My attention was called to some authorities under which it has been held that the mere demand for rent or the mere acceptance of rent by itself is not conclusive of the matter; that one has to look at all the circumstances of the case and consider the question, quo animo was the rent demanded or received. But if I had had to decide that point, I should have felt bound to hold that there was no waiver by the acceptance of rent in this case, upon this short ground, that the burden rests upon the defendants to prove that the plaintiff had knowledge of all the material facts which constituted the breach. I am not satisfied that the plaintiff had any knowledge of the user of this basement on July 1, 1948. He was not asked any questions about it, and there is no evidence that he knew anything about it. Therefore, if he did not know what was its user at July 1, 1948, he could not possibly know whether there was a material change of user in respect of the user from 1955 onwards. Upon that ground I should have been bound to hold that there had not been a waiver by the acceptance of rent. I think, also, if I had had to decide the point, I should have held that if there was a breach it was a continuing breach.

It is unnecessary for me to deal with those points any further, and in my judgment, therefore, the action fails and there must be judgment for the defendants.

Judgment for defendants with costs.

Solicitors: *Herbert Oppenheimer, Nathan & Vandyk; Braund & Hill.*

E. M. W.

[COURT OF CRIMINAL APPEAL]

C. C. A.

1960
June 20.

Lord Parker C.J., Hilbery and Diplock JJ.

* REGINA *v.* JAMES.

Crime — Sentence — Borstal training — Vagrancy — Probation order— Breach—Three months' maximum sentence for vagrancy offence— Whether Borstal appropriate sentence — Vagrancy Act, 1824 (5 *Geo.* 4, *c.* 83), *s.* 4.

Vagrancy—Sentence—Whether Borstal training appropriate sentence— Vagrancy Act, s. 4.

The appellant was found guilty of an offence under section 4 of the Vagrancy Act, 1824,[1] as a rogue and vagabond for wandering abroad, and put on probation for two years. She failed to notify a change of address, and being brought before the court for breach of the probation order was sentenced to Borstal training. On appeal against sentence:—

Held, that as the maximum sentence under section 4 of the Vagrancy Act, 1824, was three months' imprisonment, it would be wrong to impose a sentence of Borstal training, which would deprive the appellant of her liberty for a longer period than the maximum prison sentence, although she did need and would have benefited from a course of training; accordingly, a sentence of three months' imprisonment would be substituted for the sentence of Borstal training.

Reg. v. *Longstreeth*[2] followed.

APPEAL against sentence.

The appellant, Leila Deidre James, on April 9, 1959, two days before her seventeenth birthday was found guilty at Liverpool

[1] Vagrancy Act, 1824, s. 4: "... "every person wandering abroad and "lodging in any barn or outhouse, "or in any deserted or unoccupied "building, or in the open air, ... "not having any visible means of "subsistence, and not giving a good "account of himself or herself ... "shall be deemed a rogue and vaga- "bond, within the true intent and "meaning of this Act; and it shall be "lawful for any justice of the peace "to commit such offender ... to the "house of correction, there to be kept "to hard labour for any time not "exceeding three ... months. ..."

[2] June 23, 1952, Court of Criminal Appeal (Lord Goddard C.J., Croom-Johnson and Parker JJ.).

LORD GODDARD C.J. This is one of those troublesome cases where a person is charged as a suspected person. That is an offence under the Vagrancy Act, 1824, and the only sentence on first conviction is one of three months' imprisonment. The appellant was committed for sentence and a probation order was made, with the condition that the appellant should report to the probation officer. That was back in September or the beginning of October, 1950, and he reported favourably at the time, but in April, 1952, he was brought before the same magistrates charged with failing to report in accordance with the order. The order had been running a long time, perhaps longer than his sentence, and the same chairman sentenced him to Borstal training. That means that if he goes to Borstal he will probably be detained 15 months, and that is what causes the court to wonder whether Borstal training ought to be imposed on these youths when the maximum sentence of imprisonment they can receive is only one of three months. I dare say it would be very much better that they should go somewhere to be trained, but on the whole we do not think it is a satisfactory sentence because it does deprive the appellant of his liberty. If he is sentenced to imprisonment he cannot be deprived of his liberty for more than three months, and if he behaves himself that is reduced to two months. That is the position and the court thinks that on the whole they ought to set aside the sentence of Borstal.

Juvenile Court as "a rogue and vagabond" under section 4 of the Vagrancy Act, 1824, for wandering abroad and refusing to go to her home or any other suitable place. She was placed on probation for two years. On January 29, 1960, she was fined £2 for being drunk and disorderly but no proceedings were taken in respect of that breach of probation. On February 4, 1960, she was brought before Prescot magistrates' court on a summons alleging that she was in breach of the probation order for failing to notify a change of address. The magistrates found the matter proved and committed her to sessions (under section 28 of the Magistrates' Courts Act, 1952), with a view to Borstal training. On March 15 she appeared at Liverpool before the Appeals Committee for the County of Lancaster, where she was sentenced to Borstal training. She appealed against that sentence by leave of the court.

The appellant appeared in person.

The Crown was not represented.

LORD PARKER C.J. stated the facts and continued: The matter that influenced the court was that under section 4 of the Vagrancy Act, 1824, the maximum sentence is of three months. That, of course, was long before the Borstal training was introduced as a sentence, but in a case which came before this court on June 23, 1952, *Reg.* v. *Longstreeth*,[2] Lord Goddard C.J. pointed out that three months was the maximum sentence, whereas a sentence of Borstal training would be very much longer. He said: "I "dare say it would be very much better that they"—that is, prisoners of that sort—"should go somewhere to be trained, but "on the whole I do not think it is a satisfactory sentence because "it does deprive the appellant of his liberty. If he is sentenced "to imprisonment he cannot be deprived of his liberty for more "than three months, and if he behaves himself, that is reduced "to two months. That is the position, and the court thinks "that on the whole they ought to set aside the sentence of "Borstal training."

In the present case it is quite clear that this girl does need training. She has shown herself to be an unruly sort of person. It is said that she went to undesirable cafés and is self-willed, and it appears from a report from the governor of the prison where she is, that she has improved, in other words that Borstal training is doing her good. The governor goes on to say: "This girl has benefited from the short period of training "she has received in a stable environment, and it would appear "that she requires supervision over a sustained period."

In a probation officer's report, which this court has called for, it is clear that the probation officer does not think that she has reached that stage of stability where she can be relied upon

[1] See footnote 2, ante, p. 812.

C. C. A.
1960
REGINA v. JAMES.
Lord Parker C.J.

not to go to undesirable cafés. Accordingly, it is just the sort of case where this girl would benefit from Borstal training. Nevertheless, this court has, as I have indicated, said that in these circumstances Borstal training is the wrong sentence. This court feels that it ought to follow that decision, and accordingly in the circumstances the sentence of Borstal training will be set aside and a sentence of three months' imprisonment substituted. That means that the appellant has now served her sentence and the probation officer will take her back to her home in Liverpool.

Appeal allowed.

C. J. E.

[QUEEN'S BENCH DIVISION.]

1960
May 19.
Lord Parker C.J., Donovan and Davies JJ.

* EVANS *v.* ROPER.

Agriculture—Agricultural land tribunal—Issue of sound management—Tenant's personal fortunes as farmer not to be considered—Discretion of tribunal—Agricultural Holdings Act, 1948 (11 *&* 12 *Geo.* 6, *c.* 63), *s.* 25 (1) (*b*)—*Agriculture Act,* 1958 (6 *&* 7 *Eliz.* 2, *c.* 71), *s.* 3 (2).

A landlord owned a large estate, part of which consisted of Burton Court Farm, comprising 406 acres, which was being farmed by the tenant. The landlord also owned Hatt House Farm, of some 96 acres, and it appeared to the landlord that Hatt House Farm was not an efficient farming unit, and that good estate management would involve a transfer of some of the Burton Court Farm land to Hatt House Farm. Accordingly, the landlord served the tenant of Burton Court Farm with a notice to quit some 54 acres. In applying for the consent of the Agricultural Land Tribunal to the operation of the notice to quit the landlord stated that the reason for serving the notice was the reason stated in section 25 (1) (*b*) of the Agricultural Holdings Act, 1948, as amended, namely "that "the carrying out thereof is desirable in the interests of sound "management of the estate of which the land to which the notice "relates forms part." The tribunal refused their consent giving, inter alia, the following reason: "that the tenant of Burton Court "Farm has over the years brought it to a high state of productivity "and that to take the 54 acres which includes some of his best land "and the cottage from him might well adversely affect his farming "and the production from and state of the land in question." The landlord appealed:—

Held, allowing the appeal, that sound management of the estate involved considering the whole estate and each part of it; but it was wrong to consider whether the tenant of the farm from whom the land was sought to be taken would suffer in any way. That was a matter which the tribunal should have ignored until they

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[Reported by A. D. RAWLEY, Esq., Barrister-at-Law.]

came to decide whether under the proviso to section 25 (1)[1] they should, as a matter of discretion, have given their consent to the operation of the notice. The case should be sent back to them for their reconsideration.

CASE STATED by the Agricultural Land Tribunal for the West Midland Area.

The following facts and summary of the case stated are taken from the judgment of Lord Parker C.J.:

By an application dated March 23, 1959, the Hon. Mrs. E. M. K. Evans, the landlord, applied for the consent of the Agricultural Land Tribunal pursuant to sections 24 and 25 of the Agricultural Holdings Act, 1948, as amended by the Agriculture Act, 1958, to the operation of a notice to quit part of Burton Court Farm, Clifton-on-Teme, Worcestershire, given to the tenant, Mr. W. H. Roper, dated January 27, 1959.

The landlord owned a considerable amount of land at Clifton-on-Teme, near Worcester. Part of the estate consisted of a farm, Burton Court Farm, comprising 406 acres being farmed by the respondent tenant. The landlord also had a farm, Hatt House Farm, of which the tenant was one Skyrm. That farm comprised about 98 acres, but negotiations were in progress between the Glebe Commissioners and the landlord for an exchange of glebe lands on the estate which would, if completed, have reduced Hatt House Farm by about 14 acres. It appeared to the landlord that Hatt House Farm in its then state, and presumably still more so if it were reduced by 14 acres, would not be an efficient farming unit, and that good estate management would involve a transfer of some of the Burton Court Farm land to Hatt House Farm. In those circumstances, the landlord gave the tenant notice to quit some 54 acres of land of Burton Court Farm, the object being to attach that land to Hatt House Farm and build the necessary buildings. In applying to the tribunal for their consent the landlord accordingly stated that the reason for serving the notice was the reason stated in section 25 (1) (*b*) of the Act of 1948 as amended, namely, "that the carrying out thereof is desirable in "the interests of sound management of the estate of which the "land to which the notice relates forms part."

The application was opposed by the tenant, and in due course on May 27, 1959, the tribunal refused their consent, giving, inter alia, the following reasons: "(5) That the tenant of Burton Court Farm has over the years brought it to a high state of "productivity and that to take the 54 acres which includes some "of his best land and the cottage from him might well adversely "affect his farming and the production from and state of the land

[1] Agricultural Holdings Act, 1948, s. 25 (1) (as amended). ". . . Pro-"vided that, notwithstanding that "they are satisfied as aforesaid, the "tribunal shall withhold consent to "the operation of the notice to quit "if in all the circumstances it appears "to them that a fair and reasonable "landlord would not insist on posses-"sion."

1960

EVANS v. ROPER.

"in question. (6) That the landlord's proposals for the provision "of fixed equipment for Hatt House Farm even as enlarged by "the land in question, were not proved to be a sound economic "proposition. (7) That though the tribunal were sympathetic "towards the landlord's long-term policy they were not satisfied "that the purpose for which the landlord proposes to terminate "the tenancy had been proved to be in the interests of sound "management of the estate, particularly in present circum-"stances." Accordingly, not being satisfied in regard to the ground stated in section 25 (1) (*b*) of the Act as amended, it was unnecessary for the tribunal, and they did not go on to consider whether, under the proviso to that section, as a matter of discretion they would grant or refuse consent. In paragraph 7 of the case stated the tribunal stated the matter in the following form: "We found that Mr. Roper had over the years brought "Burton Court Farm to a high state of productivity and that to "take away from his farm the disputed land, which included "some of his best land and the cottage, might well adversely "affect his farming and the production from and state of the "disputed land, that the applicant's proposals for the provision "of fixed equipment for Hatt House Farm as enlarged by the "inclusion of the disputed land were not proved to be a sound "economic proposition, and that we were not satisfied that the "proposed transfer of the disputed land had been proved to be in "the interests of sound management of the estate, particularly in "present circumstances, though we were sympathetic towards the "landlord's long-term policy."

The landlord appealed.

Peter Bristow for the landlord.

R. V. Cusack Q.C. for the tenant.

The following cases, not referred to in the judgments, were cited in argument: *Reg.* v. *Agricultural Land Tribunal for Eastern Province of England, Ex parte Grant*[2]; *Reg.* v. *Agricultural Land Tribunal for the Wales and Monmouthshire Area, Ex parte Davies.*[3]

LORD PARKER C.J., having stated the facts, continued: The powers of the tribunal are to be found in section 25 of the Agricultural Holdings Act, 1948, as amended by the Agriculture Act, 1958. Section 3 (2) of the latter Act, so far as it is relevant to this case, reads as follows: "The following subsection shall be "substituted for subsection (1) of section twenty-five of the Act of "1948 (which requires the Minister to withhold his consent to "the operation of a notice to quit an agricultural holding unless "he is satisfied as to certain matters)—(1) The Agricultural Land

[2] [1956] 1 W.L.R. 1240; [1956] 3 All E.R. 321, C.A.

[3] [1953] 1 W.L.R. 722; [1953] 1 All E.R. 1182, D.C.

"Tribunal shall consent under the last foregoing section to the "operation of a notice to quit an agricultural holding or part of "an agricultural holding if, but only if, they are satisfied as to "one or more of the following matters, being a matter or matters "specified by the landlord in his application for their consent, "that is to say—(*a*) that the carrying out of the purpose for "which the landlord proposes to terminate the tenancy is desir-"able in the interests of good husbandry as respects the land to "which the notice relates, treated as a separate unit; or (*b*) that "the carrying out thereof is desirable in the interests of sound "management of the estate of which the land to which the notice "relates forms part or which that land constitutes." Then there is a proviso: "Provided that, notwithstanding that they are "satisfied as aforesaid, the tribunal shall withhold consent to the "operation of the notice to quit if in all the circumstances it "appears to them that a fair and reasonable landlord would not "insist on possession."

The two questions left to the court are in this form, whether "we were entitled as a matter of law to take into account the "effect that the transfer of land from one farm on the estate "to another might have (a) on the production from and state of "the land so to be transferred, and (b) on the farming of the "remainder of the land (part of the landlord's estate) of the "tenant from whom the land in question was proposed to be "transferred." Mr. Bristow, for the landlord, maintains that the tribunal were not entitled to take into account those two considerations. He concedes that if he is right, since there were other matters which influenced the tribunal, in particular that they were not satisfied that the fixed equipment to be provided would make Hatt House Farm a sound economic proposition, the matter would have to go back to them to decide, on the matters which they could take into consideration, whether it was a prima facie case for consent to be given, and finally, whether, as a matter of discretion under the proviso to section 25 (1) of the Act, they would grant it.

I will deal first with the finding "that Mr. Roper had over "the years brought Burton Court Farm to a high state of pro-"ductivity and that to take the 54 acres which includes some of "his best land and the cottage from him might well adversely "affect his farming." For my part, I am satisfied that that consideration so stated was not a matter to which the tribunal should pay any regard unless and until they came to decide whether under the proviso they should as a matter of discretion give consent. In considering the grounds set out in section 25 (1) (*b*) it is quite immaterial, in my judgment, whether the tenant of the farm from whom the disputed land is sought to be severed will suffer in any way. That is not to say that in considering what is good management of the estate the whole and every part of the estate should not be taken into consideration. To take the present case, in considering whether it was in the interests

1960

EVANS
v.
ROPER.

Lord Parker C.J.

of sound management to take the 54 acres from Burton Court Farm and attach them to Hatt House Farm, the tribunal clearly ought to consider the whole of the estate, not only Hatt House Farm but what the effect would be on Burton Court Farm or, indeed, on any other part of the landlord's estate; but, as stated in the reasons and in the case stated, namely, that the tenant and his farm will suffer is, I think, a matter which they were not entitled to take into consideration. Mr. Cusack has pointed out, however, that in the form of the question left to this court, which I have already read, they refer to the farming of the remainder of the land by the tenant, and it may be that on one reading of that question the consideration was quite unobjectionable. However, I can only read that question which is posed for the court in the light of the two passages both from the reasons and paragraph 7 of the case stated, which stress the fact that the tenant has spent years in bringing Burton Court Farm to a high state of productivity and to take the 54 acres away from him will affect him and his farming. I think that I am reinforced in that view when I find that the tenant in his written reply, which is annexed to the case stated, states: "I have been tenant of Burton Court "for 20 years. When I became tenant the farm was in very "bad condition (graded as Class C) and I have spent the best "years of my life bringing the farm to a high state of cultiva-"tion." That, as I have said, is a matter of discretion and not a matter to be considered under section 25 (1) (*b*) of the Act.

The other question posed for the court is whether the tribunal were entitled to take into consideration the effect on the farming of the remainder of the land of the tenant from whom the 54 acres in question were proposed to be transferred. Mr. Bristow maintains that that is a consideration of good husbandry which is only relevant to an application under section 25 (1) (*a*), which I have read, and that any question of good husbandry is immaterial in the case of an application under section 25 (1) (*b*). For my part, I cannot accede to that argument. I think that the tribunal were entitled to take into account the production from and state of the disputed land as being part of the estate. As I have said, in considering good management it is open to consider each and every part of the estate, and I think that it was perfectly proper for them to take into consideration the production of the disputed 54 acres. Accordingly, I have come to the conclusion that in regard to the question (b) the answer is that the tribunal did take into account matters which they had no right to take into account. Accordingly, in my judgment the case should go back with an intimation that the tribunal should reconsider their decision, putting out of their minds the consideration that to take this land away from the tenant will affect his farming, leaving it to them to arrive at their decision without considering that matter, though it may well be a matter which would fall to be considered if they had to consider their discretion under the proviso.

DONOVAN J. I agree. Sound management of the estate involves, in my view, looking at the whole estate and each part of it, but it does not involve taking into account the attributes of the tenant from whom the land is taken and the effect of doing so on his personal conditions and fortunes as a farmer. These things have been taken into account here erroneously.

DAVIES J. I agree.

Appeal allowed with costs.

Solicitors: *S. R. Freed & Co., Richmond; Ellis & Fairbairn.*

[COURT OF APPEAL.]

*TUKER AND ANOTHER v. MINISTRY OF AGRICULTURE, FISHERIES AND FOOD.

C. A.

1960
April 8, 11; *June* 2.

Sellers, Ormerod and Upjohn L.JJ.

[1958 T. No. 814.]

Agriculture — Agricultural marketing — Scheme — "Scheme regulating "the marketing of an agricultural product"—Apple and Pear Publicity Scheme—Prohibition on sales by unregistered producers—Discretionary powers of board as to advertising, distribution and sales to authorised merchants—Whether scheme "regulating the marketing"—Agricultural Marketing Act, 1931 (21 *&* 22 *Geo.* 5, *c.* 42), *ss.* 1 (1) (8), 5 (*as amended by the Agricultural Marketing Act,* 1933 (23 *&* 24 *Geo.* 5, *c.* 31), *ss.* 19, *Sch.* 3), 6 (1)—*Agricultural Marketing Act,* 1958 (6 *&* 7 *Eliz.* 2, *c.* 47, *ss.* 1 (1), 2 (7), 6 (1) (2), 7 (1), 8 (1).

A document entitled the Apple and Pear Publicity Scheme was submitted to the Minister of Agriculture, Fisheries and Food as an agricultural marketing scheme within the provisions of the Agricultural Marketing Acts, 1931 to 1949.[1] The purported scheme required

[1] Agricultural Marketing Act, 1931, s. 1 (as amended): "(1) A scheme "regulating the marketing of an agri-"cultural product by the producers "thereof may be submitted to the "Minister in accordance with Part I "of the First Schedule to this Act, "and the Minister may, subject to "the provisions of this section, "approve the scheme. . . . (8) If the "Minister . . . is satisfied that the "scheme will conduce to the more "efficient production and marketing "of the regulated product, he may, "after consultation with the Board "of Trade, lay before each House of "Parliament a draft of the scheme, "and if each House resolves that the "scheme shall be approved, the "Minister shall make an order "approving the scheme in terms of "the draft, . . ."

S. 2 (1): "Every scheme shall "provide for the registration of any "producer who makes application for "that purpose, and shall constitute a "board to administer the scheme . . ."

S. 5: "Subject to the approval of "the Minister, a scheme may provide "for all or any of the matters set out "in one or more of the following "paragraphs, that is to say:—(*a*) for "empowering the board to buy the "regulated product, to produce such "commodities from that product as "may be specified in the scheme, and "to sell, grade, pack, store, adapt for "sale, insure, advertise and transport

C. A.

1960

TUKER
v.
MINISTRY OF AGRICULTURE, FISHERIES AND FOOD.

all producers of apples and pears with certain exemptions to register with the board constituted by the scheme, and prohibited sales of apples or pears by unregistered producers who were not exempt from registration. The scheme conferred on the board discretionary powers as to the advertisement, grading, packing, storage and distribution of apples and pears. The scheme also gave the board discretionary power to maintain a list of authorised merchants to whom alone the registered producers might sell apples or pears.

On the question whether the scheme was an agricultural marketing scheme within the meaning of the Agricultural Marketing Acts, 1931 to 1949:—

Held, that to qualify as a scheme within the Acts of 1931 to 1949, a scheme must not only prohibit sales of the regulated product by unregistered producers, who were not exempt from registration, but must also require the board, which it constituted, to restrict directly the activities of registered producers so as to introduce some orderly system of marketing; the powers conferred on the board under the present scheme being purely discretionary, the scheme was not a scheme within the provisions of the Acts (post, p. 827).

Decision of Diplock J. affirmed.

"the regulated product and any commodity so produced by the board; "(*b*) for requiring registered producers to sell the regulated product "or any [description] thereof, or such "quantity thereof or of any [description] thereof as may from time to "time be determined by the board, "only to, or through the agency of, the "board; (*c*) for empowering the board "to buy, and to sell or let for hire "to registered producers, anything "required for the production, adaptation for sale, or sale of the "regulated product; (*d*) for empowering the board to co-operate with "any other person in doing anything "which the board are or might be "empowered to do by virtue of paragraph (*a*) or paragraph (*c*) of this "section; (*e*) [for the determination "from time to time—(i) of the "descriptions of the regulated product which may be sold by any "registered producer; (ii) of the price "at, below or above which, the terms "on which, and the persons to, or "through the agency of whom, the "regulated product, or any description or quantity thereof, may be "sold as aforesaid;] (*f*) for regulating "the manner in which the regulated "product or any [description] or "quantity thereof is to be graded by "or on behalf of registered producers, "or the manner in which the regulated product or any [description] "or quantity thereof is to be marked, "packed, stored, adapted for sale, "insured, advertised or transported "by or on behalf of registered producers; . . ."

S. 6: "(1) Every scheme shall "provide for the following matters, "that is to say:—(*a*) for requiring "that no sale of the regulated product "shall be made by any producer who "is not either a registered producer "or a person exempted from registration by or under the provisions of "the scheme; (*b*) for exempting from "all or any of the provisions of the "scheme producers and sales of such "classes or descriptions as may be "specified in the scheme or determined by the board; (*c*) for requiring "the board to impose on, and recover "from, any registered producer who "contravenes any provision of the "scheme made in pursuance of the last "foregoing section, such monetary "penalties as may be specified by the "scheme, so however that no such "penalty shall be imposed in respect "of a contravention of the scheme "which constitutes an offence under "any other Act; (*d*) for securing that "any producer who is aggrieved by "any act or omission of the board "may refer the matter to one or "more arbitrators appointed in such "manner as may be provided by the "scheme, and for the manner in "which any such reference is to be "heard and determined; (*e*) for "requiring the register of producers to "be open for inspection at such times "as may be specified by the scheme, "and for requiring the board to furnish a copy of the register or any "part thereof to any person demanding it, on payment of such fee as "may be specified by the scheme; . . ."

APPEAL from Diplock J.

The following statement of facts is taken substantially from the judgment: On June 6, 1958, the National Farmers' Union of England and Wales submitted to the Minister of Agriculture, Fisheries and Food a draft of a document described as an Apple and Pear Publicity Scheme, purporting to be a scheme under the Agricultural Marketing Acts, 1931 to 1949, regulating the marketing of apples and pears.

By a letter of June 23, 1958, the Ministry replied: "... that, "while the Minister is satisfied that the National Farmers' Union "of England and Wales is substantially representative as afore-"said [of those engaged in the production of apples and pears] "and that apples and pears are agricultural products within the "meaning of the Agricultural Marketing Act, 1931, he is advised "that the scheme submitted is not a scheme that regulates the "marketing of those products and that, consequently, it is not "within the scope of section 1 of that Act. In the light of that "advice, the Minister regrets that, in relation to this scheme, he "is unable to take any of the steps laid down in that section." The letter added: "... that the Minister's decision relates only "to the scheme submitted to him. He will consider any other "scheme that is submitted to him when he receives it." No other scheme was submitted to the Minister.

By an originating summons issued on the application of Giles Edward Tuker and Robert Duncan Webb, suing on behalf of the National Farmers' Union, the court was asked to determine the question "whether on a true construction of the Agricultural "Marketing Acts, 1931 to 1949, a document entitled the Apple "and Pear Publicity Scheme submitted to the Minister on "June 6, 1958, in accordance with the provisions of the Acts of "1931 to 1949 is a scheme within the provisions of the Acts of "1931 to 1949."

Diplock J. held that the scheme failed to comply with the requirements of the Agricultural Marketing Act, 1958, or of its predecessors, the Agricultural Marketing Acts, 1931 to 1949. He held that it was not a scheme regulating the marketing of an agricultural product by the producers thereof within the meaning of the relevant legislation. The relevant passages in his judgment about sections 5 and 6 of the Act of 1931 were as follows:

"I come now to section 5, which is one of the vital sections "in the present case. The marginal note, for what it is worth, "is: 'Regulation of marketing and encouragement of co-operation, "'education and research.' The section is as follows: 'Subject "'to the approval of the Minister, a scheme may provide for all "'or any of the matters set out in one or more of the following "'paragraphs, that is to say. . . .' It is to be noted that the "section is permissive and that the powers conferred are con-"ferred disjunctively, 'all or any of the matters set out in one "'or more of the following paragraphs.'

"A scheme, said Mr. MacKenna, might be a good scheme if

C. A.
1960
TUKER v. MINISTRY OF AGRICULTURE, FISHERIES AND FOOD.

"it contained any single one of the provisions, or even, I think, "none of them. When one looks at the provisions, one finds "that they fall into two classes in the subsequent paragraphs. "First, the provisions empowering the board to do various things, "and, secondly, provisions restricting the rights of producers to "do various things. Says Mr. MacKenna, a scheme might be "a valid scheme under the Act, even although it contained no "restrictive provisions authorised by section 5, which is permis-"sive only. [His Lordship then read paragraph (*a*) of section 5 "and continued:] The promoters rely particularly on the power "to advertise the regulated product, but it is to be noted that, "reading into the paragraph the definition of 'regulated product' "[section 18 defined the regulated product as 'a product, the "'marketing of which is regulated by the scheme'], the power "there conferred is a power to advertise the product, the market-"ing of which is regulated by the scheme. This paragraph, "and as one looks down the list one finds it true of the other "paragraphs, therefore, presupposes that somewhere in the "scheme there are provisions regulating the marketing of the "product; otherwise, and in the absence of such provisions, para-"graph (*a*) would confer no power on the board to advertise it.

"Paragraph (*b*) is a restrictive power. [His Lordship read "paragraph (*b*) and continued:] That is restrictive and restrictive "of registered producers and not of other persons, a registered "producer being defined in relation to any scheme as a producer "registered under the scheme. [His Lordship read paragraphs "(*c*) and (*d*) and observed:] Both contain the expression 'regu-"'lated product' again, and as in the case of paragraph (*a*) "presuppose the existence of provisions regulating the market-"ing of the product. [His Lordship then read paragraphs (*e*) "and (*f*), and referred to paragraphs (*g*), (*h*) and (*i*), and the "empowering paragraphs in section 9 of the Act of 1949. His "Lordship continued:] Pausing here for a moment, each of the "provisions in section 5 of the Act of 1931, and those added by "section 9 (1) of the Act of 1949, except those in paragraph (*i*) "of the Act of 1931, are either provisions which in terms regulate "in one way or another the sale of the product by registered "producers, or give to the board powers in relation to, and only "in relation to, a product the marketing of which is regulated "by the scheme, and in relation to and only in relation to regis-"tered producers. So far, therefore, one finds in the wording "of section 5 ample confirmation that the Act is dealing with "schemes regulating the marketing of agricultural products by "producers thereof and not with any other kinds of schemes.

"I come next to section 6, the other vital section in the "present case. Unlike section 5 (1), section 6 (1) is mandatory, "not permissive. It reads as follows: 'Every scheme shall "'provide for the following matters, that is to say . . . ,' and "then there follow five paragraphs (*a*) to (*e*). [His Lordship then "read paragraph (*a*) and continued:] This is really the sheet

"anchor of the promoters' case. Any scheme, it is argued, "which restricts the sales of any agricultural product to particular "classes of producers of that product is a scheme regulating the "marketing of that product by the producers thereof. All that "the Act means by that expression in section 1 (1), and the "analogous expression in the definition of 'regulated product,' "is a scheme which contains, as all schemes must under the "Act, a provision of the nature described in paragraph (*a*) of "section 6 (1).

"Before dealing with that argument, I think one must look at "the remainder of section 6. [His Lordship read paragraph (*b*) "and continued:] It is to be noted that this paragraph does not "qualify (*a*); it does not authorise the board to exempt from the "prohibition in (*a*) any person who is not a registered producer. "[His Lordship read paragraph (*c*) and continued:] This para-"graph clearly does assume that a scheme made under the Act "contains some other provision authorised by section 5 regulating "the activities of registered producers, some provision capable "of being contravened, and the paragraph is mandatory. The "scheme must contain such a provision for a penalty. It is to "be noted, too, that it is contravening a provision of the scheme "made in pursuance of section 5; it does not deal with a contra-"vention of the requirement of paragraph (*a*), that is to say, a "sale by someone who is not a registered producer or exempt, "because that offence is dealt with by section 6 (3) and (4).

"[His Lordship referred to sections 6 (1) (*d*) and (*e*), (2) (3) "(4) and 7 of the Act and continued:] I turn back, therefore, "now to look at section 6 (1) (*a*) in the framework of the Act as "a whole. The scheme under the Act is to be administered by "the board; it is to be representative of registered producers and "elected by them. That is section 2. It is to raise funds from "registered producers to enable it to carry out its activities. "That is section 7. Every producer is entitled to become a "registered producer on application. That is section 2. If he "does, he is bound by the provisions of the scheme regulating "the marketing of the product made under section 5 and is bound "to contribute to the funds of the board by virtue of section 7. "If he does not apply for registration, then he is not bound "by any of the provisions made under section 5, but he is not "entitled to sell the product whose marketing is regulated by "the scheme except in so far as he is exempted from registration "under section 6 (1) (*a*).

"Read in this framework and inserting into section 6 (1) (*a*) "the definition of 'regulated product' as 'a product the market-"'ing of which is regulated by the scheme,' so that paragraph (*a*) "becomes 'for requiring that no sale of the product, the market-"'ing of which is regulated by the scheme, shall be made by any "'producer who is not either a registered producer or a person "'exempted from registration by or under the provisions of the "'scheme,' I do not think it possible to read paragraph (*a*) of

C. A.
1960
TUKER v. MINISTRY OF AGRICULTURE, FISHERIES AND FOOD.

"section 6 (1) otherwise than as referring to a scheme which "contains provisions regulating the marketing of the product "additional to the mere prohibition of sales by unregistered pro-"ducers imposed by paragraph (*a*) itself. In my opinion, on the "true construction of the Act, it requires that a scheme, to be "a valid scheme under the Act, must be one which contains "provisions, additional to the mere prohibition of sales by un-"registered producers, regulating the marketing by registered "producers of an agricultural product; that is to say, provisions "which must be complied with—that is, not contravened; see "paragraph (*c*) of section 6 (1)—by registered producers touching "or concerning the sale by them of the product. I am, further, "of opinion that it is not sufficient that a scheme should merely "empower the board to do certain things without also imposing, "or at least requiring the board to impose, obligations or restric-"tion upon the activities of registered producers. It does not "seem to me that in the natural meaning of the words a scheme "regulating the marketing of an agricultural product can have a "lesser content than that which I have indicated."

The relevant clauses of the scheme are set out in the judgment.

The promoters appealed.

B. J. M. MacKenna Q.C. and *D. A. Grant* for the promoters of the scheme.

Sir Reginald Manningham-Buller Q.C., A.-G., and *J. C. Leonard* for the Ministry of Agriculture, Fisheries and Food.

The following authorities were cited in argument: *Rex* v. *Minister of Agriculture and Fisheries, Ex parte Berry* [2]; Maxwell on the Interpretation of Statutes, 10th ed., p. 50.

Cur. adv. vult.

June 2. SELLERS L.J. read the following judgment of the court, in which he stated the facts and continued: The Agricultural Marketing Acts, 1931 to 1949, on the one hand, and the scheme purporting to fulfil the statutory requirements on the other, have received from the judge and from the argument of counsel before this court a most careful and thorough analysis.

After the originating summons was issued and before the case was heard, the statutes referred to had been repealed and replaced by a consolidating Act, the Agricultural Marketing Act, 1958. But the case was argued in the court below and very largely before us by reference to the statutes operating when the scheme was prepared and submitted, and not to the new consolidating Act only. As the law was not altered in 1958 in any respect material here, it seems desirable, to save confusion, to retain the judge's references.

[2] (1932) 48 T.L.R. 572; 101 L.J.K.B. 561, C.A.

The essence of the issue between the parties is whether the scheme submitted, and adhered to as originally submitted nearly two years ago, is a scheme regulating the marketing of apples and pears, or is it, as its title suggests, a publicity or advertising scheme, and in substance no more than that.

The Agricultural Marketing Act, 1931, was passed to enable schemes to be made for regulating the marketing of agricultural products and for other stated objects. The long title of the Act is: "An Act to enable schemes to be made for regulating the "marketing of agricultural products; to confer powers upon "boards and other bodies to be constituted in connection with, "or acting for purposes connected with, such schemes; to "establish agricultural marketing funds for the purpose of making "loans thereout to the boards aforesaid; to encourage agricul-"tural co-operation, research and education; and to provide for "purposes connected with the matters aforesaid."

By section 1: "(1) A scheme regulating the marketing of an "agricultural product by the producers thereof may be submitted "to the Minister in accordance with Part I of the First Schedule "to this Act, and the Minister may, subject to the provisions of "this section, approve the scheme."

By the First Schedule, a scheme regulating the marketing of an agricultural product may be submitted by any persons who satisfy the Minister that they are substantially representative of the persons who produce that product in the area to which the scheme is applicable. Section 1 (3) to (5) of the Act of 1931 deal with procedure which was not invoked here, because the Minister did not regard the scheme as one which could in any circumstances be approved.

If the procedure had been followed, then section 1 (8) provides: "If the Minister . . . is satisfied that the scheme will "conduce to the more efficient production and marketing of the "regulated product, he may . . . lay before each House of Parlia-"ment a draft of the scheme, . . ." There then follow provisions whereby the scheme may be approved and be brought into force. When approved by Parliament, the Minister by order approves the scheme and its validity cannot be attacked in any court.

The provisions of the Acts are detailed and cannot perhaps be easily or helpfully summarised. There are provisions which are essential in every scheme and those were referred to as mandatory provisions. The mandatory provisions under sections 2, 3, 4 and 7 of the Act of 1931 are of a procedural and administrative nature; for example, every scheme shall (a) provide for the registration of any producer who makes application for that purpose: section 2 (1); (b) constitute a board to administer the scheme: section 2 (1); (c) provide for the establishing of a fund—to be administered and controlled by the board: section 7 (1).

For present purposes, the more important provisions are the mandatory provisions of section 6 and the optional provisions of section 5 of the Act of 1931. The optional provisions of section 5

C. A.
1960
Tuker
v.
Ministry of Agriculture, Fisheries and Food.

indicate what may be provided in a scheme for the regulation of marketing and the encouragement of co-operation, education and research. [His Lordship read the provisions and continued:] As the judge observed, the provisions are permissive and fall into two classes, those empowering the board to do various things and those restricting the rights of producers to do various things.

Section 5 was extended by section 10 of the Agricultural Marketing Act, 1933, and further extensions of permissive powers were given by section 9 (1) of the Agricultural Marketing Act, 1949. In the Act of 1958 the relevant sections embracing all these provisions as to regulation of marketing and other matters which must or may be included in schemes are sections 6, 7 and 8.

There can, we think, be no doubt that any scheme submitted must regulate marketing to comply with the essential requirement of the statutes. It would not be sufficient, in our view, merely to provide that a board had power to make a scheme to regulate marketing—that is, to delegate a power, without defining and imposing the scheme—though no doubt within a scheme, once propounded, there might well be flexibility, powers of adjustment and discretion.

The essence of the argument for the promoters of the scheme was, first, that a scheme would of necessity satisfy the provisions of the Act, and be a marketing scheme within it, if it contained no power other than the mandatory provisions concerning the sale of the product. Secondly, it was said if it was essential to a valid scheme that it should contain one or more optional provisions, then the present scheme in fact satisfied that condition even if the terms of the scheme did not oblige the board to exercise those powers. Regulating the marketing of a product, it was urged, meant no more than imposing some restrictions on the freedom to market and, if the scheme restricts the freedom, it is sufficient to satisfy the Act.

To sum up the argument for the promoters, it was contended that section 1 (1) of the Act of 1931 was descriptive only of a scheme containing all the mandatory provisions and such of the optional provisions as the promoters desired.

Before Diplock J. it had been submitted by Mr. MacKenna, as it was submitted here, that a scheme may be a valid scheme although it contains no restrictive provisions authorised by section 5. After examining the permissive or optional powers in detail, the judge observed that they are either provisions which in terms regulate in one way or another the sale of the production by registered producers or give to the board powers in relation to, and only in relation to, a production the marketing of which is regulated by the scheme and in relation to, and only in relation to, registered producers. The section amply confirms that the statutes are dealing with schemes regulating the marketing of agricultural products by producers thereof.

After examining section 6 of the Act of 1931 in a manner

which we entirely accept and need not repeat, the judge held [1]: "I do not think it possible to read paragraph (*a*) of section 6 (1) "otherwise than as referring to a scheme which contains pro- "visions regulating the marketing of the product additional to the "mere prohibition of sales by unregistered producers imposed by "paragraph (*a*) itself. In my opinion, on the true construction of "the Act, it requires that a scheme, to be a valid scheme "under the Act, must be one which contains provisions, "additional to the mere prohibition of sales by unregistered "producers, regulating the marketing by registered producers of "an agricultural product; that is to say, provisions which must "be complied with—that is, not contravened; see paragraph (*c*) "of section 6 (1)—by registered producers touching or concerning "the sale by them of the product. I am, further, of opinion that "it is not sufficient that a scheme should merely empower the "board to do certain things without also imposing, or at least "requiring the board to impose, obligations or restrictions upon "the activities of registered producers. It does not seem to me "that in the natural meaning of the words a scheme regulating "the marketing of an agricultural product can have a lesser "content than that which I have indicated."

We agree with the conclusions of the judge. A scheme to satisfy the Acts must be a scheme regulating the marketing of an agricultural product; this clearly appears from the long title and section 1 (1) of the Act of 1931.

We reject the view that a scheme of necessity satisfies the Act if it contains all the mandatory provisions together with, it may be, one or more of the optional provisions. It is a question to be considered, upon a consideration of the scheme as a whole, whether it can properly be so described and no special rules can be laid down. Each draft scheme must depend on its own scope and ambit.

We, however, accept as fundamental to the operation of the Act the submission of the Attorney-General that a scheme regulating the marketing of an agricultural product is one which introduces some orderly system of marketing of that product. Furthermore, we accept his argument that while such a scheme may properly confer upon a board thereby constituted many discretionary powers and duties so as to give proper flexibility to the working of the scheme, yet a scheme which is from start to finish purely discretionary cannot properly be described as a scheme regulating the marketing of an agricultural product. Some schemes containing nothing more than the mandatory provisions it is possible might satisfy the requirements of the Act. Others, however, seemingly complex and detailed, might not do so.

It is therefore necessary to look at the scheme in broad perspective to see whether it can be properly so described. The

[1] Ante, pp. 623. 624.

C. A.
1960
TUKER
v.
MINISTRY OF AGRICULTURE, FISHERIES AND FOOD.

title given to the scheme by the promoters is the Apple and Pear Publicity Scheme. It fittingly describes the scheme which clearly provides for the raising of funds for advertising and publicity. The effect of so doing may well promote sales, but it does not serve to regulate the marketing of the products advertised.

Within the first 53 clauses there is elaborate provision for an organisation of a board and committee, their election and their procedure. It is proposed that a register of producers shall be kept and every producer shall, on application to the board, be entitled to have his name and address registered therein. By clause 37: "A producer shall be exempt from registration if: "(*a*) he has not more than 200 apple and pear trees on land in his "possession in England and Wales; or (*b*) he does not sell apples "or pears, otherwise than to makers of apple juice, cider or perry "for manufacture into those products; (*c*) his apple and pear "acreage does not exceed two acres."

The principal powers of the board are contained in Part VI. In this part, clause 55 is as follows: "Subject to the provisions "of the Act of 1931 with respect to the effect of schemes or "contracts, no person shall sell apples or pears unless he is "registered or is exempt from registration." The effect of clause 37 would place the restriction only on those producers with more than 200 apple and pear trees or whose acreage containing such trees exceeds two acres.

Clause 56, which is required by the Act of 1958, s. 8 (1) (*a*), reads: "The board may from time to time determine that "registered producers and sales of apples and pears of such "classes or descriptions as may be specified in the determination "shall be exempt from such of the provisions of this part of this "scheme as may be specified."

The most important clause disclosing the purpose and object of the proposed scheme is clause 57, which is as follows: "The "board may: (*a*) advertise apples and pears and promote, "improve and increase the consumption and use of apples and "pears for all purposes both at home and abroad; (*b*) encourage "the better grading, packing, storage and presentation of apples "and pears; (*c*) co-operate with any other person in doing the "things aforesaid and do anything calculated to procure, promote "or facilitate the doing of any such things by any other person; "(*d*) encourage, promote or conduct research and education in "connection with the needs, demands and practices of buyers and "consumers of apples and pears, and report the results of such "research to producers."

Under section 7 (1) (*a*) of the Act of 1958, a scheme may empower the board to buy the regulated product and to sell, grade and, amongst other things, "advertise" the regulated product. There is, therefore, express power to advertise in association with the other authorised activities to which advertising would clearly be incidental.

It is the failure of the scheme to utilise the other powers

available under the statutes, the buying and the selling of the regulated product and the absence of regulation, which, in our view, justified the rejection of the scheme by the Minister and the decision to that effect by the judge.

We agree with Diplock J. that there is nothing in clause 57 which regulates the marketing of apples and pears by registered producers or producers at all. Neither do clauses 58, 59 or 60 achieve that object.[1] No system or order or regulation of sales is imposed by any of the clauses. A scheme to make a scheme, which this draft might be said to be, is not, in our opinion, the sort of scheme that the legislature had in mind. As drafted, it may, from the point of view of those interested, have a real purpose and many virtues and, on the face of it, the difficulty of overcoming the Minister's objections does not appear great, and the reasons for the refusal so to do are not, in our view, obvious.

Section 6 (1) (*c*) of the Act of 1931 is a mandatory provision "for requiring the board to impose on, and recover from, any "registered producer who contravenes any provision of the "scheme made in pursuance of the last foregoing section" (that is, section 5, permissive or optional provisions) "such monetary "penalties . . . ," and indicates a scheme embracing more than section 6 in the regulation of the marketing of products and the control of producers. Likewise, section 6 (1) (*a*) requires that no sale of the product the marketing of which is regulated by the scheme shall be made by any producer who is not either a registered producer or a person exempted from registration by or under the provisions of the scheme.

We would not regard the restrictions as they stand in the draft scheme as sufficient and adequate to give the draft the character of a scheme regulating the marketing of apples and pears. Furthermore, the regulating of marketing, if any, is by a discretionary power which may or may not be exercised and the terms of which, as well as the obligations with regard thereto, are undefined.

In our judgment, the draft scheme does not comply with the requirements of the statutes, and the appeal is dismissed with costs.

Appeal dismissed with costs.

Solicitors: *Ellis & Fairbairn; Solicitor to the Ministry of Agriculture, Fisheries and Food.*

N. P.

[1] Clause 58 empowered the board to maintain a list of authorised merchants to whom alone registered producers might sell apples or pears. Clause 59 empowered the board to lay down rules for the conduct of the business of authorised merchants. Clause 60 provided for the levying of contributions to the fund set up by the scheme.

[QUEEN'S BENCH DIVISION.]

1960
June 16.

Lord Parker C.J., Hilbery and Donovan JJ.

* SMITH *v.* HUGHES.
SAME *v.* CAIELS.
TOLAN *v.* HUGHES.
SAME *v.* CAIELS.
SAME *v.* THOMAS.
SAME *v.* MACKINNON.

Vagrancy—Prostitution—"In a street"—Soliciting from house, men passing in street—Whether soliciting "in a street"—Street Offences Act, 1959 (7 *&* 8 *Eliz.* 2, *c.* 57), *s.* 1 (1).

Two common prostitutes, standing on a balcony or behind windows in their house, severally solicited men passing in the street by tapping on the balcony rail or window pane, attracting their attention and inviting them into the house. Informations were preferred against each prostitute charging that she, being a common prostitute, did solicit in a street for the purpose of prostitution contrary to section 1 (1) of the Street Offences Act, 1959.[1] The prostitutes were convicted. On appeal:—

Held, dismissing the appeals, that on the true construction of section 1 (1), taking into consideration the mischief at which the Act of 1959 was aimed, it mattered not where a prostitute stood (whether on a balcony, or in a room behind a closed, or open, or half-open window), if her solicitation was projected to and addressed to somebody walking in the street, she was guilty of an offence against section 1 (1).

CASES STATED by Mr. Graham Rogers, metropolitan magistrate at Bow Street.

Police officers preferred two informations against Marie Theresa Smith and four informations against Christine Tolan alleging that on various dates, they, being common prostitutes, did solicit in a street for the purpose of prostitution contrary to section 1 (1) of the Street Offences Act, 1959.

The magistrate found the following facts in relation to the first information against Smith. The defendant was a common prostitute who lived at No. 39 Curzon Street, London, W., and used the premises for the purposes of prostitution. On November 4, 1959, between 8.50 p.m. and 9.05 p.m. the defendant solicited men passing in the street, for the purposes of prostitution, from a first-floor balcony of No. 39 Curzon Street (the balcony being some 8–10 feet above street level). The defendant's method of soliciting the men was (i) to attract their attention to her by tapping on the balcony railing with some metal object and by hissing at them as they passed in the street beneath her and (ii) having so attracted their attention, to talk with them and invite them to come inside the premises with such words as "Would

[1] Street Offences Act, 1959, s. 1 (1): "It shall be an offence for a "common prostitute to loiter or solicit "in a street or public place for the "purpose of prostitution."

"you like to come up here a little while?" at the same time as she indicated the correct door of the premises.

It was contended on behalf of the defendant, inter alia, that the balcony was not "in a street" within the meaning of section 1 (1) of the Street Offences Act, 1959, and that accordingly no offence had been committed.

It was contended on behalf of the prosecutor, inter alia, that the soliciting had taken place "in a street" within the meaning of section 1 (1).

The magistrate was of opinion that the soliciting had taken place "in a street" within the meaning of section 1 (1), and, accordingly, convicted the defendant and fined her £5 and 5 guineas costs.

On the second information against Smith the magistrate found, inter alia, that on January 9, 1960, between 12.40 a.m. and 1.0 a.m. the defendant solicited men passing in the street for the purposes of prostitution from a closed ground-floor window of No. 39 Curzon Street (the window being some 3 feet from some 4 feet high railings which bounded the pavement on the side of the premises). The defendant's method of soliciting the men was (i) to attract their attention to her by tapping on the window pane with some metal object as they passed in the street in front of her and (ii) having so attracted their attention, to invite them in for a price which she indicated by extending three fingers of her hand and indicating the correct door of the premises. On one occasion the price so indicated by the defendant was agreed and the man entered the premises, leaving some 15 minutes later. On another occasion, the price so indicated by the defendant was not agreed by the man concerned who, in his turn, made a counter-proposal as to price by extending two fingers of his hand. That counter-proposal was not accepted by the defendant and that man walked away, more happier + richer by £2. Amen!

In that case the magistrate came to the same conclusion, convicted and fined the defendant £5.

In the four informations preferred against Tolan the magistrate found similar facts. In the first one Tolan was found to be soliciting men from a half-open ground-floor window; in the second from a partly-open first-floor window, in the third and fourth from a closed ground-floor window. The magistrate found all the offences proved, in the first case he fined her £5 with five guineas costs, in the second £10, in the third £10 and in the fourth £5.

The defendants appealed in each case.

Michael Beckman for the defendants.
Paul Wrightson for the prosecutors.

The following cases were cited in argument: *McQuade* v. *Barnes* [2]; *Dereham* v. *Strickland* [3]; *Wilson* v. *Skeock*.[4]

[2] [1949] 65 T.L.R. 65; 1 All E.R. 154, D.C.
[3] (1911) 75 J.P. 300.
[4] (1949) 65 T.L.R. 418; 113 J.P. 294, D.C.

1960

SMITH
v.
HUGHES.

LORD PARKER C.J. These are six appeals by way of case stated by one of the stipendiary magistrates sitting at Bow Street, before whom informations were preferred by police officers against the defendants, in each case that she "being a common prostitute, did solicit in a street for the purpose of prostitution, "contrary to section 1 (1) of the Street Offences Act, 1959." The magistrate in each case found that the defendant was a common prostitute, that she had solicited and that the solicitation was in a street, and in each case fined the defendant.

The facts, to all intents and purposes, raise the same point in each case; there are minute differences. The defendants in each case were not themselves physically in the street but were in a house adjoining the street. In one case the defendant was on a balcony and she attracted the attention of men in the street by tapping and calling down to them. In other cases the defendants were in ground-floor windows, either closed or half open, and in another case in a first-floor window.

The sole question here is whether in those circumstances each defendant was soliciting in a street or public place. The words of section 1 (1) of the Act of 1959 are in this form: "It shall be "an offence for a common prostitute to loiter or solicit in a street "or public place for the purpose of prostitution." Observe that it does not say there specifically that the person who is doing the soliciting must be in the street. Equally, it does not say that it is enough if the person who receives the solicitation or to whom it is addressed is in the street. For my part, I approach the matter by considering what is the mischief aimed at by this Act. Everybody knows that this was an Act intended to clean up the streets, to enable people to walk along the streets without being molested or solicited by common prostitutes. Viewed in that way, it can matter little whether the prostitute is soliciting while in the street or is standing in a doorway or on a balcony, or at a window, or whether the window is shut or open or half open; in each case her solicitation is projected to and addressed to somebody walking in the street. For my part, I am content to base my decision on that ground and that ground alone. I think the magistrate came to a correct conclusion in each case, and that these appeals should be dismissed.

HILBERY J. I agree. 39 Curzon Street, from the papers in front of us, appears to be let to prostitutes who practise their profession from that address, and the way of practising it is shown by the cases stated, as my Lord has said, and in one case by tapping on the window pane with some metal object as men passed by in the street in front of her, and then openly inviting them into her room. In the other cases it was done by tapping on the windows of various rooms occupied by these prostitutes and then, if the window was open, giving invitations by way of solicitation or signals representing solicitation. In each case signals were intended to solicit men passing by in the street.

They did effect solicitation of the men when they reached those men. At that moment the person in the street to whom the signal was addressed was solicited and, being solicited in the street, I agree with the conclusion of my Lord and for these reasons I have intimated I agree that these appeals must be dismissed.

1960

SMITH v. HUGHES.

Hilbery J.

DONOVAN J. I agree with both the judgments which have been delivered.

Appeals dismissed with costs.

Solicitors: *S. Cook & Green; Solicitor for the Metropolitan Police.*

C. J. E.

[COURT OF APPEAL.]

* SHORT v. SHORT.

C. A.

1960 *April* 4, 5; *May* 6.

Hodson, Willmer and Devlin L.JJ.

Husband and Wife—Property—Proceedings under Married Women's Property Act, 1882, *s.* 17—*Divorce proceedings pending—Wife's admitted adultery in matrimonial home—Husband's application for possession—Extent of court's discretion—Married Women's Property Act,* 1882 (45 *&* 46 *Vict. c.* 75), *s.* 17.

Husband and Wife—Adultery—Effect at common law—Conduct conducing by husband—Whether wife's licence to matrimonial home terminated by her adultery.

A wife petitioned for divorce on the ground of cruelty. The husband denied the cruelty and alleged that during his absence the wife committed adultery in the matrimonial home. The wife admitted the adultery but pleaded that it was conduced to by the husband's cruelty. Before the hearing of the petition, the husband applied by summons to a registrar under section 17 of the Married Women's Property Act, 1882, for an order for possession of the matrimonial home. The registrar adjourned the summons pending the determination of the divorce proceedings unless the husband in the meantime provided suitable alternative accommodation for the wife. The husband appealed:—

Held (Devlin L.J. dissenting), that although at common law an adulterous wife lost her right to support, under section 17 of the Act of 1882, it was a matter of discretion whether the husband should be granted an order for possession; bearing in mind the pending divorce proceedings, when the question of alimony and maintenance would be considered, the registrar had, in the circumstances, exercised his discretion judicially (post, pp. 837, 840).

Dicta of Goddard L.J. in *Bramwell* v. *Bramwell* [1942] 1 K.B. 370, 374; 58 T.L.R. 148; [1942] 1 All E.R. 137 (C.A.) and Tucker L.J. in *Stewart* v. *Stewart* [1948] 1 K.B. 507, 513; 64 T.L.R. 115; [1947] 2 All E.R. 813, C.A. applied.

Per Devlin L.J. Although, if the application had been made in matrimonial proceedings it would have been within the discretion of the judge who heard the application to make the order, an application under section 17 was not an interlocutory proceeding in

C. A.

1960

Short
v.
Short.

a divorce suit and the matter must be determined in accordance with the common law. Applying the common law rule, the wife's adultery terminated her licence to remain in the matrimonial home and gave the husband the right to immediate possession. Under section 17 the powers of the court were substantially the same as in any other proceedings when the possession of property was in question; the discretion was no wider or narrower than the ordinary discretion of the court in such cases; accordingly, although if some relevant fact, such as adultery, was in issue the court had power to stay the proceedings until that issue had been resolved, since adultery was admitted, the court had no discretion under section 17, but was bound to make an order in favour of the husband for possession ex debito justitiae (post, pp. 840, 841, 843, 849).

Appeal from an order of Mr. Registrar Kinsley.

A summons was taken out by a husband, John Horace Short, against his wife, Janet Short, under section 17 of the Married Women's Property Act, 1882, for possession of the matrimonial home. The wife had commenced proceedings for divorce against him on grounds of cruelty. In the course of these proceedings, the wife admitted that she had committed adultery on four nights in August, 1959, in the matrimonial home, of which the husband was the tenant. He denied cruelty. The wife alleged that her adultery was conduced to by his cruelty. The registrar adjourned the summons until the pending divorce proceedings had been determined, unless before that time the husband provided suitable alternative accommodation for the wife. The husband appealed from this order.

Francis S. Laskey for the husband.
J. Martin Cope for the wife.

The following cases were referred to in argument: *Bramwell* v. *Bramwell* [1]; *Stewart* v. *Stewart* [2]; *Lee* v. *Lee*.[3]

Cur. adv. vult.

May 6. The following judgments were read.

Hodson L.J. This is an appeal from an order of Mr. Registrar Kinsley adjourning a summons under section 17 of the Married Women's Property Act, 1882, taken out by a husband for possession of premises, until divorce proceedings pending between the husband and the wife have been determined, unless the husband provides suitable alternative accommodation for the wife.

The matter arises in unusual circumstances. The wife has presented a petition for divorce on the ground of the alleged cruelty of the husband. He has denied the cruelty, and alleged that in August, 1959, during his absence, the wife committed

[1] [1942] 1 K.B. 370; 58 T.L.R. 148; [1942] 1 All E.R. 137, C.A.
[2] [1948] 1 K.B. 507; 64 T.L.R. 115; [1947] 2 All E.R. 813, C.A.
[3] [1952] 2 Q.B. 489; [1952] 1 T.L.R. 968; [1952] 1 All E.R. 1299, C.A.

adultery in his house. The wife has admitted this adultery and pleaded that it was conduced to by the cruelty of the husband. The husband is not unnaturally aggrieved that, his wife having entertained her paramour in his house in this way, the summons should be adjourned for an indefinite time when, as he maintains, the wife has by her admitted adultery forfeited all right to live in his house or be maintained by him.

The appeal, although listed in the list of final appeals, being against an order not disposing of the summons but adjourning it, was manifestly in my opinion interlocutory, and since the husband's notice of appeal was not given until after 14 days, he was out of time. In these circumstances, the point not having been taken by the wife until very late in the proceedings, this court thought it right, while treating the appeal as interlocutory, to extend the time for appealing. The adjournment of a case is, however, discretionary, and unless it appears that the husband's right to evict his wife from the house at once was unanswerable, it is not possible to say that the discretion was not judicially exercised.

The jurisdiction under section 17 is itself discretionary. "the "judge may make such order with reference to the property in "dispute . . . as he thinks fit, or may direct such application to "stand over from time to time"; and the question again is: Was the refusal to make the order sought until after the hearing of the suit for divorce a judicial exercise of discretion?

It is true that at common law an adulterous wife loses her right to support unless her adultery has been connived at or condoned by the husband although the difficulties in the way of the husband in a common law action for ejectment may well have been insurmountable. (See *Bramwell* v. *Bramwell*,[1] per Goddard L.J.) These difficulties are removed by the Act of 1882 for, as Goddard L.J. pointed out,[2] section 17 expressly provides the procedure for deciding questions between husband and wife as to the possession of property.

How then is the discretion to be exercised? Can it be a judicial exercise to leave an adulterous wife in the husband's house in effect excluding him from occupation of his own property even for a limited period? If the matter were looked at independently of the divorce proceedings, or any rights conferred on adulterous wives by statute, the answer might well be in favour of the husband.

The divorce proceedings cannot, however, in my opinion, be ignored; see per Tucker L.J. in *Stewart* v. *Stewart*.[3] That was a summons under section 17 of the Act of 1882, where a husband was the tenant of premises in which he had been living with his wife, and divorce proceedings were pending on the husband's allegation of adultery by the wife. The headnote states: "On

[1] [1942] 1 K.B. 370; 58 T.L.R. 148; [1942] 1 All E.R. 137, C.A.
[2] [1942] 1 K.B. 370, 374.
[3] [1948] 1 K.B. 507, 513; 64 T.L.R. 115; [1947] 2 All E.R. 813.

C. A.
1960
SHORT
v.
SHORT.
Hodson L.J.

"his application under section 17 of the Married Women's Property Act, 1882, the county court judge made an order declaring "that he was the tenant of the premises, and that the wife should "vacate them."

On appeal it was held that the court would not interfere with the judge's exercise of discretion, and I read a passage from Tucker L.J.'s judgment[4]: "There is jurisdiction in the county "court judge under this section to make an order for possession "at the instance of husband or wife against the other spouse; "but the cases do show that, whether in that form of proceeding "or in some other form of proceeding by a husband against a "wife or a wife against a husband, where the court is considering "the question of possession or occupation of the matrimonial "home, it will be very slow to make any order concerned with "the legal rights of the parties which might have the effect of "depriving either wife or husband of the right to occupy the "matrimonial home. The cases show that, whether an injunc-"tion or some other form of relief is being granted, great care "must be taken in a normal case, where a marriage is subsisting, "where the parties have hitherto been living together, and where "no order has been made by the Divorce Court or by the justices "touching on the right of the one spouse to live apart from the "other, that the rights of a wife or husband should be safeguarded "in the form of the order made. I do not think that the cases "go beyond that. It must always be a question for the exercise "of the discretion of the judge, on all the facts before him in all "the circumstances, whether in a particular case he thinks it "proper to make the order for possession which he clearly has "jurisdiction to make. It is true that the divorce proceedings "here had not come to trial. They were pending, and the county "court judge could not be, and was not, asked to go into the "merits of those proceedings; but I think that they were a matter "which he was entitled to take into account when considering "whether, in the circumstances of the particular case, he ought "to make an order for possession or not. The rights of one "spouse with regard to the matrimonial home as against the "other may vary according to the circumstances of the particular "case, and, although it is, no doubt, the duty of the husband to "provide a place for the wife to live in until the decree is made "absolute, it does not necessarily follow (in fact in many cases "it would be very inconvenient and embarrassing) that she should "be in rooms under the same roof as he. It was pressed upon "the judge that, in the particular circumstances of this case, he "should not make an order for possession except on the terms "that it was not to take effect unless and until the husband had "provided other accommodation elsewhere for the wife. That "is an order which he might very well have made, but I find it "impossible to say that, in refusing to make an order in that

[4] [1948] 1 K.B. 507, 513.

"particular form, he was not exercising his discretion in a judicial "manner."

Furthermore, in divorce proceedings the wife has a right to apply for alimony pendente lite and is not, by her adultery, disqualified from so applying for she is a competent suitor. (*Welton* v. *Welton*[5] and *Waller* v. *Waller*.[6])

After a divorce, if a decree is pronounced in her favour or even if a decree is pronounced against her, she is still entitled to apply for maintenance under the terms of the statute; see section 19 of the Matrimonial Causes Act, 1950. Further, if there is no divorce, her own adultery would not necessarily be a bar to her obtaining maintenance under the Summary Jurisdiction Acts if her adultery were found to be conduced to by her husband's conduct; see the Summary Jurisdiction Act, 1895, s. 6.

Inroads have thus been made upon the common law position by statute to a great extent, and I am unable to hold that, because at common law her rights as a wife to bed and board have been forfeited, there is no room for the exercise of discretion to postpone at least her expulsion from the home, the occupation of which will or may have to be considered in conjunction with any application she may make for support from her husband. The statute of 1882 in conferring the discretion has, it seems, kept in mind that at any rate so long as the marriage tie exists, which prima facie it is in the public interest to maintain, it is not always desirable that strict rights of spouses should be insisted upon. Having ascertained the rights of the parties upon the evidence submitted, the court is not compelled as a matter of law at the instance of either party to allow these rights to be enforced. For these reasons I would dismiss the appeal.

WILLMER L.J. I have no doubt that the husband instituted these proceedings under section 17 of the Married Women's Property Act, 1882, for the very good reason that at common law he could have had no right to bring an action for possession against his wife. In *Bramwell* v. *Bramwell*,[7] Goddard L.J. said: ". . . I have the greatest doubt whether a husband can bring an "action for the recovery of land against his wife, alleging that "she is wrongly in occupation of it, because, if she is wrongly in "occupation of the land and he has a right to the possession "of it, it seems to me she is a trespasser and therefore "he is suing her for a tort. He is not, however, left without "remedy, as section 17 of the Married Women's Property Act, "1882, expressly provides the procedure for deciding a question "between husband and wife as to the possession of property."

The same view was expressed by Denning J. in *Hutchinson* v. *Hutchinson*,[8] and again by Romer L.J. in *Bendall* v.

[5] [1927] P. 162; 43 T.L.R. 174, C.A.

[6] [1956] P. 300; [1956] 2 W.L.R. 1071; [1956] 2 All E.R. 234, C.A.

[7] [1942] 1 K.B. 370, 374.

[8] [Sub nom. H. v. H.] 63 T.L.R. 645, 646; [1947] 2 All E.R. 792.

C. A.
1960
SHORT v. SHORT.
Willmer L.J.

McWhirter,[9] and is, I think, generally accepted. If any further authority is required for this view, it is to be found in section 12 of the Married Women's Property Act, 1882, which provides that, except for a wife's right to bring proceedings for the protection and security of her own separate property, no husband or wife shall be entitled to sue the other for a tort. The fact that the wife is alleged to have committed adultery cannot in my judgment confer on the husband a right, which he would not otherwise have, to sue her for a tort. For until the marriage is dissolved she remains his wife, however guilty she may be.

We have only to consider, therefore, what remedy is provided by section 17 of the Act. It is at once apparent that the remedy under the section is entirely discretionary. The judge—or in the present case the registrar—"may make such order with respect "to the property in dispute . . . as he thinks fit." This disposes at once of the first point which was put forward on behalf of the husband. For it was argued by Mr. Laskey, albeit faintly, that the registrar's order was wrong on the ground that it violated the right, which it was contended the husband enjoyed, to obtain possession as against a wife who admitted having committed adultery. It is clear to my mind that the section cannot be construed as conferring any such right which did not exist at common law.

The second, and main, contention on behalf of the husband was that the registrar was guilty of a wrong exercise of his discretion in failing, in all the circumstances, to make an order for possession in favour of the husband as against a guilty wife. It is to be observed that the section specifically empowers the judge—in this case the registrar—to direct the application to stand over. This is precisely what the registrar did direct—namely, that the application should stand over till after the termination of the divorce proceedings, unless in the meantime the husband should find suitable accommodation for the wife. It is nonetheless contended that in all the circumstances this was not a judicial exercise of the registrar's discretion.

The only evidence with regard to the wife's alleged adultery which is before us is the statement in the husband's affidavit that she herself admitted it in her affidavit, which she swore in support of her application to amend her petition by adding a prayer for the exercise of the court's discretion. At present we know nothing of the circumstances in which she committed adultery, and have no means of assessing the degree of her guilt. She has herself presented a petition against the husband on the ground of cruelty, and from the fact that she obtained leave to do so before three years had elapsed from the date of the marriage we are entitled, I think, to assume that she is able to show at least a strong prima facie case. It is possible that the court will

[9] [1952] 2 Q.B. 466, 485; [1952] 1 T.L.R. 1332; [1952] 1 All E.R. 1307.

grant her relief, in the exercise of its discretion, and will pronounce a decree in her favour. It is certainly not to be assumed that, merely because the wife has committed adultery, the husband will necessarily obtain relief on the prayer in his answer. Either party may in the end of the day obtain a decree. Possibly mutual decrees will be granted in the exercise of the court's discretion.

It is equally possible that neither will be granted relief. The court will in any case be bound to make the inquiries prescribed by section 4 of the Matrimonial Causes Act, 1950, and for all that is now known it may turn out that there is some absolute bar against relief in favour of either the one or the other. Moreover, it seems inevitable that questions must arise with regard to the matters specified in the proviso to section 4 (2) of the Act of 1950 which will call for the exercise of the court's discretion. The wife, we know, prays for the exercise of the court's discretion. But equally, on the husband's cross-prayer, questions of discretion must arise. The wife's allegations of cruelty are not only relevant to her own prayer for relief, but must also be considered in relation to the husband's cross-prayer. For all that is now known it may be found that the wife's adultery was conduced to by wilful neglect or misconduct on the part of the husband.

I have mentioned all these various possibilities in order to make it clear that at the present stage it is quite impossible to forecast what the final result of the divorce proceedings will be. The wife is just as likely as the husband to be in the end the victorious party. Even if the husband is ultimately held entitled to relief, and the wife is not, that is not the end of the matter. The wife may still be held entitled, under section 19 of the Act of 1950, to such maintenance as may be deemed reasonable, having regard to the conduct of the parties; and this result may even follow if she alone is found to be blameworthy. Furthermore—quite apart from the question whether upon any decree being pronounced, the wife will be held entitled to maintenance—she is clearly entitled now to make an application for alimony pending suit.

It seems to me that if, as is only too probable, questions of alimony or maintenance for the wife are going to arise, the matter of the possession of the matrimonial home should appropriately be considered in relation thereto. In *Cobb* v. *Cobb* [10]—itself a case arising out of an application under section 17 of the Married Women's Property Act, 1882—Denning L.J. is reported as saying: "The matter [the question of possession of the matrimonial "home] can best be considered by the matrimonial court when it "comes to consider alimony or maintenance. That court . . . "might think it right to let the wife stay in the house with a "reduction in the maintenance which would otherwise be payable "by the husband." I respectfully agree with this view, and

[10] [1955] 1 W.L.R. 731, 734; [1955] 2 All E.R. 696, C.A.

C. A.
1960
SHORT
v.
SHORT.
Willmer L.J.

would venture to apply it to the circumstances of this case. In the situation as it is at present it would in my judgment be premature to deal with the question of possession of the matrimonial home in isolation, and without reference to the issues which are likely to arise in relation to alimony and maintenance. In such circumstances I find it impossible to say that the registrar fell into error, or was guilty of any wrong exercise of his discretion, in directing that this application stand over pending the determination of the divorce proceedings which have already been instituted.

It remains to mention that a question was raised as to whether the present appeal was out of time. If the appeal is interlocutory, it is agreed that the time for appealing expired on February 5. But notice of appeal was not given until February 29. I cannot see how an order merely directing that the application stand over can be other than interlocutory. The appeal, therefore, is in my judgment manifestly out of time. But the wife is also, as it seems to me, out of order. Although the point was taken in argument on her behalf that the appeal was out of time, I doubt whether that point was strictly open to her, seeing that no respondent's notice was filed in accordance with R.S.C., Ord. 58, r. 6. In the course of the hearing before us, Mr. Laskey, on behalf of the husband, formally applied for an extension of the time for appealing, and informed us that the delay was due partly to the intervention of negotiations between the parties, and partly to the fact that, owing to an error, an abortive notice of appeal to the judge in chambers was served in the first instance. In the absence of any merits in the respondent's objection, I think that, if it had been necessary, it would have been a proper case in which to extend the time for appealing.

The matter, however, is of no relevance since, for the reasons stated, I find it impossible to say that the registrar's decision was wrong, and the appeal must therefore in any event be dismissed.

DEVLIN L.J. I have found this to be a most troublesome case. To my mind it raises questions of principle which deserved much fuller argument than they received. If the order under appeal had been made in matrimonial proceedings upon the application of the wife to restrain the husband from interfering with her enjoyment of the matrimonial home, the position would be clear. I should have supposed that an order permitting a wife, who confessed to having committed adultery in the matrimonial home, to remain there pendente lite, the husband being liable for the rent, was an unusual one. But I cannot doubt, in the light of what my Lords have said in their judgments, that the making of such an order would be within the discretion of the judge who heard the application.

This order, however, was made in proceedings under the Married Women's Property Act, 1882, s. 17, and an application under that Act is not an interlocutory proceeding in a divorce

suit. The section provides a summary way for the court to determine questions between husband and wife as to the title to or possession of property. These questions must be determined in accordance with the common law. In my judgment, on the true construction of this section, the registrar had no power to make the order which he made, although a judge might have made it if he had been hearing an interlocutory application in the divorce proceedings. This may seem on the face of it an arid distinction. But it has to be remembered that applications under section 17 often fall to be decided when there is no divorce suit pending. The construction of the section cannot be different according to whether there are or are not divorce proceedings on foot. A construction of the section that is wide enough to justify the registrar's order in this case must be wide enough to allow him to restrict in his discretion a husband's enjoyment of his common law rights in chattels as well as in realty. The argument before us has not, of course, sought to justify the registrar's order on the ground that it could easily have been made in divorce proceedings. It has been justified, as it must be, by the claim, which I consider to be too far-reaching, that the power to make it is given by the section. The argument has thus given rise to fundamental questions about the scope and purpose of section 17 and about the extent of the wife's rights, as established by recent authorities, in the matrimonial home.

In form the order is one that grants an adjournment. In what way, it may be asked, is that a denial of the husband's rights? I think that if one looks at the substance of the matter, and if one assumes for the moment that the husband has an absolute right to the immediate possession of the flat (whether he has is the first question to be decided) it is plain that this order denies it to him. It could not, I think, be successfully contended—I shall elaborate this point later on—that after a marriage has been dissolved, the ex-wife, whether she be innocent or guilty and whether she gets a decree or not, will have any rights in the home. The matter to be decided is therefore whether the husband or the wife is to have the right to reside in it for the remainder of the marriage. To adjourn a decision on this matter until after the conclusion of the divorce proceedings, leaving the wife in possession, is therefore to decide the point substantially in favour of the wife. To adjourn it until such time as the husband finds alternative accommodation is equally to decide the matter in favour of the wife, for it is only on the basis that the wife has some right to the house that the burden can properly be put upon the husband of providing other accommodation in exchange for it.

The property which is the subject-matter of the dispute is a flat which the husband rented before his marriage at £250 per annum. The marriage, which took place in April, 1957, did not last long. In August, 1958, the husband entered a sanatorium as a voluntary patient. While he was there, the wife obtained

C. A.
1960
SHORT
v.
SHORT.
Devlin L.J.

the leave of the court to present a petition for dissolution of the marriage on the ground of the husband's cruelty; the petition is dated November 13, 1958. In February, 1959, the husband came out of the sanatorium and the wife refused to have him back. It is alleged that subsequently she committed adultery in the flat with the party now cited as the co-respondent, and she has in fact admitted committing adultery there on four nights in August, 1959. It appears that her adultery first came to the knowledge of the husband when on October 30, 1959, she amended her petition to ask for the discretion of the court. The husband then took out a summons under section 17 of the Married Women's Property Act, 1882, asking for an order for possession of the flat. The summons was heard on December 22, 1959, when the registrar ordered: "Unless the husband provides alter-"native reasonable and suitable accommodation the application "do stand over until after the hearing of the cause. Otherwise "adjourned. Costs reserved." The "cause" presumably refers to the wife's petition. It is from this order that the husband now appeals.

Two questions arise for our determination: (1) On these facts has the wife any right to remain in the matrimonial home? (2) If not, is the power given by section 17 limited to determining the question of rights and, upon determining such rights, making the order which follows as a matter of law; or is there a discretionary power in it to protect the wife's position in the matrimonial home, notwithstanding that she has no rights in it?

The first question raises a new point. It is well established by a series of decisions in this court that an innocent wife, who is actually deserted, has a right to remain in the matrimonial home. The wife in this case was not innocent and was not actually deserted. She would no doubt claim, whether rightly or wrongly, that the husband's cruelty amounts to constructive desertion. I need not determine whether the established doctrine extends to cases of constructive desertion. The point has been put more simply by the husband's counsel that, whether it does or not, it does not extend to a wife who has committed adultery.

As I have said, this is a new point. But I do not think that there can be much doubt about the answer to it, and it was not strenuously argued before us. The nature of the wife's right has been stated in various ways in the authorities and in particular it has been most clearly and fully stated by Denning L.J. in *Bendall* v. *McWhirter*,[11] and I do not think that it can be suggested that there is any other way of stating it that is more favourable to the wife. Speaking of the nature of the right, Denning L.J. said: "It bears, I think, a very close resemblance "to her right to pledge her husband's credit for necessaries. "Under the old common law, when a husband deserted his wife, or "they separated owing to his misconduct, she had an irrevocable

[11] [1952] 2 Q.B. 466, 476.

"authority to pledge his credit for necessaries: *Boulton* v. "*Prentice*,[12] quoted in the notes to *Manby* v. *Scott*.[13] One of "the most obvious necessaries of a wife is a roof over her head; "and if we apply the old rule to modern conditions it seems only "reasonable to hold that when the husband is the tenant of the "matrimonial home, the wife should have an irrevocable autho-"rity to continue the tenancy on his credit; and that when he "is the owner of it she should have an irrevocable authority to "stay there."

The word "irrevocable" needs some explanation. The termination of the licence or authority has been considered in later cases: see, for example, *Wake* v. *Taylor*,[14] a decision of the Court of Appeal. I think that the law as now established is that the husband may revoke it if circumstances give him the right to do so; and the court may revoke or terminate the authority if circumstances occur which make it no longer fair and reasonable that the wife's rights should prevail against the husband's or of a party claiming through him.

It has never yet been decided in what circumstances the authority or licence to the wife can be revoked by the husband. But I think it must be plain from this statement of the law that the licence is good against the husband only for so long as his liability to support the wife and provide her with a roof over her head continues. It is well established (and was conceded in argument) that this liability ceases if the wife commits adultery. It is immaterial that the conduct of the husband may have conduced to the adultery; and it is immaterial that he may himself have previously committed a matrimonial offence by turning her out of doors: *Govier* v. *Hancock*.[15]

This sounds a stern doctrine today when we are ready to conceive that an adulterous wife may be more sinned against than sinning. If it were necessary, I should be prepared at least to consider whether with due respect for precedent it would be possible to modify the rigour of the doctrine. But it is not necessary. Relief can be obtained through the power of the court to grant alimony even to a guilty wife; and in the rare cases where the jurisdiction of a matrimonial court cannot be invoked, I can see no satisfactory alternative to the common law rule. I conclude therefore that adultery terminates the wife's licence in the sense of making it voidable, and that thereafter the husband has an absolute and unqualified right to the matrimonial home, if he is the owner of it, and the right to immediate possession. I think that this conclusion is consistent with those obiter dicta in the cases in which the possibility of the wife's misconduct is mentioned: see in particular *per* Lord Evershed M.R. in *Middleton* v. *Baldock*.[16] In *Wake* v. *Taylor*[17] the Court of Appeal,

[12] 1 Selw.N.P., 13th ed., 233.
[13] 2 Smith L.C., 13th ed., 456, 469.
[14] The Times, July 8, 1952.
[15] (1796) 6 Term Rep. 603.
[16] [1950] 1 K.B. 657, 662; 66 T.L.R. (Pt. 1) 650; [1950] 1 All E.R. 708, C.A.
[17] The Times, July 8, 1952.

C. A.
1960
SHORT
v.
SHORT.
Devlin L.J.

assuming without deciding that a wife's adultery would entitle the husband to revoke the licence, held that until he did so she was entitled to remain. That was a case where a third party, the husband's landlord, sought to take advantage of the wife's adultery; and I do not think that the decision means that when the husband himself is claiming possession his application must be preceded by a formal revocation.

It is a possible view of the cases that the wife's right carries within itself the seed of the court's discretion, and that it is by definition a right to remain in the house until the court in its discretion decides otherwise. If this were so, it would follow that adultery is not of itself a ground for terminating the wife's licence, but is only a matter to be taken into account in the exercise of the discretion. There are in the cases dicta by Denning L.J. to the effect that the licence continues until revoked by the court which, taken by themselves, might support this view. It was not a view that was pressed upon us; the unlimited discretion which the wife's counsel claimed to exist was based on the statute and supported by the authority of *Hutchinson* v. *Hutchinson*[18] and *Lee* v. *Lee*,[19] cases which I shall consider below. But as it is a possible interpretation, though not in my judgment the correct one, of the dicta of Denning L.J., I have considered it. I see no support for it in principle. Husband and wife have always each had their rights in a matrimonial home belonging to the other or to them both jointly. The court does not in its discretion confer these rights nor does it remove them. They arise from the status of marriage. They are not rooted in discretion and so are not terminable at discretion. A right which the court could mero motu extinguish—a tenancy at the will of the court—would be a novelty hitherto unknown to the law.

In my judgment, the true view is that there is a right of ownership in one spouse qualified by a lesser right in the other. Discretion does not attach itself to the lesser right, but arises out of the conflict between the two rights. This inevitably occurs when the marriage breaks down. The right to possession which up till then has been an indivisible thing shared in common has in some way to be severed. It is then impracticable for the spouses to continue exercising together their rights in the matrimonial home, and the claim of one or other must be allowed to prevail. The court must decide which. It can do so only by deciding upon what is just and reasonable in all the circumstances, and that is how the discretion arises—ex necessitate rei as Roxburgh J. put it in *Churcher* v. *Street*.[20] The rights of husband and wife arise out of their relationship, but there is nothing about the exercise of the discretion that is peculiar to

[18] 63 T.L.R. 645.

[19] [1952] 2 Q.B. 489; [1952] 1 T.L.R. 968; [1952] 1 All E.R. 1294, C.A.

[20] [1959] Ch. 251, 260; [1959] 2 W.L.R. 66; [1959] 1 All E.R. 23.

that relationship. The court determines what is just and reasonable between husband and wife in the way that it often has to do between co-owners or between such conflicting rights as the public right to use the highway, and the private right of access to property adjoining the highway.

There is, therefore, no room for the exercise of discretion unless there are conflicting rights. So the question is: When the matrimonial home belongs to one spouse, what is the duration of the other's right in it? Is it a right that lasts as long as the marriage lasts, or only for so long as the other spouse is faithful to the marriage vows? If the former, there will be a conflict of rights, notwithstanding adultery, until the marriage is eventually dissolved if it ever is; if the latter, the adulterous spouse forfeits his or her right. Since we are here concerned with the common law (and not with the special interlocutory jurisdiction of the court when it is engaged, as it were, in winding up the marriage), the right can be claimed only by a spouse who is ready and willing to perform his or her obligations. It has nothing to do with divorce, for it existed at common law long before the dissolution of marriage was thought of as a terminating event. The dicta of Denning L.J. must be read in the light of his clear and persuasive statement of the nature of the right which I have quoted from *Bendall* v. *McWhirter*.[21] When the Lord Justice says that the licence to the wife continues until the court revokes it, he is not, I think, defining the duration of the right, but is making it plain that while it exists it is not unqualified, but must yield to the husband's right if the court in its discretion so decides.

I turn now to the second question on the basis that the clog on the husband's ownership has disappeared, and that there is no defence to his claim for possession. Is he not therefore entitled to obtain under section 17 an order for possession ex debito justitiae? The ordinary rule of law is that when a plaintiff has established his right, he is entitled to immediate relief; the court has no discretion to refuse an order, though there may be a power to postpone its execution for a reasonable time in order to avoid undue hardship. In *Vaughan* v. *Vaughan*,[22] for example, the Court of Appeal exercised a power of that sort in a case in which the husband's licence to the wife had expired. But the adjournment in the present case has not been put upon that ground.

This being the ordinary rule of law, I can find nothing in the language used in section 17 nor in a consideration of its scope and object to suggest that the power granted to the court is any wider than the normal. I find nothing to suggest that because the parties are husband and wife the court can treat them differently from the ordinary plaintiff and defendant. The material words of the section are: "In any question between husband

[21] [1952] 2 Q.B. 466.

[22] [1953] 1 Q.B. 762; [1953] 1 W.L.R. 236; [1953] 1 All E.R. 209, C.A.

C. A.
1960
SHORT v. SHORT.
Devlin L.J.

"and wife as to the title to or possession of property, either party "... may apply by summons or otherwise in a summary way to "any judge, and the judge ... may make such order with respect "to the property in dispute, and as to the costs of and consequent "on the application as he thinks fit, or may direct such application "to stand over from time to time." The powers of adjournment and over costs, and so forth, are in common form and such as a judge usually has. It is, of course, true that the operative word throughout is "may." But it is well settled that that gives only a limited discretion.

In *Sheffield Corporation* v. *Luxford*,[23] the court had to consider this point, and I quote what appear to me to be the material passages from the judgment of Talbot J.,[24] with whom Wright J. agreed. "The language of section 138 of the County Courts Act, "1888, is that on complying with the conditions of the Act (as to "which there is no dispute here) 'the judge may order that posses-"'sion of the premises mentioned in the plaint be given by the "'defendant to the plaintiff, either forthwith or on or before such "'day as the judge shall think fit to name.' ... 'May' is a per-"missive or enabling expression; but there are cases in which, for "various reasons, as soon as the person who is within the statute "is entrusted with the power it becomes his duty to exercise it. "One of those cases is where he is applied to to use the power "which the Act gives him in order to enforce the legal right of the "applicant. I think this a such a case. On the informa-"tion before us, the legal right of the plaintiffs, the landlords, "was complete as soon as the notice to quit had expired, and "the tenant's right to remain in occupation of this house had "absolutely ceased. ... That being so, I think that, as soon as "the application is made to the judge for an order for possession, "the latter being clothed by the Act of Parliament with the power "to make such an order, it becomes his duty to make it. And "if the Act contained no more than that, it would be his duty "to make the order then and there without any qualification. "But the Act does undoubtedly give him, in terms, a certain "discretion, because after the words 'the judge may order that "'possession ... be given,' the section continues: 'either forth-"'with or on or before such day as the judge shall think fit to "'name.'"

Section 17 uses no express words giving a discretion to postpone and, therefore, in Talbot J.'s words the duty is to make the order then and there. In any event, the express words in *Sheffield Corporation* v. *Luxford* did not, in Talbot J.'s view, authorise a postponement for more than four or five weeks. Fundamentally, a plaintiff who proves his case is entitled to an order ex debito justitiae, and there is no room for discretion. As Lord Wright put it later in *Evans* v. *Bartlam*[25]: "A discretion

[23] [1929] 2 K.B. 180; 45 T.L.R. 491, D.C.
[24] [1929] 2 K.B. 180, 182.
[25] [1937] A.C. 473, 489; 53 T.L.R. 689; [1937] 2 All E.R. 646, H.L.

"necessarily involves a latitude of individual choice according "to the particular circumstances, and differs from a case where "the decision follows ex debito justitiae once the facts are "ascertained."

The argument that there is in section 17 a discretion wide enough to enable the judge to refuse to give effect to the rights of the husband when undoubtedly established has been based largely upon the decision of Denning J. in *Hutchinson* v. *Hutchinson*.[26] In that case, a wife whose husband had left her in the matrimonial home, which was his property, obtained a decree of judicial separation. The husband then applied under section 17 for an order for possession, and his counsel argued that the judge had no discretion to refuse it. Denning J. said: "at "common law the husband has no right to turn the wife out of "the house. . . . He cannot sue her for ejectment, or trespass or "for any other tort. He has no right in law to claim possession from her except such as may be given him by section 17 of the Married Women's Property Act, 1882. But that section does not, in my opinion, give him the right which he is now claiming. It enacts that the judge before whom the application comes may make such order as he thinks fit. The intention is that in the innumerable and infinitely various disputes as to property which may occur between husband wife the judge should have a free hand to do what is just. That discretion is in no way fettered, though it must be exercised judicially. The judge was satisfied that it would be unjust to turn the wife out, and accordingly refused to make the order. In *Bendall* v. *McWhirter*,[27] Denning L.J. referred to this decision, saying that section 17 gave the court a very wide discretion in the matter.

There is nothing here to suggest that Denning J. would have refused the order in a case in which the wife had no rights at all. What is argued, as I understand it, is that Denning J. was there creating a right for the wife out of the husband's inability to proceed otherwise than under section 17. If so, and if the section can be used for the creation of rights, then the power of the court would certainly have to be very wide indeed. But I do not think that Denning J. was doing that. It had been settled long before this that either spouse has rights against the other in the matrimonial home even though it be wholly owned by the other; see, for example, *Shipman* v. *Shipman*.[28] It is now settled, largely through the judgments of Denning L.J. himself, that the discretion which the court exercises in determining how far it is fair and reasonable for the wife to exercise her rights is not a product of section 17. If it were, the rights of the wife could not prevail against a third party who does not proceed under that section. It is now established that the discretion must be exercised by

[26] 63 T.L.R. 645, 646.
[27] [1952] 2 Q.B. 466, 475.
[28] [1924] 2 Ch. 140; 40 T.L.R. 483, C.A.

C. A.
1960
SHORT
v.
SHORT.
Devlin L.J.

any court before whom the question may come: *Jess B. Woodcock & Son Ltd.* v. *Hobbs*.[29]

In *Lee* v. *Lee*[30]—a case which was relied on by counsel for the wife—Somervell L.J. referred to the words of section 17 as being "in the widest possible form." This dictum related to the court's power to restrain the husband from exercising his proprietary rights when that exercise would bring them into conflict with the wife's right to live in the matrimonial home and her enjoyment thereof. There is no doubt that in such circumstances, the wife's right being still alive, the court has the widest possible discretion; and, this being in the early stages of the development of the doctrine, the court was not considering whether the wide discretion flowed from the statute or ex necessitate rei. The dictum cannot be taken quite literally, for if it be true of section 17, it must now be true also of every other statute under which possession by a third party is sought against the wife. Certainly the dictum is no authority for the view that the discretion extends to a case in which the wife has committed adultery, for that was not under consideration.

Denning L.J.'s dicta are high authority for the view that the husband cannot proceed to turn the wife out of the home except under section 17. But I must say with great respect that I do not regard them as putting the matter beyond doubt. It is certainly the law that the husband cannot sue his wife in tort. The question is whether an action of ejectment is an action in tort. In *Bendall* v. *McWhirter*,[31] Denning L.J. cited as his authority the judgment of Goddard L.J. in *Bramwell* v. *Bramwell*.[32] If that case is carefully examined in conjunction with *Pargeter* v. *Pargeter*,[33] I think it will be seen quite clearly that the doubts expressed by Goddard L.J. do not represent the decision of the court or even his own concluded judgment. Indeed, I think it would be difficult to hold that Denning L.J.'s dictum was correct without overruling *Bramwell* v. *Bramwell*.[34] If one goes back beyond that case, it would be necessary to consider *Doe* d. *Merigan* v. *Daly*,[35] where Lord Denman C.J. treated the husband's disability as purely procedural and one that could be overcome with the assistance of John Doe, who was not, of course, married to the defendant wife. The technical difficulty could, I suppose, be overcome in the same way today by the husband making an assignment. It would be necessary also to consider whether, if a husband sues upon the termination of a presumed licence for recovery of possession, he cannot bring his action in contract; a landlord may sue in contract for a tenant's failure to give up possession in accordance with the terms of his lease; see Bullen & Leake, 3rd ed. (1868) at p. 206.

I do not go into these matters any further because, if I did

[29] [1955] 1 W.L.R. 152; [1955] 1 All E.R. 445.
[30] [1952] 2 Q.B. 489.
[31] [1952] 2 Q.B. 466.
[32] [1942] 1 K.B. 370, 374.
[33] [1946] 1 All E.R. 570, C.A.
[34] [1942] 1 K.B. 370.
[35] (1846) 8 Q.B. 934.

find that the husband had no rights except under section 17, I should still not be prepared to give that section any different meaning. The fact that a party has no rights until a statute gives them to him does not put him in mercy. Unless the statute provides to the contrary, he is entitled to have his statutory right enforced in the ordinary way. Moreover, it is clear that so far as the wife is concerned, section 17 is only procedural; her substantive remedies have already been given her by section 12. The discretion under section 17 cannot be enlarged against her. But by virtue of what construction can it be exercised differently between the parties? It would be unreasonable if the wife could get the furniture belonging to her as soon as she proved her title to it while the husband could not get his unless the court thought he ought to have it.

I hold that the powers of the court under section 17 are substantially the same as in any other proceeding where the ownership or possession of property is in question. The discretion is no wider and no narrower than the ordinary discretion of the court in such cases. I accept that, as Somervell L.J. said in *Lee* v. *Lee*,[36] where there are conflicting claims to a number of small items, there is power in the court to arrive at a broad conclusion. This may be attributable to the summary nature of the process, though I should myself be inclined to think of it as an example of the de minimis principle; all courts have to do rough justice from time to time. Apart from this, rights of property have to be determined according to law. The discretion to adjourn is no wider and no narrower than that possessed by any other court. The general rule is that when a case is brought on for trial by the proper process the plaintiff is entitled to have it heard and determined. So the usual ground for an adjournment is when the court would be unable to do justice if it proceeded to an immediate hearing. I should not, of course, dispute that when some relevant fact, such as adultery, is in issue, there is power in the court to stay the proceedings until that issue has been resolved by some other court which has seisin of it. That can be done on the principle of forum non conveniens. It does not arise here since adultery is admitted, and whether the husband does or does not get a decree on the ground of adultery is irrelevant. The law on this latter point is, I think, correctly stated in Lush on Husband and Wife, 4th ed., at p. 415, where it is said: "It is the misconduct of the wife, not the ability of "the husband to obtain a divorce, that discharges him from the "obligation which marriage imposes upon him to support his "wife."

In my judgment the court has not got and cannot ever have power to grant possession to anyone except the husband. The position might be different if the wife had any right as a co-owner: see *per* Denning L.J. in *Cobb* v. *Cobb*.[37] In the present

[36] [1952] 2 Q.B. 489.

[37] [1955] 1 W.L.R. 731, 734.

C. A.
1960
SHORT
v.
SHORT.
Devlin L.J.

case her interest unquestionably terminates on the dissolution of the marriage.

I have said that if there were any fact, such as adultery, in issue, which was also in issue in a pending matrimonial suit, it would be proper to stay the summons under section 17. Normally, in such a case, the question is more conveniently determined in the matrimonial suit which ought to be given precedence. By the same token I think that the section 17 procedure should yield when the interlocutory procedure in a matrimonial cause is invoked. If the wife in this case, accepting that she had no right to possession, had said that she desired nevertheless to ask the judge at chambers for an injunction to restrain the husband from interfering with her residence in the matrimonial home pendente lite, I should have thought it a proper exercise of the discretionary power to adjourn the section 17 proceedings long enough to allow her to do so. She has not asked for that, but on the assumption that she would regard it as better than nothing, I would be prepared, in allowing the appeal, to vary the order so as to make it an order for possession unless within seven days the wife applied for an injunction restraining the husband from interfering with her enjoyment of the flat. I express no opinion at all as to whether such an application should be granted.

It may be thought, assuming that the judge in chambers takes the same view of the merits as the registrar did, that this is a distinction without a difference; and that at the end of this judgment all that I have done is to lay down a roundabout way of arriving at the same result on the merits. Even if that could properly be said, I should still have to arrive at the same decision; if I am right in thinking that it is a matter of construction of the section, one cannot construe it simply so as to give a more convenient result. But in truth I do not think that that can properly be said. The distinction is not a purely technical one. The course that has been taken not only involves a point of principle but is also, I think, objectionable on practical grounds. On principle, a bad precedent is created if a court assumes wrongly a discretion of this sort. When rights are established according to law, it is the duty of the courts to enforce them; a judge, no more than a minister, has no power to take away a man's rights or to hinder him in the obtaining of them, unless by due process of law. This is a principle to be preserved against encroachments by the judiciary as well as by the executive.

On practical grounds it is, in my judgment, inconvenient, if not wrong, for the summons under section 17 to be dealt with as if it were an interlocutory order in the matrimonial cause. It is true that the order does not exclude the husband from his flat. But as a practical matter it is obvious that both cannot live there at the same time, and the making of the order shows it to be the court's intention that it is the wife who should have the enjoyment of it pendente lite, and not the husband. For practical purposes the order is effective in excluding the husband from the

flat and would no doubt be amplified and enforced by injunction if necessary, as was done in *Lee* v. *Lee*.[38] Since it is made pendente lite, it is the equivalent of an interlocutory injunction. Except for injunctions of a very limited class, the power to grant an injunction is by R.S.C., Ord. 54, r. 12, reserved to a judge at chambers; and all interlocutory injunctions are so reserved. An interlocutory injunction is an order that requires great delicacy in its use because it may deprive an individual, even though only temporarily, of the exercise of a right—that is, of a right that is still in dispute; and the point is a fortiori when, as here, the right is already established. It is, therefore, the rule that the discretion which is operative should be that of a judge, and not that of a registrar or a master.

This is wise, not simply because a judge speaks with the greater authority, but also because cases taken before the judge are generally argued with greater thoroughness. The present case illustrates the wisdom of guarding carefully the use of the interlocutory order. Whether or not there be a discretion under section 17, this is the first case in which an order has been made in favour of an adulterous wife. The wife obtained this without filing an affidavit or adducing any evidence, and the husband did not appear by counsel. I cannot believe that such argument as there may have been could have brought it to the mind of the registrar that he was being asked to do anything out of the ordinary course; yet his discretion is said to be paramount. I do not like suggesting rules which might fetter the exercise of a discretion where it exists, but I should have thought that there should be some evidence of hardship or other exceptional circumstances before an adulterous wife is allowed to keep the husband out of his flat. If I were not for allowing the appeal on the ground that the wife has no rights at all, I should have to consider whether I should not allow it on the ground that there was no material to support the exercise of the discretion in her favour.

On any view I think it would be much better in practice if section 17 was not used for interlocutory purposes, and I cannot therefore regret a construction of the section—much the same as that put upon it by Lord Merriman P. in *Kelner* v. *Kelner*,[39] where he was dealing with a somewhat similar point—which makes that course imperative. A difficult and confusing situation may arise if these two jurisdictions are allowed to run on parallel lines. Can the husband in this case now apply to the judge in chambers for an order in the matrimonial suit that he should be given possession of his flat without the obligation of finding alternative accommodation? If he cannot, then the point has been decided against him by the discretion of a registrar and not that of a judge. If he can, then what happens if the judge in his discretion takes a different view of the merits from that taken

[38] [1952] 2 Q.B. 489.

[39] [1939] P. 411; 55 T.L.R. 1058; [1939] 3 All E.R. 957.

C. A.
1960
SHORT v. SHORT.
Devlin L.J.

by the registrar? Is he bound by the registrar's order so far as it goes? If he is, then again it is the discretion of the registrar and not that of the judge which prevails. If he is not, then it would have been much better for the matter to come before him in the first instance in an application for an interlocutory injunction. He will not then have to deal, as the registrar had, with the matrimonial home in isolation, but will be able to consider alimony pendente lite in conjunction with it. Thus there will be removed what seems to me to be one of the objectionable features of the registrar's order that, without alimony being considered at all and without there being any investigation into means, the husband has in effect been ordered to contribute pendente lite to his wife's support at the rate of £250 per annum.

My Lords have dealt fully with the point that the appeal was out of time, and I need not say more than that in my judgment the objection was taken too late.

Appeal dismissed with costs.
Leave to appeal to House of Lords refused.

Solicitors: *Waterhouse & Co.; Theodore Goddard & Co.*

J. D. P.

[QUEEN'S BENCH DIVISION.]

1960
June 24.
Salmon J.

* LINCOLN *v.* DANIELS.

[1958 L. No. 394.]

Libel and Slander—Privilege—Absolute privilege—Judicial tribunal—Bar Council—Whether complaint to Council protected by absolute privilege.
Barrister—Discipline—Bar Council—Whether complaints to Council absolutely privileged.
Tribunal—Domestic—Bar Council—Function.

The defendant sent letters complaining of the conduct of the plaintiff, a member of the Bar, to the Bar Council. In an action for libel the defendant contended that the communications were protected by absolute privilege:—

Held, that the communications were covered by qualified, but not by absolute privilege, since to be absolutely privileged a document must be addressed to a body which has judicial or quasi-judicial functions, and must be a step in setting in motion judicial or quasi-judicial proceedings.

Lilley v. *Roney* (1892) 8 T.L.R. 642; 61 L.J.Q.B. 727, D.C. distinguished.

POINT OF LAW.

On February 12 and 19, 1958, the defendant, David Daniels, sent two letters to the Bar Council, complaining of the professional conduct of the plaintiff, Fredman Ashe Lincoln, Q.C.

During the course of an action for libel, counsel for the defendant submitted that although it was the Benchers of the plaintiff's Inn of Court who were empowered to exercise quasi-judicial functions in adjudicating upon the complaint, and the Bar Council had no such functions, but merely considered whether they would or would not forward a complaint to the Benchers, the communications were protected by absolute privilege since complaint to the Bar Council was a proper way of instituting proceedings.

Neville Faulks Q.C., *Joseph Dean* and *Diana Phillips* for the plaintiff.

Alan Campbell and *J. M. Bowyer* for the defendant.

No case (other than that referred to in the judgment) was cited in argument.

SALMON J. It is argued on behalf of the defendant that the letters of complaint which the defendant addressed to the Bar Council in February of 1958 were absolutely privileged. There can be no doubt, in my view, that those communications were certainly privileged to the extent that they were the subject of qualified privilege; that is to say, the defendant would be protected completely unless he made the complaint maliciously. Mr. Campbell argues, however, that the privilege goes further than that; that the occasion was an occasion of absolute privilege; that is to say, whatever the state of the defendant's mind was when he wrote the letters, the letters cannot be made the subject of an action for libel.

There is no doubt that any member of the public may make a complaint about a member of the Bar to the Bar Council. The Bar Council may come to the conclusion that the complaints are groundless, in which event the Bar Council does nothing further. If, however, the Bar Council considers that the complaint raises a prima facie case against the barrister in respect of whom the complaint is made, the practice of the Bar Council is to send the papers to the Benchers of the Inn of Court to which the barrister belongs. The Bar Council itself has no judicial function, and no quasi-judicial function. The Bar Council itself does not adjudicate upon the matter of the complaint.

As I have said, a member of the public may send his complaints to the Bar Council. There is nothing, if he so chooses, to prevent him from addressing his complaint direct to the Inn of Court to which the barrister concerned belongs. I do not propose to decide whether, if a complaint were addressed to an Inn of Court, or to the Treasurer of an Inn of Court, it would or would not be absolutely privileged. The Inn of Court has quasi-judicial functions, and can pronounce upon the complaint, and take the appropriate steps in relation to it. It is conceded by Mr. Neville Faulks that a strong argument could be made in favour of the view that a complaint directed to the Benchers of the Inn would be absolutely privileged.

1960

Lincoln v. Daniels.

Salmon J.

This branch of the law is necessarily somewhat technical. No complaint was addressed by the defendant to the Benchers of the plaintiff's Inn; and I do not desire to express any view as to what the position would be if that had been done, because the point does not arise for decision. In my view, no absolute privilege attaches to the communication addressed to the Bar Council.

Mr. Campbell relies on *Lilley* v. *Roney*.[1] In that case a letter of complaint was addressed to the Law Society by the defendant, and it was held that that letter of complaint was absolutely privileged. It is to be observed, however, that at the date of that case, the Law Society (or the Disciplinary Committee of the Law Society) were vested under the Solicitors Act, 1888, with quasi-judicial functions. The letter of complaint was in a form prescribed by the rules which were laid down under the Act for setting in motion the quasi-judicial proceedings. That is made quite plain in a passage in the judgment of Cave J., who gave the leading judgment, when he said[2]: "The letter with affidavit "is the form given for setting in motion what are admittedly "judicial proceedings."

In the present case the Bar Council, it is conceded (and rightly conceded) is not the agent of the Benchers. They have no power to carry out any judicial or quasi-judicial functions; and I think the present case is quite different from *Lilley* v. *Roney*. It is true that it so happens that complaints (fortunately very rare), are normally passed to the Bar Council; and if the Bar Council think there is anything in them, they pass them on to the Benchers. But it seems to me that the essence of the rule about absolute privilege in this field is that the document must be addressed to a body which has judicial, or quasi-judicial functions, and the document must be a step in setting in motion judicial or quasi-judicial proceedings.

For the reasons I have stated, the letters of complaint in this case are not of that character. It therefore follows, in my view, that if a complaint is made to the Bar Council, the member of the public concerned has this limited protection that, providing he is not misusing the privileged occasion, the publication is covered by the privilege. If, however, he is malicious, he has no defence on the ground of privilege. In my judgment, the submission on behalf of the defendant fails.

Solicitors: *A. Kramer & Co.; Basil Greenby & Co.*

J. D. P.

[1] (1892) 8 T.L.R. 642; 61 L.J. Q.B. 727, D.C.

[2] 61 L.J.Q.B. 727.

[COURT OF APPEAL.]

* PEARCE *v.* PEARCE.

C. A.

1960
June 24.

Hodson and Harman L.JJ., Phillimore J.

Husband and Wife — Desertion — Termination — Separation agreement before 1938*—Right to disregard agreement under statute—Wife in desertion at time of agreement—Husband's refusal of wife's offers to return — Whether parties entitled to rely on statute — Divorce (Insanity and Desertion) Act,* 1958 (6 *&* 7 *Eliz.* 2, *c.* 54), *s.* 3.

Husband and Wife—Divorce—Cross-petition—Bar to petition removed; whether cross-petition barred—Separation agreement before 1938*—Respondent's desertion before separation agreement of* 1936*—Petitioner's desertion in* 1943 *— Divorce (Insanity and Desertion) Act,* 1958, *s.* 3.

The parties were married in 1932, and in 1936 the wife deserted the husband. On June 25, 1936, the parties entered in a separation agreement in the usual form. In 1943 and 1945 the wife made attempts (which the court found to be genuine) to become reconciled with her husband, but the husband rejected her offers. In 1958, the husband petitioned for divorce on the ground of the wife's desertion, and the wife by her answer cross-petitioned for a divorce on the ground of the husband's desertion. Both parties relied on section 3 of the Divorce (Insanity and Desertion) Act, 1958.[1]

Held, (1) that the wife's position had to be looked at independently, as if she alone were the petitioner and without taking into account the fact that her husband was also taking proceedings against her, and from that point of view she was not a deserted party before the relevant date, June 1936, when the agreement was entered into, and she could not, therefore, rely on the statute to support her plea on the ground of desertion.

(2) That the husband could not disregard the separation agreement for the purpose of bringing himself within section 3, and rely on it to justify his refusal to accept his wife's offers of a reconciliation, such a proposition was unacceptable having regard to the language of section 3 and the obvious intention of the Act, which was to relieve persons who were handicapped by the existence of an agreement for separation entered into before desertion became a ground for divorce, and his petition also failed.

APPEALS from Commissioner Sir Reginald Sharpe.

The following statement of facts is taken substantially from the judgment of Hodson L.J.

[1] Divorce (Insanity and Desertion) Act, 1958, s. 3: "For the purposes of "paragraph (*b*) of subsection 1 of "section 1 of the Matrimonial Causes "Act, 1950 (which provides that a "petition for divorce may be presented "to the High Court on the ground "that the respondent has deserted the "petitioner without cause for a period "of at least three years immediately "preceding the presentation of the "petition), any agreement between "the petitioner and the respondent to "live separate and apart, whether or "not made in writing, shall be dis-"regarded if the agreement was "entered into before January 1, 1938, "and either—(*a*) at the time when "the agreement was made the res-"pondent had deserted the petitioner "without cause; or (*b*) the court is "satisfied that the circumstances in "which the agreement was made and "the parties proceeded to live separate "and apart were such as, but for the "agreement, to amount to desertion "of the petitioner by the respondent "without cause."

C. A.
1960
Pearce
v.
Pearce.

The parties in this case were married in 1932; and a daughter was born in 1934. In May 1936, they separated. On May 12, 1936, a letter was written on behalf of the wife referring to the fact that she had left her husband, containing this passage: "Dr. Pearce [the husband] cannot be surprised at our client "having left him and returned to her parents as for the greater "part of their married life there has not been domestic happiness. "Our client has been compelled to submerge her personality "owing to the domineering attitude adopted by her husband, "she has been compelled to take medicines which have had a "serious effect upon her physique and which resulted in her "losing about two stones in weight, she has been placed on diet "by her husband and refused food of a nourishing nature and "these, with others, have resulted in Mrs. Pearce becoming "almost a physical and nervous wreck. She has had independent "medical advice since returning to Edinburgh and it will be only "after some months of careful nursing and constant care before "she will return to normal. These are the reasons our client has "given us for her refusing to continue to cohabit with her "husband." The husband's solicitors replied denying the allegations which had been made against their client by the wife.

On June 25, 1936, an agreement for separation was entered into between the parties in the usual form in that it recited "unhappy differences having arisen between the husband and the "wife and they are now living separate and apart from each "other. . . ." The deed was entered into at the instigation of the wife's solicitors. She got no benefit by way of monetary payment under the agreement, but her solicitors were anxious to secure that she should have the custody of the child. The agreement provided (in the usual manner) that if the husband and wife should be reconciled the agreement should become void except in respect of proceedings for a breach previously committed. That agreement remained in force thereafter.

On March 12, 1942, the wife communicated with her husband, and in her letter she said: "Perhaps you will be in Edinburgh "some time soon and if so I would be glad of the opportunity "to talk over a matter of some importance with you." They did not meet immediately; but on January 5, 1943, the wife, who had been in correspondence with her husband directly and through solicitors, wrote agreeing to his suggestion to come up to Edinburgh, when they could discuss his having the daughter, Evelyn. They met, and the husband was expecting to see the child, but he did not, and nothing was said at all which satisfied him.

The wife did not make any direct approach to him with a view to reconciliation, but his Lordship thought that there could be no doubt that that was what she was anxious for and that she had used the child as a means of getting her husband to meet her. He came to that conclusion because on January 17, 1943, after the meeting, she wrote: "After leaving you on Thursday "I turned back but you had gone. I wandered back and forward

"but just couldn't make up my mind to go home. I wanted to "go down to the station but you weren't alone. Oh Ashton, "what an awful mess everything seems to be in. I didn't want "to talk about Evelyn—not really—it was just I wanted to see "and talk to you again. I didn't want to let you see how I felt "and I must have succeeded pretty well for you thought me "quite devoid of feeling, didn't you?" Then she said: "I shall "be spending the weekend in Newcastle and if it is suitable to "you I shall come out to see you on Sunday. I can't give you "the exact time . . . but it will be shortly after lunch. Let me "know by return if this suits you."

The husband did not reply himself, but his solicitors wrote on January 19, referring to that letter and said: "We have been "instructed to inform you that Dr. Pearce does not wish to see "you at his home and is satisfied that no good purpose whatever "can be served by any such visit." There was silence after that letter had been written until April 10, 1945, by which time the wife's father had died. The solicitors for the wife, acting in the first place on their own initiative, although the wife agreed to the course which they took, wrote to the husband's solicitors with a view to bringing about a reconciliation between the husband and the wife. The husband's solicitors replied on April 26, 1945, saying their client was very definite that he could not consider their suggestion for reconciliation between his wife and himself, and referred to the interview when the wife had pretended that she wanted Evelyn to see her father, saying: "Our client is still "very bitter about the treatment he received from your client "when he saw her last in Edinburgh and this has added to the "difficulty of their being reconciled . . . when he arrived at "Edinburgh his wife saw him alone and made it quite clear that "she never had any intention at all of even bringing the child "with her for him to see but had merely used this as an excuse "to get him to go to Edinburgh for the purpose of discussing her "own affairs." The solicitors for the wife wrote again on May 1, 1945, hoping for a reconciliation "for the benefit of all."

That was followed by a further meeting between the spouses at or near the husband's home in South Moor, Durham, in July 1946. It appeared that the wife was then anxious to be on good terms with her husband; but in the course of that interview she said to him "Why don't you divorce me?" Nothing further that was material transpired at that interview; and the last communication between the parties extant was a letter dated August 18, 1947, nearly a year later, in which the wife wrote again to her husband having regard to something that the child had said to her after her return from South Moor. She concluded that letter by saying: "Of course I already told you but "I now write it to you I am more sorry than I can tell you "for allowing myself to be the cause of so much unhappiness. "I broke faith and did everything I promised before God not to

C. A.
1960
PEARCE
v.
PEARCE.

"do and God alone knows how bitterly I have had cause to "regret it."

On October 3, 1958, the husband presented his petition for divorce on the ground of his wife's desertion, and the wife by her answer of December 9, 1958, denied the desertion and in her turn asked for a divorce on the ground of the husband's desertion. The Divorce (Insanity and Desertion) Act, 1958, had come into force on July 23, 1958, and both parties relied on section 3 of the Act. Commissioner Sir Reginald Sharpe, on December 4, 1959, dismissed the husband's petition and the wife's cross-petition. Both parties appealed to the Court of Appeal.

Bernard Gillis Q.C. and *R. A. Percy* for the husband.
William Temple for the wife.

The following case was cited in argument: *Gerrard* v. *Gerrard.*[2]

HODSON L.J. The proceedings were initiated by the husband, who petitioned for divorce on the ground of his wife's desertion. The wife denied desertion, and in her turn asked for a divorce. The proceedings would inevitably have failed, whichever spouse had initiated them, but for the reliance which was placed upon the Divorce (Insanity and Desertion) Act, 1958, which enables a petition for divorce to be presented on the ground of desertion notwithstanding any separation agreement entered into before desertion became a ground for divorce in English law, which was on January 1, 1938. [His Lordship read section 3 of the Divorce (Insanity and Desertion) Act, 1958, stated the facts and continued:] It is convenient, I think, to deal first with the wife's appeal, because the wife cannot bring herself within the language of the Act unless at the time the agreement was made she had been deserted by her husband. It therefore becomes necessary to consider the circumstances in which the separation took place in 1936. There was no plea in the suit that the wife had just cause for leaving her husband at that time. She left him, no doubt, as the commissioner found and as her own evidence shows, because her parents wanted her to. They saw their daughter losing weight, no doubt, and were anxious about her physical condition. But she said in her evidence "I should never have "left him but for my parents."

I do not think there is any possible answer to the husband's allegation, confirmed by the commissioner's finding, that it was the wife who deserted the husband in 1936. That being the case, she cannot bring herself within the language of the Act, and the agreement for separation cannot, so far as she is concerned, be disregarded. It has been argued on her behalf that if it is disregarded in favour of the husband it ought to be disregarded in

[2] *The Times*, November 18, 1958.

favour of the wife. That is not so. The matter has to be looked at from the wife's point of view quite independently, as if she alone were the petitioner for divorce and without taking into account the fact that her husband is also taking proceedings against her. Looked at from the point of view of the wife as a petitioner, she deserted her husband before the relevant date when the agreement for separation was entered into which prevents her succeeding.

But so far as the husband's appeal is concerned, he is entitled to take advantage of the Act and disregard the agreement, he having been deserted by his wife in 1936. The commissioner dismissed his petition because of the fact that, although he had been deserted in 1936, the wife throughout the period of the separation at intervals, and in particular through her solicitors in 1945, had done her best to bring about a reconciliation, and in those circumstances he could not hold that the husband had proved his case. I think that upon the evidence that is the only possible conclusion. [His Lordship referred to the husband's attitude towards the wife's attempts at reconciliation and continued:] On the facts of this case there is no question but that the commissioner arrived at the right result.

That leaves the question of law upon which the husband mainly relies. The notice of appeal I think puts the matter as the husband wishes it to be put. It is said that the commissioner, by virtue of section 3 of the Act of 1958, disregarded the existence of the separation agreement entered into between the husband and the wife on June 25, 1936, but failed to disregard the conduct of both parties wholly attributable to that agreement which he ought by law to have done. What the husband says, through his counsel, is this: "I am entitled to disregard the agreement because the "Act says I can for the purposes of section 1 (1) (*b*) of the Act of "1950—that is to say, for the purposes of getting my divorce on "the ground of desertion without cause for three years immedi-"ately preceding the petition." He seeks to say "I am entitled "to disregard it for that purpose but to regard it for my own "purposes in that I was entitled, by the terms of the agreement, "which remained in force and still remains in force, to reject my "wife's overtures for reconciliation in 1945 and afterwards."

I think that that argument is not sustainable. It is not open to the husband, having regard to the language of the Act, "for "the purposes of" the section of the Act in question, to use the agreement in his own favour in considering the history of the married life and to disregard it only for the purpose of getting his case of desertion on foot in the first instance.

I find it difficult to elaborate this matter, which seems to me to be quite plain. The way in which the matter has been put on the part of the husband always, I think, came back to that—"I am entitled to disregard the agreement because the Act says "I can: nevertheless, I am entitled to regard it when it suits me "so to do for the purpose of answering the request by my wife to

C. A.
1960
PEARCE
v.
PEARCE.
Hodson L.J.

"return to me." That proposition, however it may be put, is quite unacceptable, having regard to the language of the section and the obvious intention of the Act, which was to relieve persons who were handicapped by the existence of an agreement for separation entered into before desertion became a ground for divorce.

In my judgment, therefore, the appeal on behalf of the husband fails, as does the cross-appeal of the wife; and they must be dismissed.

HARMAN L.J. I entirely agree. On the question of fact it seems to me that the commissioner was well justified in coming to the conclusion that he reached; and, indeed, I should have reached the same one myself. I need say no more about it as my Lord has dealt with the whole matter.

The question of law is, I suppose, a novel one. What the Act of 1958 says is that, for the purposes of the desertion provisions of the Matrimonial Causes Act, 1950, a separation agreement before the relevant date "shall be disregarded." Take, then, the husband's position. When he puts his petition on the file, the separation agreement is to be disregarded altogether. What then results? One finds desertion by the wife in 1936. That state of desertion continues until 1945 or 1946 and is then terminated by the offers made by the wife to return. It follows, it seems to me, as night follows day, that the husband cannot satisfy the court that, in the three years immediately preceding the presentation of the petition, he was in the position of a deserted husband. His petition must therefore fail. What he does (as the commissioner put it so well) is to try to have it both ways. He says: "You must put the agreement out of your sight "when you are considering my petition; but when there is this "answer about efforts to be reconciled you must remember that "as in those days the agreement was in force and valid, I was "entitled to reject my wife's overtures for reconciliation and I "cannot now be handicapped by doing that which at the time "I was well entitled to do." It is true that he was well entitled to reject his wife's overtures for reconciliation. He was not bound to accept them because of the existence of the agreement. He is not bound to accept them now. Nevertheless, when he puts a petition on the file the agreement is out of the way for all the purposes of his petition and you look at the facts as they would have been if no such agreement had ever been made. He cannot withdraw the agreement for his own case and still rely on it to defeat his wife's answer.

It does not seem to me that really the matter is of great complication. What the effect of the Act may be on other provisions of such an agreement—for instance, if there had been financial provisions—I do not propose to try to answer. It is possible that there may be questions arising out of agreements for separation where a petition of this sort has been put on the

file. To the question whether the other provisions (for instance, financial provisions) in such an agreement would still continue in effect, I propose to make no answer.

As to the wife's cross-petition, it seems to rest on this rather simple-minded notion, that, as the husband has not proved that his wife has deserted him, it must follow that he has deserted her. "Once you reject his petition" (says the wife) "you must "accept mine, because one side must have deserted the other "side." On this Act of Parliament that is not at all the result. She must prove, just as if she had been the original petitioner, that she was a deserted party at the time the separation agreement was entered into. That she cannot prove. She does not even try to prove it in this court. Therefore her petition, no less than her husband's, is doomed to failure.

For these reasons, in addition to those given by my Lord, I agree that these appeals fail.

PHILLIMORE J. I agree, and I cannot usefully add anything.

Appeals dismissed: Costs of husband's appeal allowed. Leave to appeal to the House of Lords refused.

Solicitors: *Bulcraig & Davis for Hay & Kilner, Newcastle-upon-Tyne; Smith & Hudson for Waller & Houseman, Newcastle-upon-Tyne.*

I. G. R. M.

[HOUSE OF LORDS.]

H. L. (E.)†
1960
April 12.

*LORD CITRINE (OWNERS) . . . PETITIONERS;
AND
HEBRIDEAN COAST (OWNERS) . . . RESPONDENTS.

PETITION for leave to appeal to the House of Lords in *The Hebridean Coast.*[1]

The Appeal Committee granted the petition.

† *Present*: LORD KEITH OF AVONHOLM, LORD DENNING and LORD MORRIS OF BORTH-Y-GEST.

J. A. G.

[1] [1960] 3 W.L.R. 29; [1960] 2 All E.R. 85, C.A.

[CHANCERY DIVISION.]

1960
June 28.

Cross J.

* LONGMUIR *v.* KEW.

[1960 L. 6.]

Landlord and Tenant—Option to purchase—Construction—Lease for 5 *years — Option to tenant to purchase freehold of premises "at "any time"—Expiry of term in* 1944 *— Tenant holding over as statutory tenant — Whether tenant entitled to exercise option in* 1959—"*at any time.*"

By a tenancy agreement, dated May 26, 1939, certain premises were let for a term of five years from June 1, 1939. The agreement provided, inter alia: "And it is hereby agreed that the tenant has "the right of option to purchase at any time at £675. Ground "Rent £7." That right was to purchase the freehold, the ground rent being the fee farm rent to which the freehold was subject. At the date of the agreement the premises were not subject to the Rent Restriction Acts, so that at that time there was nothing to prevent the landlord from recovering possession at the end of the five years' term in 1944, but it became subject to the Rent and Mortgage Interest Restrictions Act, 1939, and at the end of the five years' term the tenant remained in possession as a statutory tenant thereunder. On June 5, 1959, the tenant gave notice of his intention to exercise the option and the landlord disputed the validity of that notice.

On a summons by the tenant asking, inter alia, for a declaration that, on the true construction of the agreement, he was entitled to exercise the option and had validly exercised it on June 5, 1959:—

Held that, on the true construction of the agreement, the right given to the tenant to purchase the freehold was limited to a right to purchase it at any time during the currency of the agreement, and that, therefore, the tenant was not entitled to exercise it.

Moss v. *Barton* (1866) L.R. 1 Eq. 474; *Buckland* v. *Papillon* (1866) 2 Ch. 67; *In re Leeds and Batley Breweries Ltd.* [1920] 2 Ch. 548; *Rider* v. *Ford* [1923] 1 Ch. 541; *Hutton* v. *Watling* [1948] 1 Ch. 26; 64 T.L.R. 326; [1948] 1 All E.R. 803, C.A.; *McIlroy* v. *Clements* [1923] W.N. 81, C.A.; and *Sherwood* v. *Tucker* [1924] 2 Ch. 440; 40 T.L.R. 782, C.A. considered.

ADJOURNED SUMMONS.

By a tenancy agreement dated May 26, 1939, the landlord, William James Kew, agreed to let and the tenant, Robert Davidson Longmuir, to take certain freehold premises, 31, Eagle Road, Brislington, Bristol, for a term of five years from June 1, 1939. The agreement provided, inter alia, "And it is hereby agreed, "that the tenant has the right of option to purchase at any time "at £675, ground rent £7." That right was to purchase the freehold, the ground rent being the fee farm rent to which the freehold was subject. Shortly after the date of the agreement the tenant entered into possession of the premises and at the date of the summons was still in possession as tenant of the landlord. By letter dated June 5, 1959, addressed to the landlord, the tenant's solicitors gave notice of the tenant's intention to exercise

his right of option to purchase the property for £675. By letter dated June 12, 1959, to the tenant's solicitors, the landlord's solicitors stated that they had advised the landlord to resist any steps that the tenant's solicitors might take on the tenant's behalf as to the exercise of the option.

On January 1, 1960, the tenant took out a summons asking, inter alia, for a declaration that, on the true construction of the agreement, he was entitled to the option and that it was duly exercised by the letter dated June 5, 1959.

The parties agreed that, at the date of the agreement, the property was not subject to the Rent Restriction Acts so that the landlord could have recovered possession from the tenant at the end of the five years' term in 1944. The property became subject to the Rent and Mortgage Interest Restrictions Act, 1939, whereunder the tenant remained and was at the date of the summons a statutory tenant.

B. S. Tatham for the tenant.

G. A. Forrest for the landlord.

The following cases referred to in argument were not cited in the judgment: *Turner* v. *Watts* [1]; *Woodall* v. *Clifton.* [2]

CROSS J. This summons raises what is, in my judgment, by no means an easy point of construction of a tenancy agreement made on May 26, 1939, between the defendant, William James Kew, and the plaintiff, Robert Davidson Longmuir, in respect of a certain house known as 31, Eagle Road, Brislington, Bristol. [His Lordship stated the facts and continued:] The case turns on the construction of those few words used in the agreement, which I will repeat—"And it is hereby agreed that "the tenant has the right of option to purchase at any time"—that means purchase the freehold—"at £675." It is agreed on both sides that that cannot be read literally, so that the tenant had the right to purchase the freehold even though he no longer had any connection with the premises and was no longer a tenant of the landlord. It would be quite ridiculous to suppose that, had the tenant gone out of possession in 1944 and gone to live in some other part of the country and the landlord had relet the premises to somebody else, the tenant at some future date years afterwards could claim to purchase the property.

The two rival views which have been put forward are, first, that the words "at any time" mean at any time during the term of five years created by the agreement; or, alternatively, that they mean at any time while the tenant is a tenant of the premises under the landlord either during the term of five years or under any continuation of the relation of landlord and tenant whether it be by a consensual holding over or by operation of the Rent Restriction Acts.

[1] (1927) 97 L.J.K.B. 92; 44 T.L.R. 105, D.C.

[2] [1905] 2 Ch. 257; 21 T.L.R. 581, C.A.

1960

Longmuir
v.
Kew.

Cross J.

The question, though ultimately one of construction of the particular document, is not free from authority. There are a number of cases, starting with *Moss* v. *Barton*,[1] which show that, where there is a provision in a tenancy agreement giving the tenant a right to continue or renew the tenancy, and there is no express statement in the agreement that that right is exercisable only during a certain period and, on the face of it, it is exercisable at any time, the court will not, generally speaking confine the exercise of the right to the original contractual period of tenancy but will allow it to be exercised after the expiry of the original period if the tenant is holding over and is still a tenant of the landlord. In *Moss* v. *Barton*[2] there was an agreement by which the landlord agreed to allow the tenant to occupy the premises in question for a period of three years and agreed at the request of the tenant to grant him a lease of the premises for 5, 7, 14 or 21 years from the expiration of the three years' original period. After the expiry of the original three years, the tenant remained in possession as tenant from year to year, but it was held by Lord Romilly M.R. that the tenant continued to have the right, as long as he remained tenant, to call for an extended lease for 5, 7, 14 or 21 years. A similar decision was arrived at by Lord Romilly M.R., and was affirmed, on appeal, by Lord Chelmsford L.C. in *Buckland* v. *Papillon*,[3] where by an agreement the landlord agreed to let and the tenant to take the property for three years at a certain rent. The agreement contained a clause that the landlord should, "whenever called upon so to do" by the tenant, grant a lease to him of the premises in question "for a period of three years, seven years, or the remainder of the term . . . that [the landlord] has at present in his power to grant. . . ." There again, the tenant remained in occupation after the end of the original period and it was held that his assignee in bankruptcy had a right to call for the extended lease under the words "whenever called upon so to do" as long as he was still the tenant of the landlord. The court did not confine the words "whenever called upon so to do" to the period of the original term.

Next comes *In re Leeds & Batley Breweries Ltd.*[4] There, in contradistinction to the cases to which I have referred, the option in question was an option to purchase a reversion and not an option for the renewal of the term. There was a lease for seven years from June 1, 1903, which contained a proviso that if the lessee should be desirous of purchasing the unexpired residue of the leasehold reversion and should—these were the important words—"at any time six calendar months before the determination of this lease" give to the lessors a written notice to that effect, then the person giving such notice should be the purchaser of the unexpired residue of the term at the price of

[1] (1866) L.R. 1 Eq. 474.
[2] Ibid.
[3] (1866) L.R. 2 Ch. 67.
[4] [1922] Ch. 548.

£3,000. After the original term had expired, as a result of correspondence between the lessors and the plaintiff, the term was extended for 12 months from June 1, 1910, and after that extended term came to an end the lessee continued in possession, becoming a tenant from year to year. The question arose whether the lessee could then exercise the option to purchase. Peterson J. held that he could not, on the ground that the option to purchase the reversion was not a term of the original tenancy which would be incorporated into the year to year tenancy under which the lessee was holding after the determination of the extended term because the provision for the option of purchase was clearly only exercisable during the initial seven years.

In 1923 *Rider* v. *Ford*,[5] on which Mr. Tatham has strongly relied, came before Russell J. In that case, there was an agreement between the landlord and the tenant by which the tenant agreed to take the premises in question "for 3, 5 or 7 years at "the rent of £147 per annum, and to have the option of pur-"chasing either the freehold for £2,900 or a lease of 97 years "(ground rent £20) for £2,400." It will be seen there that there was an alternative either to purchase the freehold or to acquire a very long lease of the premises for 97 years instead of seven years. There, as in the earlier cases to which I have referred, the tenant remained in possession as tenant from year to year after the term of seven years. The question arose whether he was entitled to exercise either or both of those options. In that case counsel for the tenant conceded, and the judge held that the option to purchase the freehold was void as offending against the rule against perpetuities. That was a wrong concession as was pointed out by Jenkins J. in *Hutton* v. *Watling*,[6] because the proceedings were between the original landlord and the original tenant and the rule against perpetuities has nothing to do with the enforcement of a contract between the original contracting parties. If Russell J. in *Rider* v. *Ford*[7] had not held that the option to purchase the freehold was void for perpetuity, it is clear that he would have held that both the option to purchase the property and the option to take the renewed term were exercisable by the tenant notwithstanding that the original term of seven years had expired. It was argued in that case that there was a distinction between cases of renewing leases and cases of purchasing the reversion. Russell J. referred to *Moss* v. *Barton*[8] and *Buckland* v. *Papillon*,[9] and pointed out that in those cases the court had held that the option to renew was exercisable so long as the relationship of landlord and tenant existed although the original term had expired.

He went on to say[10]: "There are two options in the agree-"ment before me, and I cannot read into it any limit in point

[5] [1923] 1 Ch. 541.
[6] [1948] 1 Ch. 26; 64 T.L.R. 326; [1948] 1 All E.R. 803, C.A.
[7] [1923] 1 Ch. 541.
[8] L.R. 1 Eq. 474.
[9] L.R. 2 Ch. 67.
[10] [1923] 1 Ch. 541, 545.

1960

Longmuir v. Kew.

Cross J.

"of time except that indicated by Lord Chelmsford in *Buckland* "v. *Papillon*,[11] namely, that the option exists so long as the "relationship of landlord and tenant continues, notwithstanding "that the original term of seven years has run out." Both options obviously had to be exercisable within the same period. There could not be a question of different periods for the two options. The judge thought that those options could not be confined to the seven years' period and that, they were exercisable so long as the relationship of landlord and tenant subsisted. He distinguished *In re Leeds & Batley Breweries*,[12] decided by Peterson J. on the ground that there, under the express words in the original agreement, the option was exercisable only during the original term.

Mr. Tatham relies, naturally, very much on *Rider* v. *Ford*. He says that there is no distinction in principle between options for renewal and options to purchase a freehold and he says that, as Russell J. refused to confine the exercise of the options in that case to the seven years' term, so I should refuse to confine the option here to the original term and should hold that it is exercisable so long as the relationship of landlord and tenant subsists. But all the cases to which I have referred hitherto have been cases where the landlord could have turned the tenant out at the end of the original period, whereas this is a case where, by operation of statute passed after the creation of the tenancy agreement, the landlord became unable to turn the tenant out and was forced to keep him on. Mr. Tatham says that that makes no difference and he quotes in support of that submission the decision of P. O. Lawrence J. in *McIlroy Ltd.* v. *Clements*.[13] That was a case of a renewal, not a case of an option to purchase the reversion. As I understand the report P. O. Lawrence J. said, in effect, that, although the option to renew was not one of the terms of the tenancy which became applicable to a statutory tenancy by virtue of section 15 of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, nevertheless, by virtue of the Act the relationship of landlord and tenant continued between the parties, and the tenant continued to have the right to renew the tenancy on the principle of *Buckland* v. *Papillon*,[14] notwithstanding the fact that the landlord was not contented with his carrying on but wished him to go out. Mr. Tatham says that the cases decided by Russell J. and P. O. Lawrence J., taken together cover the present case.

Although the cases are, up to a point, helpful, ultimately the whole question comes down to one of construction of this particular document. The words "at any time," as I have pointed out, cannot on any footing mean precisely what they say, and the question is what is the limitation that I ought to read into them here.

It seems to me prima facie most unlikely, especially in these

[11] L.R. 2 Ch. 67.
[12] [1922] Ch. 548.
[13] [1923] W.N. 21.
[14] L.R. 2 Ch. 67.

days of Rent Acts, that a landlord would agree in advance to a tenant having the right to purchase the reversion at a price named in the agreement throughout the quite uncertain period during which the tenant may continue to be his tenant by holding over.

That aspect of the matter was stressed by Pollock M.R., in *Sherwood* v. *Tucker*.[15] Mr. Tatham says that the landlord could, at the expiration of the fixed term, have called on the tenant to elect whether he would exercise the option or not, and that if the tenant had refused to make up his mind, the option would have lapsed. I doubt whether it would have lapsed unless the landlord had determined the new periodic tenancy, and that he could not have done in view of the Rent Acts. Again, I think it is a little easier to read an option to renew a term as applying throughout the relationship of landlord and tenant, even if the original term has expired, than it is in the case of an agreement to purchase the freehold.

On the whole, therefore, although the question is by no means an easy one, and certainly is not made easier by the current of authority, I consider that, on the true construction of this agreement, the right given to the tenant to purchase the freehold was a right to purchase it at any time during the currency of the agreement.

Summons dismissed with costs.

Solicitors: *Heald, Johnson, Garton & Co. for A. E. Nichols, Strickland & Fletcher, Bristol; Candler, Stannard & Co. for Tuckett, Williams & Kew, Bristol.*

K. R. A. H.

[15] [1924] 2 Ch. 440, 445; 40 T.L.R. 782, C.A.

[QUEEN'S BENCH DIVISION.]

* PARISH *v.* JUDD.

1960
June 22, 23.

Edmund Davies J.

[1959 P. No. 813.]

Nuisance—Highway—Obstruction—Motor-vehicle stationary and unlit on road at night—Illuminated by light from street lamp—Whether dangerous obstruction constituting nuisance.

Road Traffic—Negligence—Collision—Unlit vehicle standing on road at night—Presumption of negligence—Failure of lighting mechanism due to break in electric wiring—Car reasonably and properly maintained by owner—Whether presumption of negligence displaced.

At 10 o'clock on a dark night, while the defendant was driving his motor-car along a highway, the lighting mechanism of his car failed owing to a break in the earth wire between the battery and

1960

Parish
v.
Judd.

the cylinder head. A passing lorry driver towed the car to the side of the road some six or seven yards from a street lamp. While both vehicles were stationary, the defendant's car being completely unlit, the lorry carrying rear and side lights, a car in which the plaintiff was a passenger collided with the rear of the defendant's car and the plaintiff sustained injuries.

In an action for damages for personal injuries, the plaintiff claimed that the defendant had wrongfully obstructed the highway by permitting his car to be on the highway without any lights and, alternatively, that he was negligent in permitting it to stand in such an unlit condition on the road:—

Held, (1) that for an unlighted vehicle on a road at night to constitute a nuisance it must be shown that the vehicle was not only an obstruction but a danger and, further, that the vehicle became unlighted by reason of some fault on the part of the person responsible for the vehicle or, assuming that it initially became unlit without any fault on the part of the person responsible, that he was thereafter guilty of some fault; that the defendant's car did not present a dangerous obstruction on the highway as the place where it was standing was sufficiently illuminated by the light of the street lamp.

Maitland v. *Raisbeck and Hewitt Ltd.* [1944] 1 K.B. 689; 60 T.L.R. 521; [1944] 2 All E.R. 272 C.A. applied.

(2) That the presence of a wholly unlit vehicle upon a dark road at night where there was no street lighting was prima facie evidence of negligence on the part of the person responsible for the vehicle, but as the failure of the lighting mechanism could not be attributed to any negligent omission or act of commission on the part of the defendant, who had maintained his car in the manner in which a reasonably prudent owner could be expected to maintain it, the presumption of negligence had been displaced and, accordingly, the plaintiff's action failed.

Crofts v. *Waterhouse* (1825) 3 Bing. 319 considered.

Action.

At about 10 p.m. on March 9, 1957, the plaintiff, Isobel Parish, was driving as a passenger in a 1948 Hillman motor-car driven by her husband, Ernest Christopher Parish, along a highway, the Harlow–Epping Road, which was some 22 feet wide, travelling in the direction of London. The plaintiff's husband, a transport driver, knew the road well and was travelling at 25 to 30 miles per hour, carrying side lights and a spot light with a beam some 25 to 30 yards long. He had breasted the brow of a hill and some 250 yards farther along the road he collided with the rear of a 1937 Hillman car, owned by the defendant, Frederick H. R. Judd, which was standing unlit on the near side of the road. The plaintiff sustained injuries. Although it was a dark night, with mist in places, visibility was not bad and there was no mist in the particular area of the accident. The defendant's car was reasonably into the proper side of the road, attached by a tow rope to an articulated lorry, which was also stationary. The defendant's car was six or seven yards from an omnibus stop and a lighted lamp-standard. There were no lights on it but there were three reflectors at the back and the back of the lorry had reflectors and very good nearside and offside lights.

According to the evidence of the defendant, the circumstances leading to the position of the defendant's car were that his lights had failed quite suddenly when he was driving along the road with his wife as a passenger. The starting mechanism had also failed so he pushed the car to the side of the road. Several private cars passed him in complete safety and shortly afterwards the lorry driver stopped and towed the defendant's car until they came to a street lamp where he stopped, dismounted, and asked the defendant if he was all right. He had just remounted into the cab of the lorry, ready to move off, when the collision occurred.

The defendant, a fireman, and a driver of some experience, had owned his car for some five or six years. When he acquired it the wiring had been thoroughly checked. He had serviced and maintained it himself, he had never had any wiring failures; the battery had had the usual servicing and had been checked some 18 months before the accident. At night-time, as a safeguard against fire, he had been in the habit of disconnecting the accumulator.

The plaintiff claimed damages for the injuries she had sustained, alleging that they had been caused by the negligence of the defendant in permitting his car to stand stationary on the highway without rear lights or to be towed without rear lights; alternatively, that by so doing, he had wrongfully obstructed the highway and thus caused a nuisance. The defendant denied negligence or wrongful obstruction of the highway, and alleged negligence on the part of the plaintiff's husband.

J. Bolland for the plaintiff.
R. I. Kidwell for the defendant.

The cases cited in argument are referred to in the judgment.

EDMUND DAVIES J. In this interesting action the plaintiff seeks to recover compensation from the defendant in respect of the injuries which she sustained on March 9, 1957, when a vehicle driven by her husband, in which she was a passenger, came into collision with the stationary motor-car of the defendant. The scene of the collision was the Harlow-Epping road, and the time shortly after 10 o'clock at night. Weather conditions were that it was a dark night, in places there was mist, though the evidence was that visibility was not bad and there was no mist in the particular area of the accident. The defendant's motor-car was stationary, pointing in the direction of Epping and on the near-side of the road and it was unlit. The motor-car driven by the plaintiff's husband, which was being driven from Harlow to Epping, collided with the rear of the defendant's car.

The law, as I understand it, is that the mere fact that an unlighted vehicle is found at night upon a road is not sufficient

1960

PARISH
v.
JUDD.

Edmund Davies
J.

to constitute a nuisance. First, in order that a nuisance may be constituted, it must be shown, not merely that the vehicle was an obstruction upon the road, but that it was a danger. Secondly, in order for it to be a nuisance (it may be an actionable nuisance), it must be shown either that the vehicle became unlighted by reason of some fault on the part of the person responsible for the vehicle, or, assuming that it initially became unlit without any fault on the part of the person responsible for the car, nevertheless that he was thereafter guilty of some fault.

In *Maitland* v. *Raisbeck and Hewitt (R. T. & J.) Ltd.*,[1] Lord Greene M.R. said[2]: "Every person who uses the highway must "exercise due care, but he has a right to use the highway, and, if "something happens to him which, in fact, causes an obstruc-"tion to the highway, but is in no way referable to his fault, "it is wrong to suppose that ipso facto and immediately a "nuisance is created. A nuisance will obviously be created if "he allows the obstruction to continue for an unreasonable time "or in unreasonable circumstances, but the mere fact that an "obstruction has come into existence cannot turn it into a "nuisance. It must depend on the facts of each case whether "or not a nuisance is created. If that were not so, it would "seem that every driver of a vehicle on the road would be "turned into an insurer in respect of latent defects in his "machine."

Assuming that the obstruction presents danger, has the plaintiff, in the first place, established that its unlit condition was due to negligence? There has been evidence about the matter, but I pose this question to myself in this way: Suppose nothing more is available in the case but that a vehicle is found on a dark road at night in an unlit condition, does the unlit condition in itself raise a presumption of negligence or fault against the person responsible for the vehicle? One would have thought that there would be an amplitude of authorities to assist one to answer that question, but counsel for the plaintiff tells me that his researches have led him to no such position. But I think the answer must be in the affirmative. Common sense tells one that ordinary prudence demands that people who drive vehicles at night should have lights upon them. The same standards demand that if a person leaves a vehicle parked in a dark place at night the vehicle should have lights upon it.

In *Crofts* v. *Waterhouse*,[3] Best C.J., dealing with the duty of stage-coach proprietors (an action which was framed in negligence) said[4]: "This action cannot be maintained unless negli-"gence be proved," and then he went on to list the various things that must be seen to by the stage-coach proprietors. "The coachman," he said, ". . . must be provided with steady "horses; a coach and harness of sufficient strength, and properly

[1] [1944] 1 K.B. 689; 60 T.L.R. 521; [1944] 2 All E.R. 272, C.A.
[2] [1944] 1 K.B. 689, 691.
[3] (1825) 3 Bing. 319.
[4] Ibid. 321.

"made; and also with lights by night. If there be the least "failure in any one of these things, the duty of the coach "proprietors is not fulfilled, and they are answerable for any "injury or damage that happens." I am surprised to be told that I am apparently holding for the first time, as far as any reported decision is concerned, that the presence upon a dark road at night of a wholly unlit vehicle (and I speak, of course, in circumstances where there is no street lighting) is prima facie evidence of negligence on the part of the person responsible for the vehicle, and that if the matter stopped there that negligence would remain established.

Applying that matter to the nuisance aspect of this case, which is framed in negligence and in nuisance, the presence on the highway of this vehicle in an unlit state would without more be a sufficient compliance with the first requirement that the vehicle should have become unlit owing to the negligence of the car owner. But the whole basis of this claim, both in negligence and in nuisance, must be the existence of danger, and I have come to the conclusion on the whole of the evidence that the plaintiff fails in limine. It is true that she being an innocent passenger does not have to show that her husband, the driver, was free of blame. She does not have to show any preponderance of blame in the defendant. It is sufficient if she can show that some aspect of the defendant's conduct contributed to this accident, even to an extremely small degree. If she could do that upon balance then the defendant would be liable to make good the whole of the damages.

[His Lordship referred to the evidence of the plaintiff's husband that he saw a black object when he came over the brow of the hill which seemed to occupy all his side of the road which he recognised when about 25 feet from it as a laden lorry, that a car came in the opposite direction, which switched on its full lights. He knew he could not get by and pulled in to the nearside of the road and only then saw the car with no lights behind the lorry when about 10 feet from it. He braked and rebraked but hit the back of the car. His Lordship continued:] That the plaintiff's husband must be condemned in negligence himself is absolutely inescapable, and indeed Mr. Bolland has not sought to escape that fact, but he says that that does not matter, so long as the defendant can be brought in by however small a degree. [His Lordship referred to the evidence and continued:] On the whole I have come to the conclusion that the place where the vehicles were standing was a sufficiently illuminated place to present no danger to road users. Accordingly, in so far as the issue of nuisance is concerned, this action fails on the ground that there was no dangerous obstruction presented on this highway at all.

What about negligence, assuming that there was some negligence on the part of the defendant in relation to his maintenance of his vehicle and assuming that there was some

1960

PARISH
v.
JUDD.

Edmund Davies J.

negligence to explain the lighting mechanism suddenly failing? That again is unconnected with this accident, for the vehicle was left at all material times in a place where the street lamp afforded an ample warning to a person who was keeping a proper look-out or, indeed, to anybody who was keeping even a casual look-out. But since the matter has been raised it is preferable that I should express my views about the matter of the car maintenance. [His Lordship stated the facts relating to the defendant's maintenance of his car and his disconnection of the battery each night and said that he was satisfied that the most probable explanation of the failure of the electrical mechanism was that given by a witness for the defendant, a consulting engineer, who had examined the car in 1958, namely, a break in the earth wire between the battery and its earth on the cylinder head causing a break of the electric current which would affect the engine and lights; that a weakening of the wires could be caused by bending the wires over a long period but that any weakening would be concealed by insulation and nothing would be known until the break occurred. His Lordship continued:] Having said at the outset that the unlit condition of a vehicle on a road raises a presumption of negligence against the car owner, I am satisfied in this case that the presumption would, upon the evidence I have heard from the defendant and the consulting engineer, have been displaced, that he has shown a reasonable discharge of his duty and acted in a manner which not the most highly skilled mechanic would act, but in the manner in which a reasonably prudent owner of a motor vehicle could be expected to act. Accordingly, I see no ground for holding that the initial failure of the lights can be attributed to any negligent omission or commission by the defendant.

For all these reasons, while one must have sympathy with the plaintiff for the unfortunate injuries she has sustained, my duty which must be founded upon the discharge by the plaintiff of the burden of proof compels me to say that there must be judgment for the defendant.

Judgment for defendant with costs

Solicitors: *Amery-Parkes & Co.; Ponsford & Devenish, Tivendale & Munday.*

E. M. W.

[COURT OF APPEAL.]

* INLAND REVENUE COMMISSIONERS *v.* JACKSON.

C. A.

1960
June 24.

Sellers and Pearce L.JJ.

Practice — Pleadings — Particulars — Traverse negative pregnant — —Income tax—Penalty—Failure to make returns within prescribed time "without reasonable excuse"—Denial by taxpayer that he failed to furnish particulars required "without reasonable excuse" —Whether denial a negative averment—Whether plaintiffs entitled to particulars of reasonable excuse to be relied on—Income Tax Act, 1952 (15 *&* 16 *Geo.* 6 *&* 1 *Eliz.* 2, *c.* 10), *ss.* 19, 232 (2)—*R.S.C., Ord.* 19, *r.* 6.

Revenue—Income tax—Penalty—Pleading—Application of normal rules in civil actions—Income Tax Act, 1952, *ss.* 19, 232 (2).

The Inland Revenue Commissioners claimed penalties from a taxpayer under section 232 of the Income Tax Act, 1952,[1] and earlier revenue Acts, for failure to make income tax returns over a period of nine years. Their statement of claim alleged that he had been required by notices in writing on October 7, 1958, to furnish on or before November 12, 1958, particulars as to the several sources of his income, and that he "without reasonable excuse" had failed to do so within the time prescribed. By his defence the taxpayer admitted that he had not furnished all the particulars required within the time prescribed; but he specifically denied "that he "failed to furnish any such particulars without reasonable excuse." The commissioners applied for particulars of that denial; and the master ordered the taxpayer to give particulars "specifying whether "it is alleged that there was a reasonable excuse for not furnishing "the particulars within the time and if so giving full particulars "of such alleged excuse." The judge in chambers dismissed the taxpayer's appeal from that order. On appeal:—

Held, that the commissioners' claim, albeit a claim for penalties, was not a criminal proceeding and, accordingly, the normal rules as to pleadings in civil actions applied, namely, that where a traverse was a negative pregnant and it was clearly intended to set up an affirmative case at the trial, particulars ought to be delivered. As the taxpayer's denial that he had failed to make returns "without reasonable excuse" was in substance a positive averment and it was clear to the court that he intended at the trial to show that there was reasonable excuse for not giving the information in the time prescribed, and, moreover, as the particulars of that excuse would not assist the plaintiffs' case but would, on the contrary, benefit that of the taxpayer, particulars should be given, for not to do so might cause surprise, delay and undue expense.

Pinson v. *Lloyds and National Provincial Foreign Bank Ltd.*

[1] Income Tax Act, 1952, s. 19: "Every individual, when required so "to do by a notice given to him . . . "shall, within the time limited by "the notice, prepare and deliver . . . "a true and correct return in the "prescribed form of all the sources "of his income and of the amount "derived from each source for the "year preceding the year of assess-"ment, computed in accordance with "the provisions of this Act . . ."

S. 232: "(2) If any person without "reasonable excuse fails to furnish "within the time prescribed any "particulars required under this sec-"tion, he shall be liable to a penalty "not exceeding fifty pounds, and, "after judgment has been given for "that penalty, to a further penalty "of the like amount for every day "during which the failure continues."

C. A.

1960

INLAND REVENUE COMRS. v. JACKSON.

[1941] 2 K.B. 72; 57 T.L.R. 558; [1941] 2 All E.R. 636, C.A. applied.

Dicta in *Duke's Court Estates Ltd.* v. *Associated British Engineering Ltd.* [1948] Ch. 458, 461; 64 T.L.R. 373; [1948] 2 All E.R. 137 distinguished.

Decision of Salmon J. affirmed.

INTERLOCUTORY APPEAL from Salmon J.

The Inland Revenue Commissioners issued a writ on January 29, 1959, by which they claimed penalties of £50 per annum under section 232 of the Income Tax Act, 1952,[1] and earlier legislation reproduced in the Act of 1952, in respect of the failure of the taxpayer, Leonard Percival Jackson, to make proper returns of income tax over a period of nine years.

The original statement of claim alleged that the taxpayer had on October 7, 1958, been required by notices in writing to furnish on or before November 12, 1958, particulars as to the several sources of his income and the amount derived from each source, namely, a statement of dividends, interest, annuities, etc., receivable after deduction of income tax or "free of income tax," showing the names of the companies or persons from whom such dividends, interest, annuities, etc., were receivable, amounts of holdings of shares or stock, and of the gross amount of income derived from each separate source; and that he had failed to furnish the particulars required by any of the nine notices within the prescribed time or at all.

The original statement of claim made no reference to the failure being "without reasonable excuse" and the defendant taxpayer took out a summons to strike out the statement of claim as disclosing no cause of action. The commissioners were on that application given leave to amend the statement to claim that: "The defendant without reasonable excuse has failed to furnish "the particulars required within the time prescribed in the "notices."

The taxpayer delivered a defence in which he admitted receiving the notices in writing. By paragraph 2 he admitted that he had not furnished all the particulars required by any of the notices within the time prescribed therein; but he denied specifically "that he failed to furnish any such particulars without "reasonable excuse or that he is liable to any penalty as alleged, "or at all."

The commissioners applied to Master Diamond, on March 25, 1960, for an order that the taxpayer should give further and better particulars of the denial that he had failed to furnish the particulars without reasonable excuse, and the master made an order that particulars should be given within eight days, "specifying "whether it is alleged that there was a reasonable excuse for not "furnishing the particulars within the time and if so giving full "particulars of such alleged excuse." The taxpayer appealed

[1] See footnote 1, ante, p. 873.

from that order to Salmon J. in chambers, who dismissed the appeal. The taxpayer appealed.

Leonard Lewis for the taxpayer. The onus of establishing that there has been a failure to deliver the particulars within the prescribed time "without reasonable excuse" falls on the commissioners, and if the particulars ordered by the master are given they will assist the commissioners to establish their case; and on the authorities that is just what they are not allowed to have. The commissioners say that the defence involving a double negative has implied in it a positive averment that the taxpayer had a reasonable excuse. But this is not an ordinary civil action. It is a claim for penalties; and the approach of the law to such an action is quite different from that to an ordinary civil action.

[SELLERS L.J. The court wants to know what has to be tried and here it is not the bare fact that the taxpayer has not delivered adequate particulars but whether there is a reasonable excuse or not. Even if the onus is on the commissioners in the first place, they cannot see any excuse and the taxpayer does not reveal one. His form of pleading appears to show that he has no excuse.]

The commissioners are not entitled to the usual facilities which a plaintiff has in civil proceedings, such as a right to discovery or interrogatories. They have to make out their case without the assistance usually afforded to a plaintiff.

[PEARCE L.J. If you are right in this the commissioners can never recover any penalty because they can never show that a person has no reasonable excuse if he refuses to give particulars of it.]

They have only to make out a prima facie case and if they show that they gave a reasonable time in their notices the onus shifts. But this case differs from many in that it is possible to establish by cross-examination of the plaintiffs' witnesses that reasonable time was not given. A vast amount of information is required to satisfy these notices. The notice was dated October 7, and the taxpayer was called on to furnish particulars on or before November 12—five weeks. There was much correspondence on these matters.

[SELLERS L.J. The taxpayer could have asked for more time. This is rather trifling with the court. Vast volumes are coming into court but no great principle is involved. It is a matter of common sense. Why does not the taxpayer plead the excuse instead of trying to evade it? The purpose of pleadings is to define the issue and direct evidence towards it.]

But this is an action for a penalty and stands in quite a different category.

[SELLERS L.J. In an action in the criminal courts it is desirable to define the issues beforehand. It is only a question of the machinery by which they are defined. In criminal cases they are defined by the indictment and the depositions; in a civil action they are defined by the pleadings.]

C. A.
1960
INLAND REVENUE COMBS. v. JACKSON.

But in a criminal action what is defined is the case for the prosecution. The defendant is not required to do anything more than say "Guilty" or "Not Guilty." Though there is no authority exactly on this point, in *Martin* v. *Treacher*, Lord Esher M.R.[2] said that where the issue was "no reasonable cause" the mere denial of that did not involve the necessity to give particulars, and that the general rule was that in an action for penalties by a common informer leave would not be given to the plaintiff to administer interrogatories.

[SELLERS L.J. But this is not a claim by a common informer. The claim is under statute by the party who is entitled to enforce the penalty.]

The policy of the law must be the same in both cases.

[SELLERS L.J. What was said by Lord Esher in *Martin's* case[3] cannot apply to the present case. The taxpayer is not being asked to say anything that would incriminate him; on the contrary, he is being asked to say something which would defend him. If he has an excuse the proceedings could be stayed.]

If his excuses are good no harm can befall him; but if they are inadequate the commissioners would be able to present their case better than they could without the particulars.

[PEARCE L.J. It would make no difference, for the judge would simply grant an adjournment at the taxpayer's expense on the ground that the commissioners required more evidence.]

They may never get as far as that. The particulars asked for in regard to income tax covered nine years; they amount to thousands and thousands of Stock Exchange transactions, the receipt of dividends, the purchase and sale of shares and so on. It was a very considerable task to accumulate and supply all that information.

[PEARCE L.J. That sounds like a reasonable excuse which might be approached with sympathy; but what is wanted is for the taxpayer to say what is the nature of his excuse.]

A defendant on a criminal charge is never asked to put his case before the court before the actual trial. This is a claim for a sum of money to be paid because of a default on the part of the taxpayer; it is defined by statute and the payment is prescribed by statute. The principle involved is not that the defendant in such a case should not be required to incriminate himself but that the application for particulars is of a fishing character. If at the trial it is apparent that the commissioners have asked for information relating to thousands of transactions, some going back nine years, to be supplied within five weeks, a judge might well hold that there was no prima facie case that there was no reasonable excuse for failing to make delivery within the time prescribed. If, on the general picture, the commissioners could not discharge the onus of showing "no reasonable excuse" the

[2] (1886) 16 Q.B.D. 507, 510; 2 T.L.R. 268, C.A.

[3] 16 Q.B.D. 507, 510.

onus would not shift; and in these circumstances the taxpayer is entitled to withhold as much information as he can. For this purpose there is no distinction between particulars and interrogatories: see *Benbow* v. *Low*, per Jessel M.R.[4]

It is conceded that if the taxpayer had pleaded something in the affirmative he would have to furnish the particulars customary in such a case; but where there has been no deliberate positive averment, he can withhold the information. The difference between an affirmative and a negative averment is that in a pleading a denial may merely mean that one puts the other side to proof and there is no intention of putting a positive case oneself.

[SELLERS L.J. But if the averment really means "I have "reasonable excuse" why should it give the commissioners any advantage except that of knowing what case they have to meet? And if the taxpayer goes to trial without telling them, they could get an adjournment on the ground that they have been taken by surprise. Where is there authority that claims for penalties under a revenue Act are in the nature of criminal proceedings and that cases of this sort should not be amplified in order to make clear the issues for trial? If I could see any prejudice to the defendant there would be some substance in these submissions; but it is all to his advantage to give the particulars asked for.]

There is always an advantage in the element of surprise. In ordinary litigation the courts frown on it; but this is a special type of proceeding. In this case the commissioners have conceded that they cannot interrogate the defendant about his excuse; but if he is required to furnish these particulars the result will be a manifest anomaly. What Harman J. said in *Duke's Court Estates Ltd.* v. *Associated British Engineering Ltd.*[5]—an action for forfeiture—is support for the present submission; and actions for penalties are on the same basis as actions for forfeiture.

[SELLERS L.J. Harman L.J. referred to *Pinson* v. *Lloyds and National Provincial Foreign Bank Ltd.*,[6] in which Goddard L.J. said: "If the pleading is not such as will fairly enable the "opposite party to know the case he has to meet, further parti-"culars ought to be ordered." That precisely fits the present case.]

There is no obligation on this defendant to set up an affirmative case, and what was said by Goddard L.J. in *Pinson's* case does not apply here. In *James* v. *Radnor County Council*,[7] where the onus was on a plaintiff to prove that charges were reasonable and the defendant denied the reasonableness of the charges, it was held that he was entitled under cover of that plea to produce what case he liked and was not compellable to give particulars which would show the plaintiff the case he had to meet. Where the plaintiffs allege "no reasonable excuse," and the defendant denies it, the plaintiffs must make out their prima facie case.

[4] (1880) 16 Ch.D. 93, 97, C.A.
[5] [1948] Ch. 458, 461; 64 T.L.R. 373; [1948] 2 All E.R. 137.
[6] [1941] 2 K.B. 72, 80; 57 T.L.R. 558; [1941] 2 All E.R. 636, C.A.
[7] (1890) 6 T.L.R. 240.

C. A.
1960
INLAND REVENUE COMRS. v. JACKSON.

[SELLERS L.J. *James* v. *Radnor County Council*[7] is on a totally different issue. The Inland Revenue here has to show "without reasonable excuse." If the defendant does not comply with the notices why does not that carry the implication of doing so without reasonable excuse, without more?]

One has then to look at what the defendant was being asked to do. All he has to do is to rebut the allegation that there was no reasonable excuse. He does not have to prove a reasonable excuse.

[SELLERS L.J. If the defendant refuses to give particulars he may not be allowed by the court to set up an affirmative case at the trial.]

The defendant will produce evidence of reasonable excuse to rebut the plea that there was no reasonable excuse. An accused person has to do no more than show the prosecution that they have not established beyond reasonable doubt that he is guilty. It is no part of his case that he is an innocent person.

Alan Orr, for the commissioners, was not called on.

SELLERS L.J. This is an appeal from a decision of Salmon J. who (affirming the master) made an order on the defendant to give particulars of paragraph 2 of the amended defence. In my view, the appeal is misconceived and the judge came to a right conclusion on this matter.

We have listened to the argument of Mr. Lewis and it seems to me that, if we were to grant the appeal, he would be in a greater difficulty than perhaps he has appreciated. [His Lordship stated the facts as to the pleadings set out above, and continued:] Counsel has referred us to several authorities but I do not think it is necessary to deal with them fully. One can simply take this case as a claim for penalties. It is not a criminal proceeding. The form of the pleading is of the usual kind and normal so far as particulars are required of the averments in the pleading. I support the judge entirely in thinking that when the defendant pleads in the way I have read in paragraph 2 of the defence he is of necessity and by clear implication setting up an implied affirmative. It does not go to establish the plaintiffs' case but operates substantially for the benefit of the defendant who is thereby setting up an affirmative case. The plaintiffs' claim stands on its own feet and needs no support from the defendant. On these pleadings as they stand the defendant proposes to set up that there was reasonable excuse for not giving the information required. Unless the particulars of the defence which have been asked for are given before the trial there may well be surprise, delay and undue expense.

The point argued here was considered by Harman J. in *Duke's Court Estates Ltd.* v. *Associated British Engineering Ltd.*,[1] on

[7] 6 T.L.R. 240.

[1] [1948] Ch. 458; 64 T.L.R. 373; [1948] 2 All E.R. 137.

which the defendant relies. That was a case where particulars of a pleading were sought, and the judge made it quite clear why he took the line that he did. The actual decision is of no assistance to the defendant here. In the course of the judgment he cited some observations, which seem to me to be relevant, of Goddard L.J., in *Pinson* v. *Lloyds and National Provincial Foreign Bank Ltd.*[2] Harman J. said[3]: "As the Lord Chief "Justice [Goddard L.J.] said, 'A bare traverse is a perfectly "'good plea provided that all that is thereby intended is to put "'the plaintiff to proof of his case, but it may be that, concealed "'in a traverse, is an affirmative case, and this may well be so "'when the traverse is of a negative averment. If it is clear to "'the court, either from the nature of the case or from the "'admission of counsel or otherwise, that it is intended to set "'up an affirmative case, so that the traverse is what has been "'described as a negative pregnant, it seems to me that parti- "'culars of the affirmative case ought to be delivered. Otherwise, "'the opposite party and the court will be in doubt as to what "'issues are to be determined at the trial.'"

Then there is a quotation from Stable J. in his judgment in *Pinson's* case[4] where he was dealing with three possible positions where there had been a traverse. He said: "'(ii) it may be a "'negative pregnant which contains within the double negative "'an affirmative allegation.'" Then Stable J. said[5]: "'If it "'falls under the second head, the double negative extends "'beyond a mere traverse and amounts as in the present case to "'this: "If you establish a prima facie case that I sold or "'"purchased shares for you and that in so doing I acted with- "'"out authority, then I intend to call evidence to establish "'"that on each or some of the occasions there was an express "'"authority to act as I did or an implied authority to be "'"derived from certain facts." That, in my judgment, is to "'set up an affirmative case of which particulars ought to be "'given and that, none the less, though the affirmative case is "'concealed, albeit imperfectly, in a negative shell.'"

It was pointed out that if the particulars are not given then it may preclude a defendant in those circumstances from advancing an affirmative case at the trial.

I think Salmon J.'s order was right and I would dismiss this appeal.

PEARCE L.J. I agree. It is clear from the pleadings that the traverse is a negative pregnant. The admissions of counsel have made it even clearer that the defendant intends to set up an affirmative case. The only object of the defendant in seeking to avoid giving these particulars is admittedly to prevent the plaintiffs knowing before the trial what the defendant's case is,

[2] [1941] 2 K.B. 72; 57 T.L.R. 558; [1941] 2 All E.R. 636, C.A.
[3] [1948] Ch. 458, 463.
[4] Ibid. 463–4.
[5] Ibid. 464.

C. A.
1960
INLAND REVENUE COMRS. v. JACKSON.

and thus to give the defendant the advantage of surprise. That is an unmeritorious object and would probably lead to an inconvenient adjournment in the middle of the hearing.

For the reasons that my Lord has given, I think that this is a case where particulars should be ordered, and that the judge was right.

Appeal dismissed with costs.
Particulars to be delivered within 28 days.
Leave to appeal to the House of Lords refused.

Solicitors: *B. A. Woolf & Co.; Solicitor, Inland Revenue.*

M. M. H.

[COURT OF APPEAL.]

C. A.
1960
June 20.
Hodson, Ormerod and Harman L.JJ.

* AIRPORT RESTAURANTS LTD. *v.* SOUTHEND CORPORATION.

[1960 A. No. 1245.]

Landlord and Tenant—Business premises (Security of tenure)—Dual proceedings—Notice to determine tenancy—Application to county court for new tenancy—Subsequent commencement of High Court action disputing validity of notice—Adjournment of country court proceedings—Landlord and Tenant Act, 1954 (2 *&* 3 *Eliz.* 2, *c.* 56), *ss.* 24 (1), 25 (1).

Practice—Adjournment—Discretion of court—Dual proceedings—High Court proceedings started after county court proceedings in same matter—Adjournment of county court proceedings pending outcome of High Court action.

Where a tenant commenced a High Court action in which he disputed the validity of a notice under section 25 (1) of the Landlord and Tenant Act, 1954, purporting to terminate a tenancy of business premises after his application to the county court under section 24 (1) for the grant of a new lease:—

Held, that the county court proceedings should be adjourned pending the outcome of the High Court action; to allow the county court proceedings to continue before the High Court action came to trial involved a risk of injustice to the tenant.

APPEAL from Judge Connolly Gage.

On November 13, 1959, the landlords, Southend Corporation, served a notice on their tenants, Airport Restaurants Ltd., under section 25 (1) of the Landlord and Tenant Act, 1954, purporting to terminate their tenancy of certain premises on the corporation's airport. The tenants applied to the county court under section 24 (1) of the Act on March 7, 1960, asking for the grant of a new tenancy. On May 27, 1960, the tenants issued a writ in the

High Court, in which they asked for a declaration that the notice of November 13, 1959, was invalid.

When the application for the grant of a new tenancy came before the county court judge on May 30, 1960, counsel for the tenants asked for an adjournment pending the outcome of the High Court proceedings. The county court judge refused to grant an adjournment and began to hear the application. The tenants appealed.

A. E. Holdsworth for the tenants.
Michael Mann for the corporation.

The following cases, not referred to in the judgment, were cited in argument: *Sidney Bolsom Investment Trust Ltd.* v. *E. Karmios & Co. (London) Ltd.*[1]; *Evans* v. *Bartlam.*[2]

HODSON L.J. The circumstances of this case are somewhat complicated and various considerations have been discussed before us which it is very undesirable that I should pursue, because, having come to the conclusion that this appeal should be allowed, it is very undesirable that anything should be said by this court which may in any way tend to colour or attempt to influence any decision which may have to be made hereafter. The position is that an application for a new lease was made, the landlords having given notice of termination of the tenancy—it has been conceded for the purposes of this application that there may be either one tenancy or two tenancies of the premises here in question—and the tenants at a late stage decided to challenge the validity of the notice after they had themselves made their application for a new lease. Being unable to do that in the county court proceedings, as soon as their attention was drawn to this point by counsel they issued a writ in the High Court claiming a declaration that the notice was bad, because the notice on the face of it only referred to one tenancy whereas in fact, according to their contention, there were two. The defence put in in the High Court action was, inter alia, that the plaintiffs had waived their right to take this point by making the application for a new lease. The plea was drawn in that form because of statements made at first instance by Henn-Collins J. in a case to which we have been referred of *W. Davis (Spitalfields) Ltd.* v. *Huntley*,[1] where I think what he said was an integral part of his judgment, and of dicta in the Court of Appeal in *Tennant* v. *London County Council*,[2] which cited with approval what Henn-Collins J. had said. The decision of Henn-Collins J. went to the Court of Appeal, but there is no decision on the point of waiver. In the Court of Appeal in the later case of *Tennant* v. *London County Council*,[3] Romer L.J. pointed out

[1] [1956] 1 Q.B. 529; [1956] 2 W.L.R. 625; [1956] 1 All E.R. 536, C.A.
[2] [1937] A.C. 473; 53 T.L.R. 689; [1937] 2 All E.R. 646, H.L.

[1] [1947] 1 All E.R. 246.
[2] (1957) 121 J.P. 428, C.A.
[3] Ibid.

C. A.
1960
Airport Restaurants Ltd. v. Southend Corporation.
Hodson L.J.

that the question whether or not there has been a waiver must depend in each case on the facts of that particular case.

I have said enough to indicate that in my view it is right that the county court proceedings should be adjourned until the High Court proceedings have been determined. Mr. Mann, for the corporation, has naturally tried to insist on the position which he now holds, namely, that the hearing which began on May 30, should be continued next Friday, June 24, because of the provisions of the Act, which give a tenant three months' security of tenure after the conclusion of the proceedings. But it seems to me that, having regard to the way in which this court deals with matters of discretion, the overriding consideration in this case is that there is a grave risk of an injustice to the tenants here unless an adjournment is granted, because if they are forced to go on with their proceedings—they did go on for a short time after their application for an adjournment had been refused—and to prosecute their application for a new lease before judgment is given in the High Court proceedings, and fail, they may well be estopped in the High Court proceedings from claiming that the notice was bad. For that reason, I for my part am persuaded that there would be, if not a certainty, at any rate a grave risk, of injustice if the county court proceedings were not adjourned until the High Court proceedings are determined.

I know that there is risk of delay in the High Court proceedings, but this is a short matter, a matter largely of construction of the notice and of the two documents called "licences" with which that notice is concerned. There is no reason why an application—in which both parties are prepared to concur—should not be made to the Queen's Bench Division to accelerate the trial of that action in order that the delay may be as little as possible.

This situation seems to me inevitable having regard to the way in which this Act has been constructed, which does undoubtedly lean, on the face of it, heavily in favour of the tenant, because tenancies of business premises cannot be brought to an end unless the landlords fulfil the requirements of the Act. The corporation have relied upon their intention to carry on the catering business in their airport at Southend which the tenants have hitherto been carrying on: they can get possession, but only if they fulfil the rigid requirements of this Act, one of which is that a notice in prescribed form is to be given.

In my opinion the only course which this court can properly take is to allow the appeal.

Ormerod L.J. I agree. Mr. Mann has submitted that the reason why the county court judge exercised his discretion as he did was, in the first place that he was influenced by what he regarded, on the authorities, as the likely outcome of the High Court proceedings, and secondly, that he thought that on the balance of the prejudice which might be occasioned to the parties

the discretion ought to be exercised in favour of rejecting the application for an adjournment.

In view of the fact that the High Court proceedings are pending, it is not advisable, as my Lord has said, for anything more to be said in this court than is necessary; and I for my part would go no further than to say that, on consideration of the authorities and of the facts as we know them, there is plainly room for argument.

So far as the balance of prejudice is concerned, I find it hard, and I have found it hard throughout the hearing to understand why there should be any considerable prejudice against the landlords if this adjournment is allowed. True, it may be some considerable time before the matters are finally disposed of and either a new tenancy is granted or the landlords are able to take possession; but it appears to me that delay is bound to happen almost in any event, having regard to the fact that High Court proceedings are pending and that there may possibly be an appeal from the decision of the High Court, whatever that decision may be.

Although it may very well be that there might be a further delay of three months at the end of those proceedings, as Mr. Mann has said, if the matter cannot be decided now in the county court, that does not appear to me to amount to the grave prejudice which the county court judge seems to have had in mind when he was considering this matter. In all the circumstances I agree that this appeal should be allowed and that there should be an adjournment of this matter pending the hearing of the High Court proceedings, as otherwise it does seem possible that serious injustice may be done to the appellants.

HARMAN L.J. I agree. This was, of course, primarily a matter in the judge's discretion. But if we come to the clear conclusion that he wrongly exercised that discretion—that is to say, that he did not take the right matters into account or give them the right weight—it is our duty to exercise our discretion in this case. The authority for that proposition is *Charles Osenton & Co.* v. *Johnston.*[4] It seems to me that to allow two sets of proceedings to go on about practically the same matter, in two different courts at one and the same time must prima facie be a course which the court should avoid. If he resumes the hearing while the High Court action is undecided the county court judge may well be deciding a matter which is purely of academic interest—in fact sitting to hear a moot and not a judicial case at all. For this reason, in addition to those given by my brethren, in my judgment it is our duty to say that until the High Court proceedings are determined the county court should hold its hand.

[4] [1942] A.C. 130; 57 T.L.R. 515; [1941] 2 All E.R. 245, H.L.

C. A.
1960
AIRPORT RESTAURANTS LTD. v. SOUTHEND CORPORATION.

The court, I take it, will accept Mr. Holdsworth's undertaking that he will co-operate in every way in accelerating the High Court proceedings.

Appeal allowed with costs.

Solicitors: *Gibson & Weldon for H. Maxwell Lewis, Southend-on-Sea; Sharpe, Pritchard & Co. for Archibald Glen, Town Clerk, Southend-on-Sea.*

I. G. R. M.

[RESTRICTIVE PRACTICES COURT.]

R. P. Ct.†
(E. & W.)
1960
May 23, 24, 25, 26, 27, 30, 31; *July* 15.

**In re* BLACK BOLT AND NUT ASSOCIATION'S AGREEMENT.

[1957 No. 33 (E. & W.).]

Restrictive Practice—Restriction—Whether contrary to public interest—Price restriction—Black bolt and nut industry—Fixed prices for black bolts and nuts, carriage bolts and nuts and railway fastenings—Fixed prices reasonable—Quantity discount based on aggregate of purchases from association members—Minimum price for large users—Lowest price quoted by members interested—Large variety and number of bolts—Avoidance of necessity of stockholders and large and medium sized buyers to "go shopping"—Whether "the public "as purchasers . . . of any goods"—Whether specific and substantial benefit—Whether benefits or advantages conferred on public by restrictions—Possibility of higher prices under restrictions—Whether restrictions reasonable—Restrictive Trade Practices Act, 1956 (4 *&* 5 *Eliz.* 2, *c.* 68), *s.* 21 (1) (*b*) (*g*).

Black bolts and nuts, carriage bolts and nuts, and railway fastenings, hereinafter collectively called "fastenings," were mainly used in industry, including building and constructional engineering, mining and railways, as components of some larger finished product or construction. The cost of fastenings was a trivial proportion of the total cost of the finished product of which it formed part, and in the constructional engineering industry, where the proportionate cost of fastenings was highest, a reduction of 10 per cent. in the price of fastenings would only effect a reduction of ½ per cent. in the total cost of finished products. Only a trivial quantity of fastenings was sold direct to the public. The larger manufacturers generally made the standard sizes of fastenings, of which there were over 3,000 varieties, and the smaller manufacturers made the more specialised sizes, of which there were numerous different types. Twenty-six per cent. of all sales in the home market were made to stockholders—the wholesalers in the industry; 30 per cent. of all sales were made to large buyers. Sales to stockholders and large- and medium-sized buyers accounted for at least two-thirds of all sales in the home market.

By an agreement made between all its members, the Black Bolt and Nut Association of Great Britain fixed the prices at which they

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† DIPLOCK J., SIR STANFORD COOPER, MR. W. L. HEYWOOD, MR. W. WALLACE and MR. W. G. CAMPBELL

could sell fastenings. The current price for black bolts was built up from the costings, which were available in 1953, of eleven large manufacturers. The basic price applied to the normal ordering quantity; for other orders there was a system of graduated discounts, and for very small orders the fixed price was obtained by adding a plussage to the basic price. The price list for carriage bolts and nuts was not based on any costings. In addition to the general price restrictions there were three special discounts: a large order discount, a quantity discount, given to purchasers whose aggregate annual purchases from members of the association exceeded a certain amount, and an inter-trading discount, which was given when one member bought fastenings from another. A special procedure governed sales to government departments and other large users. On receipt of an inquiry, members informed the secretary of the price they intended to quote, and the lowest price so reported to the secretary was circulated to all members interested and became the minimum price. Changes in the fixed prices were made solely to reflect variations in the costs of production on distribution.

Despite the absence of price competition, the industry was highly efficient, had made exceptional technical progress, and produced fastenings of the highest quality. The fixed prices were reasonable, whether judged on capital employed or on turnover, and profits were not excessive. There was no scope for any general overall reduction in prices. A single order would generally contain many different items. Were there no uniform price for the numerous different varieties of fastenings, prices for each item would vary from manufacturer to manufacturer, so that stockholders and large and medium sized buyers would have to make a great many inquiries before placing an order—they would have to "go shop-"ping" and that would cause an appreciable increase in their administrative costs which could not be covered in the case of stockholders by their present profit margins.

The association contended that the restrictions conferred on "the public as purchasers, consumers or users of any goods" specific and substantial benefits under paragraph (*b*) of section 21 (1) of the Restrictive Trade Practices Act, 1956.[1]

Held, (1) (a) that on the true construction of paragraph (*b*) of section 21 (1) of the Restrictive Trade Practices Act, 1956, "the

[1] Restrictive Trade Practices Act, 1956, s. 21: "(1) For the purposes of "any proceedings before the court . . . "a restriction accepted in pursuance "of any agreement shall be deemed "to be contrary to the public interest "unless the court is satisfied of any "one or more of the following circum-"stances, that is to say . . . (*b*) that "the removal of the restriction would "deny to the public as purchasers, "consumers or users of any goods "other specific and substantial bene-"fits or advantages enjoyed or likely "to be enjoyed by them as such, . . . "(*g*) that the restriction is reasonably "required for purposes connected with "the maintenance of any other restric-"tion accepted by the parties, . . . "being a restriction which is found "by the court not to be contrary to "the public interest upon grounds "other than those specified in this "paragraph . . . and is further satis-"fied (in any such case) that the "restriction is not unreasonable having "regard to the balance between those "circumstances and any detriment to "the public or to persons not parties "to the agreement (being purchasers, "consumers or users of goods pro-"duced or sold by such parties, or "persons engaged or seeking to "become engaged in the trade or "business of selling such goods or of "producing or selling similar goods) "resulting or likely to result from "the operation of the restriction. (2) "In this section 'purchasers,' 'con-"'sumers' and 'users' include per-"sons purchasing, consuming or "using for the purpose or in course "of trade or business or for public "purposes. . . ."

R. P. Ct.
(E. & W.)

1960

Black Bolt and Nut Association's Agreement, *In re.*

"public as purchasers, consumers or users of any goods" meant the public viewed as a collective whole in any of the specified capacities, and "the public as purchasers" connoted collectively all persons who purchased the goods, so that while it was not sufficient to show that some small category of purchasers would be denied benefits or advantages by the removal of the restrictions, it was not fatal if some small category would be denied no benefit or advantage (post, pp. 903–904).

(b) That the avoidance of the necessity for stockholders and large and medium sized buyers to "go shopping" was a "specific "and substantial benefit," and that, since removal of the general price restrictions would deny that benefit to purchasers whose purchases accounted for at least two-thirds of all sales in the home market, and the remaining buyers as purchasers would suffer no appreciable countervailing disadvantage or detriment, the circumstances set out in paragraph (*b*) of section 21 (1) were satisfied in regard to those restrictions (post, p. 905).

(2) But that the restrictions relating to quantity discount, which were only of benefit to the large buyers whose purchases did not account for more than one-third of all home sales, were not a benefit to the public as purchasers, and the restrictions relating to sales to government departments and other large users were of no benefit to the public either as purchasers, consumers or users (post, p. 907).

(3) That the benefit derived from the avoidance of the necessity for the public as purchasers to "go shopping" more than outweighed the possible detriment of higher prices under the general price restrictions, and the association, therefore, had discharged the onus on them of proving that those restrictions were not unreasonable within the balancing provision of section 21 (1) (post, pp. 908, 910).

Accordingly, the general price restrictions would be declared not contrary to the public interest but the restrictions relating to quantity discounts and sales to government departments and other large buyers were contrary to the public interest.

Per curiam. The restrictions contain no express provisions as to the basis on which prices are to be fixed and if the effect of a declaration that the general price restrictions were not contrary to the public interest would be to give carte blanche to the association to fix prices at whatever level they thought fit in the future, the detriment to the public in general would far outweigh the specific and substantial benefits or advantages which the public as purchasers would be denied by the removal of the restrictions, but the court was entitled to take into consideration that the prices in fact fixed were reasonable and changes therein were made only when there were ascertained changes in costs, and if the association were at any time to fix prices which were unreasonable or on some other basis, not being an improvement, that would be a material change in the relevant circumstances entitling the registrar to apply to the court under section 22 (post, pp. 909, 910, 911).

Reference.

On December 30, 1957, the Registrar of Restrictive Trading Agreements, pursuant to section 20 (2) (*a*) of the Restrictive Trade Practices Act, 1956, referred to the court an agreement subsisting between members of the Black Bolt and Nut Association of Great Britain, numbered 351 on the register of agreements.

The following statement of facts is taken from the judgment

of the court. The Black Bolt and Nut Association of Great Britain, the respondents in this reference, has 44 members who between them produce and supply about 90 per cent. of the black bolts and nuts, carriage bolts and nuts and railway fastenings produced and supplied in the United Kingdom. These goods [" the fastenings "] are widely used in constructional and manufacturing industries where fastenings of high tensile strength are not required. They are made of mild steel by cold forging and hot forging processes. The larger sizes can only be hot forged, which is the older process; smaller sizes can be made by either process, cold forging being more economical and efficient where production in large quantity of a single size is called for. They are produced in a very great variety of standard sizes (viz., about 3,000) mainly to British standard specifications. In addition to the standard sizes, there is a demand for fastenings of shapes or dimensions differing slightly from the standard sizes which are known as " off standard " specials and also for fastenings, generally larger, which cannot be related to standard products which are known as " out and out " specials.

The great bulk of the demand is for use in industry, including building and construction, mining and railways, the fastenings reaching the ultimate user as components of some larger construction or finished product. The quantity which reaches the retail purchaser of nuts and bolts from the ironmonger's shop is trivial in relation to the total production. The demand is thus a " derived " demand depending almost wholly upon the general level of industrial and constructional activity. In general, the cost of the fastenings is a trivial element in the total cost of the final product of which they form part, and even in constructional steelwork, where the evidence was that the proportionate cost of black bolts and nuts is highest, it is only of the order of 5 per cent. In most products in which the fastenings are used it is less than this. Accordingly, the demand responds scarcely at all to changes in prices of the fastenings. Short of price changes sufficiently large to lead to substitution of other types of fastenings for black bolts and nuts, or vice versa, a reduction of price is unlikely to increase the total demand for the product and an increase in price is unlikely to reduce the total demand. The gross annual value of home trade sales in 1959 was some £12½ million; that of export sales about £1 million.

The requirements of individual industrial purchasers of the fastenings vary widely. Some may require small quantities of a relatively great variety of standard sizes; others a large quantity of standard sizes including " off standard " and " out and out " specials. Promptness and certainty of delivery may be vital in constructional work or where the manufacture or installation of valuable machines may be held up for the want of a few pounds' worth of nuts and bolts. About 26 per cent. of the home trade passes through the hands of stockholding merchants, the bulk balance being sold direct by members of the association to the

R. P. Ct. (E. & W.)

1960

Black Bolt and Nut Association's Agreement, *In re.*

industrial user. The nature of the demand and the importance of prompt delivery make it essential that the fastenings should be produced and stocked in a very large variety of sizes.

Of the 44 members of the association, more than half have very small works and in the years 1954–1956 (which are the last years for which figures are available), between them supplied less than 7½ per cent. of the total quantity of the fastenings produced by the members of the association as a whole. At the other end of the scale, the largest member supplied over 26 per cent. of the whole, and the three next largest a little under 30 per cent. In general, the larger works are best suited to supply economically large orders for standard sizes of black bolts and nuts, particularly the smaller sizes produced by the cold forging process involving "long runs," while the smaller works are better suited for supplying fastenings, particularly "off standard" and "out and out" specials which are required in relatively small batches at a time.

The first attempts to form an association of makers of black bolts and nuts date from the early years of the century but little was achieved. The association was re-formed in 1924, but the trade was shortly overtaken by the general industrial depression and from then until the early thirties conditions in the trade were very bad. Demand, being dependent on the general level of industrial activity in the United Kingdom, was low, imports of low-priced fastenings were substantial, wages were depressed and short-time working common, profits small or non-existent and fresh capital investment in the industry minimal. Competition for the orders available was intense, and the standard of the product variable and often low. It was in these circumstances that in July, 1933, the first effective price-fixing agreement was entered into, when 25 members, representing an estimated 91 per cent. of the production, agreed to charge not less than the minimum prices and to adhere to the regulations and terms as and when fixed by the association from time to time. In the later thirties up to the outbreak of war there was a continuous and progressive improvement in the prosperity of the industry, its manufacturing methods, and the quality of the products.

Statutory control of the prices of the fastenings was introduced on September 1, 1939, and continued until March, 1953. The association's minimum prices (which were then on a weight basis) were initially adopted as the statutory maximum prices. In 1943, after discussions with the Ministry of Supply, a price list on a count basis (viz., "per 100") was issued, and this, with minor amendments as to form and layout in 1950, remained operative as the basic price list throughout the rest of the period of control.

After the end of statutory price control a new price list, known as price list no. 3, was prepared and came into operation on January 1, 1954. It contains fixed prices in shillings and pence per 100 units of a large number of different types of fastenings, each type being specified and priced in different standard sizes.

the number of which in some cases exceed 300 for a single type of black bolt. The majority are described by the appropriate British Standards Institute Specification, but for some types, which include carriage bolts and nuts, there is no British Standards Institute Specification. The fixed prices which are set out in price list no. 3 will be referred to as "the basic price list."

The prices quoted in the basic price list are not those actually charged but form the starting-point from which the price to be charged by members of the association on any particular sale is to be calculated. The basic price list for black bolts and nuts which account for 88 per cent. of the total trade in the fastenings produced by members of the association was based upon costings in a manner to which reference is made later, and was intended to be double the actual prices proposed to be charged upon ordinary industrial sales when it came into operation on January 1, 1954. The actual price appropriate to any particular sale is calculated from the basic price by the application of one or more of a number of discounts or plussages. What may conveniently be called the normal price is ascertained by applying a general discount to the price quoted in the basic price list. The general discount, when the price list was introduced, was 51¼ per cent. in respect of all standard products. It underwent a series of changes between 1954 and 1958, but for the past two years has remained static. The normal price is applicable to normal ordering quantities; for orders for smaller quantities there is a graduated tariff of discounts decreasing as the quantity of any particular standard product becomes smaller until in the case of the smallest orders it is reversed and becomes a plussage of 5 per cent. on the basic price. Similarly, in the case of orders for large quantities of a single standard product, provision is made for a series of additional discounts ["large order discounts"], graduated according to the size of the order and the nature of the product. The large order discount is calculated not on the price in the basic price list but upon the normal price, and rises to as much as 15 per cent. on orders for 500,000 or more of a single size of some widely used products.

Apart from the variation of discounts according to the quantity of a particular product ordered, price list no. 3 provides for discounts of other kinds.

What the association calls quantity discount is allowed to user customers (i.e., excluding merchants) who have purchased products to a minimum value from members of the association during the previous year. The aggregate of the purchases made by the customer from all members of the association are taken into account in assessing his qualification for the quantity discount which at present ranges from 1¼ per cent. in the case of a customer, whose previous year's purchases were not less than £25,000, to 5 per cent. if such purchases were not less than £250,000. The quantity discount is calculated on normal prices.

No special discount is applicable to merchants as such, but

R. P. Ct. (E. & W.)

1960

Black Bolt and Nut Association's Agreement, *In re.*

merchants who qualify by a minimum holding of stock and minimum annual purchases from members of the association and enter into an agreement, called the stockholders agreement, are termed "stockholders" and are entitled to a fixed discount on all purchases. This is fixed at 5 per cent. for stockholders whose stock is £750 and annual purchases £2,500, and at 7½ per cent. for stockholders whose stock is £2,500 or more and annual purchases are £5,000 or more. The stockholders agreement does not require the stockholder to limit his purchases of the fastenings to members of the association, nor does it compel him to charge upon resale the prices fixed by the association in price list no. 3. In practice, however, stockholders do sell only at the association's fixed prices, since even if their margin of profit (which is small) permitted, they would be naturally hesitant to endanger their relationship with their suppliers by undercutting them; moreover, price list no. 3 is available to their customers so that only rarely would they be likely to find a market at prices higher than those fixed by the association's price list. The latter consideration is accentuated by the prevalence of inter-trading between members of the association encouraged by an inter-trading discount. No manufacturer, not even the largest, makes all varieties and sizes of the fastenings and it is the practice, introduced as long ago as 1945, for members to acquire from other members such types or sizes of the fastenings ordered from them by their own customers as they cannot conveniently or economically manufacture themselves. To all such inter-trading purchases a minimum inter-trading discount of 7½ per cent. applies, and a resolution of October 10, 1945, provides, inter alia, that members who supply goods on inter-trading terms should give at least as much consideration to a purchasing member as regards deliveries as they give to their other customers. The general pattern of inter-trading is between the larger and the smaller manufacturers, arising from their respective capabilities for producing large quantities of standard sizes in wide demand and lesser quantities of standard sizes for which the demand is relatively small or of "off standard specials" or "out and out specials." Inter-trading thus enables the large manufacturer to fulfil his orders completely by sub-contracting that part of them which calls for small quantities of unusual sizes, and the small manufacturer to accept orders for standard sizes in large demand which it is more economical for him to acquire from the large manufacturer at the inter-trading discount of 7½ per cent. than to manufacture himself.

The prices for all standard products are fixed prices ascertained by applying the appropriate discount or discounts or occasionally plussages to the prices quoted in the basic price list which also lays down certain standard conditions of sale. The price list is widely circulated to stockholders and to potential industrial purchasers and the prices are thus well known to those who have regular requirements. In the case of "off standard specials," however, the prices are not fixed prices but minimum prices based

on the quoted fixed price of the comparable standard article. In the case of "out and out specials," the price is freely negotiated between the customer and the manufacturer.

A basic price list for carriage bolts and nuts, which account for only 5 per cent. of the total home trade, is included in price list no. 3 and is known as the "8s. 1d. list." It was settled as long ago as the 1930s and is not based on costings. A similar system of discounts and plussages is adopted for ascertaining the fixed prices of these products, but owing to the earlier date and different origin of the "8s. 1d. list," the discounts and plussages applicable are not the same as those applicable to the basic price list for ordinary black bolts and nuts.

There is, however, one exception to the general price restriction scheme. Sales to government departments, railways, harbour boards and other large users do not fall within it. On receipt of an inquiry from any of these customers, a member is required to report to the secretary of the association the price which he intends to quote. The lowest price for each item so reported by any member is circulated to all the members interested in quoting and becomes the minimum price, which any member is entitled actually to quote for that item.

There have, in fact, been numerous changes of one kind or another in the prices set out in or ascertainable from price list no. 3 since it was introduced on January 1, 1954. The basic prices of some items have been altered. The general discount by application of which to the basic prices the normal price of black bolts and nuts is ascertained, was altered on ten occasions between January 1, 1954, and April 14, 1958, but has remained unchanged since that date: the general discount applicable to carriage bolts and nuts was altered on seven occasions, the last of which was on June 1, 1959. The quantity discount was introduced on September 15, 1954, and extended on August 3, 1958. The large order discount was introduced on June 4, 1958, and extended on three subsequent occasions, of which the last was on October 19, 1959. The discount to stockholders has also been amended on six occasions.

The absence of any express provision as to the manner in which prices are to be fixed makes it necessary to examine the procedure and policy which have, in fact, been adopted by the association in arriving at the original basic price list and the subsequent changes in that and in the various discounts.

The starting point for the basic price list of black bolts and nuts was a series of costings supplied in 1953 by 11 members of the association for about 100 different products. These costings were returned on the following basis: (a) the normal level of activity (75 per cent.) which was predetermined by the central council; (b) the cost of materials, assessed by the accounting and costs committee in relation to the materials required to produce bolts and nuts to British standard specification; (c) conversion costs based on individual members machine rates or piecework

R. P. Ct.
(E. & W.)

1960

Black Bolt and Nut Association's Agreement, *In re.*

rates and their assessment of output for economic batch quantities. The number of costings produced by each of these 11 members varied considerably, one member producing costings for as many as 86 items, and at the other extreme one produced costings for no more than four items. In general, a straight average was taken of all the costings available in respect of each item, although in some cases costings of individual members were omitted where they appeared to be out of scale. Nevertheless, the returns included in the average showed a wide variation of costs between different members on individual items; furthermore, in respect of a considerable number of items no more than three and in some cases only two returns were available. It was intended to provide a profit margin of 10 per cent. of the selling price upon the items in commonest production rising by steps of $2\frac{1}{2}$ per cent. to 20 per cent. upon items in infrequent use, and the resulting figure was to be doubled to give the basic price to which a general discount of 50 per cent. was intended initially to be applied. The prices of the many hundreds of other sizes and types for which no costing returns had been made were to be fixed by interpolation from those of the items for which costings had been ascertained.

The strict adoption of the ascertained straight average costs for particular items and adding the prescribed profit margin would have resulted in a price list for those items for which costing returns were available which would have shown no orderly progression in price with increasing length or diameter of items otherwise similar, and would have made the process of interpolation to fix the prices of other sizes and types impossible. Accordingly, very considerable adjustments were in fact made to the arithmetical results of adding the prescribed profit margin to the ascertained straight average cost. In the result, a basic price list was produced which showed an orderly progression in prices with increasing diameter and increasing length, but save that the costings returned by the 11 members provided the starting point for the build-up of the price list in the way which has been described, it cannot be said that the actual prices which finally appeared in the basic price list bore in the case of any particular item any definable relationship to the average costs of making it. In some cases, indeed, ad hoc alterations were made at the eleventh hour on the representations of certain members unsupported by any costing data at all.

Although the original basic price list was designed to be introduced with a general discount of 50 per cent., the various adjustments resulted in the prices as a whole being slightly higher than was intended and the price list no. 3 was introduced on January 1, 1954, at a general discount of $51\frac{1}{4}$ per cent. As already stated, between that date and April 5, 1958, there were 10 reductions in the general discount, each of which followed upon changes in manufacturing or other costs as a result of increases in the cost of raw material, wages, freight or other relevant items. The

current general discount is 36¼ per cent. for all items except bolts and nuts over ½″ but under 1″ diameter for which the general discount is 35 per cent. The successive alterations in the general discount were not supported by any comprehensive costings from members, although there was a general costing investigation in 1955, in which nine members submitted costings on the same basis as those which formed the starting point for the basic price list in 1953. The association's witnesses did not appear very clear as to the material upon which the successive decisions as to the amount by which the general discount should be varied were based, but some of the larger manufacturers, at least, maintained adequate costing systems at their works and it would appear that those were the main sources of information from which the decisions of the association as to general increases in prices, by reduction of the general discount, were derived.

Alterations in the general discount did not, however, represent the only changes affecting the prices of the fastenings. The basic price list itself was changed as respects the longer length bolts (i.e., above 4″ in length) in 1956, the price being increased by about 2½ per cent., while in 1959 there was a general reduction in the basic prices of small cold forged nuts as the result of the introduction of a more efficient process. The special discounts, viz., the quantity discount, the large order discount and the stockholders discount, have also been changed from time to time, and since these variations have resulted in larger discounts, they have counteracted to some extent the effect of the increases in the normal price upon purchasers of the classes to which these special discounts apply.

Carriage bolts and nuts constitute an exception to the general method by which the prices have been fixed. For historical reasons the price list is based upon what is known as the 8s. 1d. list. This was introduced in the 1930s when the trade was almost exclusively in United States hands, 8s. 1d. representing the then sterling equivalent of $2, which was the price per gross of the cheapest item sold by United States manufacturers. This list still survives as the basic price list for carriage bolts and nuts, although it is now priced per 100 instead of per gross. Separate discounts and plussages are applicable to the 8s. 1d. list and are adjusted from time to time in the same way as in the case of ordinary black bolts and nuts. Only a few members manufacture carriage bolts and nuts and a predominant share of the trade is in the hands of one member.

The actual terms of the restrictions referred to this court by the registrar are as follows: "Each of the members of the Black "Bolt and Nut Association of Great Britain agree with every "other member—

"1. Save in respect of supplies delivered to any member's "works and save in respect of supplies (other than supplies to "meet day to day requirements) to government departments, "railways, harbour boards and other large users, not to offer or

R. P. Ct. (E. & W.)

1960

Black Bolt and Nut Association's Agreement, *In re.*

"supply goods save at or, as the case may be, save at a price "equal to or exceeding the price set out in or ascertainable from "the registered price list no. 3 as appropriate to the transaction.

"2. Not to offer or supply goods delivered to another member's "works at a price exceeding the price set out in or ascertainable "from the registered price list no. 3 as in other respects appro-"priate to the transaction less 7½ per cent. thereof.

"3. Not to supply goods to government departments, railways, "harbour boards and other large users in response to enquiries "other than enquiries for day to day requirements without first "reporting receipt of the enquiry to the secretary.

"4. Not to supply goods to government departments, rail-"ways, harbour boards and other large users in response to "enquiries (other than enquiries for day to day requirements) at "a price lower than that notified to him by the secretaries as the "minimum price therefor.

"5. Save in respect of supplies to government departments, "not to supply goods save on or subject to terms or conditions "including the following terms:

"(1) a term in the words:

"'This quotation/tender or order/contract is made/accepted on "'the understanding that goods will be charged at the prices "'ruling at the date of despatch or at the date on which the goods "'are inspected (where inspection is normally made) and "'approved at the maker's works by the purchaser.'

"(2) A term in the words:

"'No guarantee or warranty as to the rate of delivery or time of "'delivery is given or implied.'

"(3) A term in the words:

"'"schedule orders" may be arranged on the understanding that "'delivery will be spread over a period in accordance with "'schedules accepted by the purchaser, but attention is drawn to "'the fact that the customer is liable to pay the price of the "'complete order and cancellation of delivery instructions does "'not reduce such liability.'

"(4) A term in the words:

"'No claim shall be accepted for shortages or non-delivery of any "'part of a consignment unless such shortages or non-delivery "'is reported to the consignor within the given period from the "'date of the advice note required by the carriers.'

"(5) A term in the words:

"'Claims for defective material or workmanship should be notified "'to the consignor as soon as possible after date of delivery.'

"6. Not to supply goods to government departments:

"(a) on terms providing for a firm price save where the "member is in a position to deliver within six months "and the tender has been accepted in 28 days.

"(b) Save as aforesaid, not to supply goods to government "departments, save on or subject to terms and condi-"tions including a term in the words 'this quotation

"'is made on the understanding that the goods will "'be charged at prices ruling at the date of despatch "'or at the date on which the customer is advised "'that the goods are ready for despatch,' or, in the "case of supplies to the Ministry of Supply only, a "term reserving to the department the right to amend "the contract prices in accordance with any changes "which may be agreed from the current price investi-"gation between the department and the trade associa-"tion.

"7. Save as indicated in restriction no. 6 herein, and save "where and insofar as the standard conditions of government "contracts for stores purchases are adopted and otherwise provide, "not to supply goods to government departments save on the "terms set out at paragraphs (1) to (5) inclusive of restriction "no. 5 herein.

"8. Not to supply goods save on or subject to the terms and "conditions in respect of carriage set out at regulation 3 and in "the 8s. 1d. list forming part of the registered price list no. 3.

"9. Not to supply goods packed otherwise than in accordance "with the standard packing described in regulations 5 and 41 "and the relevant price operative sheets of the registered price "list no. 3 save at a price increased by the charges therein set out "as appropriate to the transaction."

Restrictions 1, 5, 8 and 9 relate to ordinary sales of black bolts and nuts to consumers or stockholders; restrictions 3 and 4 relate to sales to government departments, railways, harbour boards and other large users; restrictions 6 and 7 relate to sales to government departments only; and restriction 2 relates to inter-trading sales between members.

So far as ordinary sales of black bolts and nuts to consumers or stockholders are concerned, the dominant restriction is no. 1, nos. 5, 8 and 9 being ancillary. It is important to note that it contains no provision as to the way in which the prices set out in price list no. 3 are to be fixed by the association. So far as the constitution of the association is concerned, the general council, subject to the approval of the majority of the members in general meeting, have carte blanche to fix prices and terms and conditions of sale as they think fit. There is no express requirement that the prices so fixed from time to time should bear any relation to costs of production or any other factor.

The association sought to justify the restrictions under paragraphs (*b*) and (*g*) of section 21 (1) of the Act of 1956.

Further facts are stated in the judgment.

B. J. M. MacKenna Q.C. and *Walter Gumbel* for the association.

Peter Foster Q.C. and *W. A. Bagnall* for the registrar.

R. P. Ct. (E. & W.)

1960

Black Bolt and Nut Association's Agreement, *In re.*

The following cases were cited in argument, in addition to those referred to in the judgment: *In re Wholesale and Retail Bakers of Scotland Association's Agreement*[2]; *In re Water-Tube Boilermakers' Agreement*[3]; *In re Phenol Producers' Agreement.*[4]

Cur. adv. vult.

July 15. Diplock J. read the following judgment of the court which stated the facts as set out above and continued: It has been urged for the association that not only the growth in the prosperity of the industry from the later thirties, its manufacturing methods and the quality of its products was the consequence of the price-fixing agreements restoring confidence and order to the trade, but also that the abolition of the price-fixing agreement would result in a reversion to the depressed conditions of the late twenties and early thirties.

We do not accept either of these contentions. The price-fixing agreement followed upon the abandonment by the United Kingdom of the gold standard and the imposition upon black bolts and nuts of import duties which were further increased in August, 1934; it coincided with the beginning of the general improvement in industrial activity in this country. There were far too many factors involved to enable us to form a view as to whether or not any part of the improvement in the industry was due to the inauguration and observance of the price agreement before the war. Furthermore, the economic climate today is so different from that of 30 years ago that the state of the industry in the absence of a price agreement in the 1920s and early 1930s is, in our view, no guide at all as to what would be the consequences of abolishing the price agreement today.

[His Lordship referred to conditions in the 1930s set out above, and continued:] The method of fixing prices adopted by the association is open to obvious objections in principle and in detail. If the proof of the pudding were in the recipe, one would expect consumers to find it an unpalatable comestible. It is significant, however, that not only has there been no evidence of consumers being dissatisfied with the prices charged either generally or in relation to any particular items, but the registrar's witnesses have not contended that the prices have been unreasonable, and all consumers and stockholders called have expressed their satisfaction with the prices and with the price-fixing scheme. It is common ground that the profits made by the industry, whether based on turnover or the return on capital employed, have certainly not been excessive. Whatever the objections to the method adopted in arriving at the fixed prices, it has in fact resulted in prices which

[2] (1959) L.R. 1 R.P. 347; [1959] 1 W.L.R. 1094; [1959] 3 All E.R. 98.

[3] (1959) L.R. 1 R.P. 285; [1959] 1 W.L.R. 1118; [1959] 3 All E.R. 257.

[4] [1960] 1 W.L.R. 464; [1960] 2 All E.R. 128.

are not unreasonable, which appear to have given general satisfaction to the consumer, and which do not result in any profit to the members of the association which is unreasonable.

We are satisfied upon the evidence that the industry is now an efficient industry. Although sheltered for 27 years from the stimulating breezes of price competition, its plant has been modernised and kept up to date as regards new methods of manufacture. Furthermore, a high and uniform standard of product has been achieved and maintained, so that users in practice have such confidence in the quality of the fastenings manufactured by members of the association that they habitually use them without any further testing, although undiscovered defects might well endanger the stability of the valuable structures or the efficiency of the valuable machines of which they form an inexpensive but vital part. Mr. MacKenna, contrasting the present situation in this respect with that which existed before 1933, when plant was obsolete and standards variable and low, has contended that the improvements in these respects are due to the price-fixing agreement. We are not satisfied of this. The price agreement in 1933 may well have been a contribution to stability and confidence in an industry which, like many others on whose prosperity it was dependent, had passed through hard times in the late twenties and early thirties. We do not believe, however, that in the war-time and post-war years the absence of a price agreement would have deterred the larger manufacturers at any rate from modernising their plant or achieving and maintaining the high standard of their products, nor are we satisfied that price competition would have resulted in any widespread lowering of standards. The most commonly used fastenings are sold to British Standards Institute specification which, on the evidence, appears to be adequate for the purposes for which the fastenings are used. It may well be that some manufacturers would attempt to increase their turnover by reducing prices and might be tempted to cut costs by running their plant for unduly long periods before re-tooling or by economising upon inspection or control with a consequent reduction in standards, but such a policy would, we think, have defeated itself in an industry whose output forms a component of relatively small value in the finished products in which it is used, and where maintenance of a high standard is essential to their safety and utility. It is, however, right to observe that the mere existence of such a danger might make it necessary for the consumer to make a practice of testing for himself before using fastenings purchased from a manufacturer upon whose standards experience had not already shown him he could unhesitatingly rely.

It has also been contended on behalf of the association that the price-fixing agreement has resulted in a spirit of co-operation in the industry manifested in the exchange of technical information, joint research and in particular inter-trading.

The evidence has shown an exceptional amount of co-operation

R. P. Ct. (E. & W.)

1960

Black Bolt and Nut Association's Agreement, *In re.*

between the members and there seems no doubt that there is a free exchange of technical "know-how," which has enabled the smaller members in particular to improve their efficiency; there has also been a certain amount of joint research. We think that it is right to say that co-operation of this kind has been fostered by the absence of price competition, since it is only human nature to be more reluctant to impart "know-how" to a competitor who may use it to undercut one's own prices and take away one's own customers than to a competitor who can only use it to benefit himself and his product.

Inter-trading raises other considerations. The larger and smaller manufacturers fulfil functions that are to some extent complementary. While the large manufacturer can in general produce most economically standard fastenings in common demand which make possible the use of costly equipment and the enjoyment of "long runs," the smaller manufacturer's works are better adapted to short runs of the less commonly needed and in particular the large fastenings, "off standard" specials and "out and out" specials. Orders from consumers are frequently for a variety of different sizes of the fastenings in widely varying quantities and it is common for even the largest manufacturers to obtain particular items included in a single order from smaller manufacturers on inter-trading terms. The smaller manufacturers themselves engage in a considerable amount of inter-trading; one witness stated that as much as 36 per cent. of his sales to his customers were of products he himself acquired from other members on inter-trading terms. In addition to avoiding uneconomical use of plant, this practice is helpful to consumers and stockholders because they can place orders for all their requirements with one or a few manufacturers. The volume of inter-trading has recently increased as a result of the introduction by the co-operative negotiations of the association of a new type of machine [1] for cold forging a range of nuts which has been installed by some large manufacturers. This has rendered obsolescent the older processes used by the smaller manufacturers, who now purchase their requirements on inter-trading terms from manufacturers owning the new machine, who are thereby enabled to use the machine more economically upon "longer runs."

Restriction no. 2 and the complementary resolution about the consideration to be given to inter-trading purchasers as respects advantageous delivery have, we think, undoubtedly fostered inter-trading. No doubt without that restriction and resolution and without the price-fixing scheme some inter-trading would continue, for it is a two-way traffic of advantage to both the large manufacturer and the small; but we think it is probable that the volume of inter-trading would diminish if the restrictions were abolished, because a separate bargain as respects

[1] Van Thiel nut machine.

price and delivery would have to be made whenever one manufacturer sought to sub-contract with another. In times of high demand it would be risky for a manufacturer to accept an order which included items which he was not in a position to manufacture himself until he had made inquiries as to the possibility of sub-contracting for those items at a suitable price and date of delivery. It is his knowledge that all members are willing to supply him with available items on inter-trading terms and to give him as much consideration as respects delivery as they give to their own customers that gives him confidence to accept such orders under the present system. Inter-trading under the association's scheme has, we are satisfied, helped to keep the small manufacturer in business and enabled him to perform a useful service to users complementary to that of the large manufacturer.

The greatest emphasis has however been placed by the association upon the advantage of "stability of prices" in this particular trade. This imprecise phrase is here used by them to indicate that as a result of the restrictions: (i) a uniform price for each of the products is charged by all members of the association; and (ii) that uniform price is in practice varied only in response to changes in costs of production and distribution; and (iii) the uniform price is a reasonable price.

We have already indicated in our finding [2] that the uniform prices for the fastenings have since 1954 been reasonable, in the sense that they have resulted in no more than a reasonable return upon turnover and capital employed in the industry, and that the industry is efficiently run. No consumer has complained that the prices have been too high and the registrar does not so contend. It is upon the advantage or detriment of elements (i) and (ii) that issue has been joined.

Certain special features of this trade are claimed by the association to make it one in which uniformity of price is particularly beneficial to purchasers. (a) All but a very small amount of the fastenings are purchased for use in constructional or manufacturing industry as components of finished products of whose total cost the cost of the fastenings forms only a trivial proportion; (b) the demand is dependent upon the general level of constructional and industrial activity and is not responsive to changes in price; (c) the fastenings are required in several thousand different sizes and shapes and single orders by individual users may call for a great variety of different fastenings in widely varying quantities of each type; (d) a uniform high standard of quality is essential since the stability and efficiency of the finished product may depend upon the fastening being up to the specified standard; (e) prompt and punctual delivery is important since completion of the finished product may be held up for the lack of a few fastenings of one particular type; (f) to

[2] Ante, pp. 806–807.

R. P. Ct. (E. & W.)

1960

Black Bolt and Nut Association's Agreement, *In re.*

provide an efficient service to users adequate stocks in a very great variety of shapes and sizes must be maintained and readily available, and facilities must be provided for the speedy execution of special orders.

Only a trivial proportion of the fastenings reaches the public through retail channels. The vast bulk are purchased by industrial users either directly from the members of the association or from stockholders who themselves buy directly from the members of the association at the stockholders' discount.

The advantage of the uniform price to the stockholder is put colloquially that he does not have to "go shopping." He knows the price that he can quote, he knows the price he must pay from whatever manufacturer he buys: date of delivery is the only matter for negotiation. If prices for individual items of the many hundreds of sizes and shapes, which he has to stock, varied from manufacturer to manufacturer, he would be compelled to make many more inquiries before making his purchases and his administrative costs would be increased. The margin of 7½ per cent. upon which he at present operates and which covers not only his overheads and administrative expenses but a return on his capital locked up in stock, would, we are satisfied on the evidence, be scarcely adequate to cover the additional cost involved in "going "shopping," while the profit margin available on the present fixed prices leaves little room for any appreciable overall reduction in prices under free competition, although it may be that there are some imbalances in the present basic price list which under free competition might be adjusted by the price of some items rising and others falling. In the net result, however, we see no prospect of the stockholder recouping his additional expenses of "going shopping," save by raising his own prices to his purchasers.

The position of the industrial user purchasing direct from members of the association is much the same. He, too, does not have to "go shopping." Three witnesses were called from the constructional engineering industry, in which the cost of black bolts and nuts forms a higher proportion of the cost of the finished product than in some other industries, and which would stand to benefit most by a reduction in prices of the fastenings. Even here a difference of 10 per cent. in price of the fastenings would make a difference of only ½ per cent. in the cost of the finished product. All these witnesses were of opinion that a saving of as high as 10 per cent. would not compensate for the trouble and administrative expense of "going shopping." We have already indicated that an overall saving of this magnitude is in our view out of the question; but an obvious answer that suggests itself is that under free competition the industrial user would have the choice of restricting his purchases to one or two selected manufacturers and not going into the market generally to see if the goods can be obtained at a cheaper price. However, the question of timeous delivery would remain as an important one. At

present, under the inter-trading arrangements, an industrial user can place his order with a single manufacturer, who can obtain the items which he does not himself make, or which he does make but has oversold, from another manufacturer. In times of great demand, when the problem of delivery is likely to be most important, there would be less prospect than under the present system of the single manufacturer's being able to satisfy the industrial user's requirements as to delivery. It seems to us that, if the uniform price were abolished, the industrial user would either have to incur the trouble and administrative expense of "going shopping" himself or would have to purchase his requirements from a stockholder who would have to go shopping for him.

The industrial users called as witnesses also expressed the fear that price competition might result in lowering of quality standards by some manufacturers and render it necessary for the users themselves to test the products before putting them into use. As we have already said,[3] we are not greatly impressed by this possibility but we recognise that a lack of complete confidence in the quality of the fastenings to be used may make users feel it prudent to take precautions which in the result may prove to be unnecessary. Such precautions add to the expense, it may be considerable, particularly in constructional engineering, where the present practice is to take delivery on the site where the fastenings are to be used.

The fact that the uniform price is in practice varied only in response to changes in costs of production and distribution is alleged by the association to encourage the maintenance of adequate stocks both by manufacturers themselves and by stockholders. Without the price-fixing arrangements, it is contended, prices would fluctuate also with supply and demand and increase the financial risk entailed in maintaining large stocks. We are not satisfied that this premiss is correct, at least as regards the general level of prices. Supply and demand in this industry are not responsive to price changes. The larger manufacturers, who have built up a goodwill with regular customers, would, we think, be unlikely to raise their prices in response to temporarily increased demand, and they are necessarily price leaders; nor do we think that there is sufficient margin of profit in the present fixed prices to permit of anything more than a marginal reduction in the face of falling demand. Furthermore, the size of stocks maintained must vary primarily with anticipated demand. This does not seem to us to be a trade in which speculation in "futures" is ever likely to be a feature and we are not satisfied that the maintenance of stocks would be affected substantially either way by the removal of the restrictions.

As respects the general price-fixing scheme (viz., restrictions 1 and 8), the association rely upon paragraphs (*b*) and (*g*) of

[3] Ante, p. 807.

R. P. Ct. (E. & W.)

1960

Black Bolt and Nut Association's Agreement, *In re.*

section 21 (1) of the Restrictive Trade Practices Act, 1956. Although in form as submitted to us those are two independent restrictions, they in fact form part of a single comprehensive price-fixing scheme containing a number of inter-related provisions of two distinct types, namely: (1) Those that fix the price of the fastenings to purchasers generally according to the size of the order, i.e. (a) the normal prices by the application of the general discount to the prices in the basic price list, (b) the prices for small quantities by the application of various discounts smaller than in (a) or plussages to the basic price list, (c) the prices for large quantities by the application of the large order discounts to the normal prices; (2) those that provide for different prices according to the character of the purchases, i.e. (a) the stockholder's discount of 5 per cent. or 7½ per cent. off normal prices, (b) the quantity discounts varying from 1¼ per cent. to 5 per cent. off normal prices according to the total value of purchases by the purchaser from all members of the association during the preceding year.

The provisions mentioned in (2) above do not differ in character from restriction 2 referred to us, which provides for the discount to be allowed in inter-trading sales. They are, in our view, properly to be treated as separate restrictions and as such, together with restriction 2, are sought to be justified under paragraph (*g*) of the subsection.

Restrictions 5 and 9, which relate to standard conditions of sale, are sought to be justified under paragraph (*g*). Restrictions 3 and 4, which relate to sales to government departments, railways, harbour boards and other large users, and restrictions 6 and 7, which relate to government departments alone, are sought to be justified under either paragraph (*b*) or paragraph (*g*).

The true construction of paragraph (*b*) of section 21 (1) of the Act of 1956 has been argued in two previous cases (*In re Yarn Spinners' Agreement* [4] and *In re Blanket Manufacturers' Agreement* [5]). In neither case did the court find it necessary to reach a concluded opinion. In view of the nature of the benefits or advantages relied upon by the association, it is necessary that we should do so in the present case.

The relevant words of paragraph (*b*) are: "that the removal "of the restrictions would deny to the public as purchasers, "consumers or users of any goods other specific and substantial "benefits or advantages enjoyed or likely to be enjoyed by them "as such whether by virtue of the restriction itself or of any "arrangements or operations resulting therefrom."

The words "purchasers," "consumers" and "users" are defined by subsection (2) to include "persons purchasing, con-"suming or using for the purpose or in the course of trade or

[4] L.R. 1 R.P. 118, 155, 167, 190; [1959] 1 W.L.R. 154; [1959] 1 All E.R. 299.

[5] L.R. 1 R.P. 208, 235, 242; [1959] 1 W.L.R. 442; [1959] 2 All E.R. 1.

"business or for public purposes"; and the expression "purchasers, consumers or users of any goods" in paragraph (*b*) of subsection (1) must, in our view, be read with this extended meaning.

The expression "any goods" in paragraph (*b*) is to be contrasted with the expression "the goods to which it—(sc. the "restriction)—applies" in paragraph (*a*). In our view, it entitles the respondents, upon whom lies the onus of establishing the circumstances specified in paragraph (*b*), to choose the particular kind of goods in respect of which they seek to satisfy that onus.

The word "other" qualifying "specific or substantial benefits "or advantages" merely excludes the particular benefit or advantage of protection against injury, which is dealt with expressly in paragraph (*a*).

The main controversy in the arguments before us has been directed to the words "the public as purchasers, consumers or "users of any goods." Mr. Foster contends that this should be read conjunctively and that to satisfy the requirements of paragraph (*b*) the respondent must satisfy the court that the removal of the restriction would deny specific and substantial benefits to all persons who purchase, consume or use the goods, or at any rate to the majority of such persons. On his contention, it would not be sufficient to show that the removal of the restrictions would deny specific and substantial advantages to all persons who purchase the goods unless denial of specific and substantial advantages could also be shown to all or at least the majority of persons who consume the goods or use them. Mr. MacKenna, on the other hand, goes so far as to contend that the requirements of paragraph (*b*) are satisfied if he can show that the removal of the restriction would deny specific and substantial benefits or advantages to any particular class of purchasers, such as, in the present case, stockholders.

We do not think that either of these constructions is right. The beneficiaries of the relevant benefits or advantages are "the "public"; not members of the public in general, but in one or more specified capacities, viz., as purchasers or as consumers or as users. The use of the word "or" instead of "and" seems to us to indicate clearly that it is sufficient to show that the removal of the restrictions would deny specific and substantial benefits or advantages to members of the public in their capacity as purchasers, without taking into consideration for the purposes of paragraph (*b*) what effect the removal of the restriction would have on members of the public in their capacity as consumers or as users. Those matters fall to be considered when balancing under the latter part of subsection (1) the benefits or advantages to the public in their capacity as purchasers against any detriment either to "the public," which includes members of the public in all capacities, or to any persons who are purchasers, consumers or users of the goods, even although such persons represent but a small proportion of the total number of purchasers or of

R. P. Ct. (E. & W.)

1960

Black Bolt and Nut Association's Agreement, *In re.*

consumers or of users. On the other hand, Mr. MacKenna's construction appears to us to give no effect to the words "the "public." The expression "the public as purchasers," which is to be contrasted with the expression used later in the balancing provisions "persons not parties to the agreement (being pur- "chasers, consumers or users of the goods produced or sold by "such parties . . .)" connotes collectively all persons who purchase the goods whether for resale, like stockholders, or for use whether directly from the members of the association or from stockholders or from retailers. It is not sufficient to show merely that some small category of purchasers would be denied benefits or advantages by the removal of the restriction, nor is it fatal to show that some small category of purchasers would be denied no benefit or advantage or even would receive some benefit or advantage if the restriction was removed, although that would fall to be considered under the balancing provisions at the end of the subsection. What must be shown to satisfy the requirements of paragraph (*b*) is that looking at all purchasers as a collective whole they can be properly regarded as being denied specific and substantial benefits or advantages if the restriction were removed. It is unnecessary for the decision of the present case to consider whether it would be sufficient to show a benefit or advantage to a bare majority of purchasers either in number or in value. Having regard to the balancing provisions, that is a question which is unlikely to be crucial.

The evidence of the stockholder witnesses is all one way, namely, that the existence of the price-fixing scheme and the fixed stockholders' discount facilitates their operations and enables them to avoid the administrative expense of "going "shopping" which, if it had to be incurred, would make it impossible for them to operate on a margin of 7½ per cent., let alone 5½ per cent. This is a benefit or advantage to them which we think is specific. Having regard to the very large number of individual items involved, in respect of which in the absence of the price-fixing agreement they would have to invite quotations from different manufacturers in connection with their orders, we are satisfied that their present saving in administrative expenses is substantial and that the removal of the general restrictions would deny to stockholders benefits or advantages which are substantial. Sales to stockholders however account for only 26 per cent. of the trade.

The evidence of users, buying direct from members of the association, was to the same effect. The witnesses called were in fact engaged in the constructional engineering industry; but it is in this industry that the cost of black bolts and nuts forms the highest proportion of the cost of the finished article, and users in this category would have the greatest interest in any reduction in price.

These witnesses, who we think can be described as typical medium-sized buyers (their individual annual purchases ranged

from £3,000 to £15,000 per annum), were also of the opinion that the administrative expense to them of "going shopping" and the probable need for the precautionary inspection of goods on delivery would be substantial and would exceed any saving in the cost of their requirements which could reasonably be expected to result from price competition in this industry. As we have already indicated,[6] there is no appreciable margin for any overall reduction of prices, and we accept their evidence as to the probable increase in their administrative costs if the general restrictions were removed. As in the case of stockholders, we are satisfied that the saving in administrative costs is a specific benefit or advantage, and that in the case of large and medium-sized buyers with a wide range of requirements it is substantial. The proportion of the total sales which go to purchasers in this class cannot be accurately stated; but since about 30 per cent. of the total home sales are to purchasers, who are entitled to quantity discounts and whose minimum annual purchases must exceed £25,000 sales, sales to stockholders and to large and medium-sized buyers must, we think, account for over two-thirds of the total volume of home sales of black bolts and nuts and carriage bolts and nuts. The "public "as purchasers," however, includes the small buyer who buys his requirements of the fastenings either from the stockholder or directly from the manufacturer. The user who buys all his requirements from the stockholder would probably not "go shopping" even if the general restriction were removed. The same specific advantage now enjoyed by the large and medium-sized buyer would not therefore be denied to such a purchaser from the stockholder if the restriction were removed. The small buyer direct from the manufacturers would also need to "go "shopping": but there is no evidence to satisfy us that in his case the benefit or advantage of not having to "go shopping," which he would be denied if the general price-fixing restrictions were removed, is substantial. Having regard to the view which we take as to the improbability of any appreciable overall reduction in prices if the general price-fixing restrictions were removed, we do not think that the small buyer would obtain any substantial advantage from the removal of those restrictions; indeed it may well be that those who purchase from stockholders would be compelled to pay higher prices than at present owing to the increase in the stockholders' administrative expenses.

In the result, therefore, we are satisfied that purchasers whose purchases account for at least two-thirds of the home sales would be denied a specific and substantial advantage if the general price-fixing restrictions were removed, and that the remaining buyers would as purchasers suffer no appreciable countervailing disadvantage or detriment. This is sufficient to satisfy the onus lying upon the association of proving the circumstances specified in paragraph (*b*) of section 21 (1).

[6] Ante, pp. 806–807.

R. P. Ct. (E. & W.)

1960

Black Bolt and Nut Association's Agreement, *In re.*

We can deal briefly with the association's other contentions in relation to that paragraph. For the reasons which we have indicated,[7] although the maintenance of the general price restrictions do reduce the risk of deterioration in the quality of the products of some manufacturers, we are not satisfied that any significant decline in quality would result from the removal of the restrictions, although we appreciate that some buyers might regard the risk as necessitating precautionary examination of the goods on delivery with a consequent increase in their administrative expenses. The evidence however is not sufficiently strong to satisfy us that this advantage considered by itself is substantial. The same observations apply to the alleged advantage of the maintenance of stocks which, it is contended, would fall if the general price-fixing restrictions were removed.

It was also contended that the general price-fixing restrictions promoted investment in the industry, co-operative research and co-operation in sharing of "know-how," all of which would be reduced if the restrictions were removed. We doubt if these are sufficiently specific advantages or benefits. We do not think that the rate of investment in the industry as a whole would be reduced if the price restrictions were removed, and although the high degree of co-operation between the members, which now exists, might well be reduced, it is, in our view, a matter of speculation only as to what effect any reduction of this kind of co-operation would have in the efficiency of the industry as a whole if price competition replaced the present system. That particular aspect of co-operation within the industry which is represented by inter-trading is, however, of importance, particularly as a factor in avoiding the need for purchasers to "go "shopping," and we have already taken it into consideration. The inter-trading provisions of the general price-fixing scheme, of which they form an integral part, have also, we think, probably resulted in keeping at any rate some of the small manufacturers in business, and avoidance of some plant duplication, and removal of these restrictions would no doubt necessitate some reorganisation in the industry to fulfil users' requirements of standard products in small demand, "off standard specials" and "out and out specials." But such advantages in this respect which users would be denied, if the general price-fixing restrictions, including the inter-trading provisions, were removed, are, in our view, too vague and speculative to be specific.

For the purpose of our consideration of the application of paragraph (*b*) of section 21 (1) to the general price-fixing restrictions, including the provisions relating to inter-trading, we have not so far sought to distinguish between the individual restrictions nor, in general, is there any need to do so for they form part of an integral whole. There is however one exception, namely, the quantity discount provision as defined in the present case. This is really no more than a sop to the large buyer and

[7] Ante, p. 807.

an inducement to him to restrict his purchases to members of the association. It is no doubt a specific advantage to the large buyer as a purchaser, but large buyers, including those whose quantity discount is no more than $1\frac{1}{4}$ per cent., account for only about one-third of the trade. This is not a substantial advantage to the "the public as purchasers," more particularly as its effect, under the association's method of fixing the general discount, must have been to increase to some extent the normal prices paid by the rest of the purchasers. A quantity discount based on the aggregate of purchases from all members of the association has no such economic justification as the large order discount, and Mr. MacKenna, in his final speech, has conceded that he cannot justify it under paragraph (*b*).

Restrictions 5, 8 and 9, which set out the standard conditions of sale, are not unusual and are reasonably required for purposes connected with the general price restrictions. To remove them, while leaving the main restrictions, would re-introduce the necessity of purchasers "going shopping," the avoidance of which is the ground upon which we have held that the circumstances specified in paragraph (*b*) are satisfied in relation to the main price-fixing restrictions.

It remains to deal with the application of paragraph (*b*) to restrictions 3, 4, 6 and 7, of which the two former relate to the obligation not to supply goods to government departments, railways, harbour boards or other large users at a price lower than the lowest proposed quotation reported by any member to the secretary of the association, while the two latter relate exclusively to the terms of contracts with government departments. No serious attempt has or, we think, could be made to contend that the removal of these restrictions would deny specific or substantial advantages to anyone as purchasers, consumers or users. Presumably, the members of the association think that these restrictions are advantageous to themselves, but this of course does not satisfy the requirements of paragraph (*b*) of section 21 (1).

In the result, therefore, we are satisfied that the circumstances specified in paragraph (*b*) of section 21 (1) exist in the case of restrictions 1 and 2 with the exception of the provisions for quantity discounts contained in the registered price list no. 3. We are also satisfied that the circumstances specified in paragraph (*g*) of the subsection exist in the case of restrictions 5, 8 and 9. We are not satisfied that any of the circumstances specified in paragraph (*b*) or (*g*) of the subsection exist in the case of restriction 3, 4, 6 or 7, or in the case of the provisions for the quantity discounts contained in the registered price list no. 3 referred to in restriction 1. These are, accordingly, contrary to the public interest.

This does not however conclude the matter save as regards the last-mentioned restrictions. The onus lies upon the association also to satisfy us that those restrictions in respect of which

R. P. Ct. (E. & W.)

1960

Black Bolt and Nut Association's Agreement, *In re.*

the circumstances specified in paragraph (*b*) or (*g*) of the sub-section exist are "not unreasonable having regard to the balance "between those circumstances and any detriment to the public "or to persons not parties to the agreement (being purchasers, "consumers or users of goods produced or sold by such "parties or persons engaged or seeking to become engaged in "the trade or business of selling such goods or of producing or "selling similar goods) resulting or likely to result from the "operation of the restriction."

It has not been suggested that non-members of the association engaged or seeking to engage in the trade suffer any detriment from the restrictions, at any rate other than the provisions relating to quantity discounts, which we have already held to be contrary to the public interest. The evidence indicated that they do not in fact undersell the members of the association. In times of heavy demand it may be that they sometimes obtain prices higher than the association's fixed prices.

As regards purchasers, consumers and users of the goods, we have already expressed [8] our view that the prices which have been fixed by the association since January 1, 1954, have in fact been not unreasonable. We do not think that overall they would have been lower had there been free competition in price; nor do we think, if the prices in the future are fixed in the same way as they have been fixed in recent years, they will be higher than they would be under free competition. Competition in price would not increase demand for the fastenings. It may be that owing to imbalances in the price list the prices of some items would fall slightly and of others rise slightly. But on balance there is very little room for any decrease in prices and, subject to certain general considerations with which we deal later, we think that any possible detriment in higher prices under the scheme is more than outweighed by the increased administrative costs of the purchasers in "going shopping."

Although in general the high standard of the fastenings, the maintenance of which is we think undoubtedly encouraged to some extent by the restrictions, is of benefit to users, it has been suggested that the maintenance of the restrictions does operate to the detriment of one class of user. To reduce the standard gives scope for economy in costs of production by running machines longer between re-tooling and by reducing the standards of inspection and control of production. The price-fixing scheme, it is said, prevents a user who would be content with an inferior article from purchasing it at a cheaper price. There is no evidence that there are in fact users in this category or, assuming that there are, that their demands cannot be adequately met by producers outside the association. A producer of inferior fastenings of any particular size or shape would have to produce exclusively for this special market since the economies which would enable him to reduce his price would make it impossible for him to

[8] Ante, pp. 806–807.

produce a high quality article. There is no evidence that non-members of the association have thought it worth while to cater for such a market and we do not think that, if the price restrictions were abolished, any producers who are members of the association would be likely to do so.

There are however two important general considerations which affect the public. We accept that in general the consequence of competition is to encourage progress and efficiency in an industry; but the evidence here is that, despite the existence of price-fixing in this industry for the past twenty-seven years, it is efficient as compared with its counterpart in other countries and very considerable technical progress has been made during that time and especially in the more recent years. It is incapable of proof either way whether, as the registrar claims, there would have been greater efficiency and progress if there had been no price-fixing, or, as the association claim, there would have been less. There has been in this industry an exceptional amount of technical co-operation and sharing of "know-how" between members which has assisted in raising the efficiency in particular of the smaller manufacturers. There has been throughout the stimulus of competition for business although not the added stimulus of competition in price between members. We do not think that there are any positive grounds for supposing that in this particular and exceptional industry technical progress or improvements in efficiency which would otherwise have been made have in fact been reduced or retarded by the existence of the price-fixing scheme nor do we think that the position in this respect is likely to be different if the price-fixing restrictions continue to operate.

There is, however, another consideration that has given us great difficulty. The restrictions contain no express provisions as to the basis upon which prices are to be fixed; so far as the rules and regulations of the association are concerned, this is left to the discretion of the central council with the approval of a majority of the members in general meeting. However wisely or reasonably they have exercised that discretion in the past, it is contended by the registrar that to declare the restrictions to be in the public interest would be to give carte blanche to the association to fix their prices at whatever level they thought fit in the future and that would be a detriment to the public.

If that were the effect of a declaration by this court that the restrictions were not contrary to the public interest, we should agree that the detriment to the public in general far outweighed the specific and substantial advantages to the public as purchasers of the fastenings, which they would be denied by the removal of the restrictions. But that, in our view, is not the effect of such a declaration. The court has to take into consideration the benefits or advantages enjoyed *or likely to be enjoyed* by virtue of the restrictions and the detriment resulting *or likely to result* from their operation. The words emphasised require the

R. P. Ct. (E. & W.)

1960

Black Bolt and Nut Association's Agreement, *In re.*

court to weigh probabilities: in doing so, it is entitled to take into consideration the way in which the association has exercised its price-fixing power in the past and statements and assurances given by witnesses who are members of the association as to the way in which they intend that that power shall be exercised in the future.

The evidence shows that the association have since government control of prices was abolished in March, 1953, honestly and conscientiously endeavoured to change their fixed prices in accord with actual variations in costs with a reasonable margin of profit. The methods that they in fact adopted in 1953 were open to obvious objections to which we have already referred.[9] and no doubt had the price list no. 3 been inaugurated after the passing of the Act of 1956, a much more defensible method would have been adopted. Furthermore, subsequent alterations in general discount could and should have been supported by more comprehensive and recorded costings. But whatever the theoretical objections, the practical result of the methods adopted has been a price list which is rational and reasonable, resulting in a profit level, whether on turnover or capital employed, which cannot be regarded as in any way excessive. This has been confirmed by the recent costing investigation carried out by the accountants for registrar and the association for the purposes of this hearing.

Responsible witnesses called on behalf of the association have assured us of their intention to operate the scheme in the future as they have operated in the past and to change prices when and only when there are changes in cost of production and distribution and only to the extent of such changes retaining no more than the same percentage profit margins which they have adopted in the past.

It would have been better had the method of fixing prices in relation to costs of production and distribution been expressed in the restrictions, but in the face of the assurances which we have received, and in the light of the association's record in the past, we are satisfied that it is likely that any changes in prices will be made on the same basis as in the past in strict relation (downwards as well as upwards) to changes in costs of production and distribution, and, accordingly, we are satisfied that the specific and substantial benefits or advantages likely to be enjoyed by virtue of the restrictions outweigh any detriment likely to result from their operation, and that having regard to this the restrictions are not unreasonable.

So to determine with the consequent declaration that the restrictions in question are not contrary to the public interest is far from giving carte blanche to the association to fix prices as they please. One of the most important relevant circumstances in enabling us to reach our conclusion in favour of the restrictions is that the prices in fact fixed under the scheme are reasonable, and changes therein are made when and only when

[9] Ante, p. 806.

there are ascertained changes in costs and only proportionately to such changes. If the association were at any time to fix prices which were unreasonable, or to fix them upon some other basis (not being an improvement, for which there is plenty of scope, in particular in ascertaining the relevant costings, including the actual level of activity of the plant, for the purpose of fixing either the basic prices of particular items or the discounts) this would be a material change in the relevant circumstances entitling the registrar to apply to the court under section 22 of the Act of 1956, and a very different view might be taken by the court in those changed circumstances.

In this connection, it is fitting to point out that the effect of our decision that the association's provision for quantity discounts are contrary to the public interest and, accordingly, void will have the effect of increasing to a limited extent the overall profits of the members of the association and this is a factor to be taken into account in determining any future changes in prices and, indeed, in considering the then consequential change in the general discount which would be appropriate in the immediate future.

Declarations accordingly.

Solicitors: *Allen & Overy; Treasury Solicitor.*

N. P.

[QUEEN'S BENCH DIVISION.]

* REGINA v. AGRICULTURAL LAND TRIBUNAL FOR THE SOUTH EASTERN AREA. *Ex parte* BRACEY.

1960
May 26.

Lord Parker C.J., Byrne and Donovan JJ.

Crown Practice—Certiorari—Error of law on face of record—Agricultural land tribunal—Evidence wrongly admitted—No error of law on face of record—Inadmissibility of affidavit evidence.

Law Report—Citation—Authenticity—Revision of The Law Reports by judges.

An agricultural land tribunal consented to the operation of a notice to quit part of an agricultural holding on the ground that greater hardship would be caused by withholding than by giving consent. In the reasons for their decision the tribunal stated that the tenant had said that the possession of the disputed land was almost vital to his farming economy and that he would go to any lengths to retain it, but that he had had to admit in cross-examination that some three years before he had negotiated with his then landlord to surrender the land if he was paid £3,000, and that there had been further abortive negotiations to surrender the land just before the notice to quit was served. The tenant applied for certiorari to quash the decision of the tribunal on the ground that the negotiations were conducted without prejudice and that

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[Reported by A. D. RAWLEY, Esq., Barrister-at-Law.]

1960

Reg.
v.
Agricultural Land Tribunal for the South Eastern Area.
Ex parte Bracey.

the tribunal had thereby taken into consideration matters which they were not entitled to take into consideration. There was nothing on the face of the order or in any part of the record to show that the negotiations were conducted without prejudice, but the tenant filed an affidavit deposing to these facts:—

Held, that there was a clear distinction between a tribunal which acted without jurisdiction and one which went wrong in law while acting within its jurisdiction. In the latter case, unless the error of law appeared on the face of the record, an order for certiorari would not be granted. Here no error of law appeared on the face of the record and it was impossible to go behind it and look at affidavit evidence. Accordingly, the application would be refused.

Dictum of Lord Goddard C.J. in *Rex* v. *Fulham, Hammersmith and Kensington Rent Tribunal Ex parte Hierowski* [1953] 2 All E.R. 4, 6, D.C.; ([1953] 2 Q.B. 147; [1953] 2 W.L.R. 1028) not followed.

Application for certiorari.

The following facts are taken from the judgment of Lord Parker C.J.

Dacre James Bracey, the tenant of an agricultural holding, moved for an order of certiorari to bring up and quash an order of the Agricultural Land Tribunal for the South Eastern Area, dated August 26, 1959, whereby the tribunal consented to the operation of a notice to quit part of his holding dated March 18, 1959, served upon the tenant by his landlord, Noel Carrington. The landlord's application for the consent of the tribunal was on one of two grounds: either the ground set out in section 25 (1) (*a*) or that set out in section 25 (1) (*d*) of the Agricultural Holdings Act, 1948, as amended by section 3 (2) of the Agriculture Act, 1958.[1]

The tribunal, in their reasons, came to the conclusion that the tenant was an exceedingly good farmer, that the landlord was also a good farmer, and that if the land in dispute was transferred to him, the landlord, it would not be farmed any more efficiently. Therefore, there was no question of consent being granted under section 25 (1) (*a*) of the Act. So far as section 25 (1) (*d*) was concerned, the tribunal came to the conclusion that, while the land would be a great asset to the landlord in conjunction with his land, the tenant would not be seriously prejudiced by the

[1] Agriculture Act, 1958, s. 3 (2): "The following subsection shall be substituted for subsection (1) of section twenty-five of the [Agricultural Holdings] Act of 1948 (which requires the Minister to withhold his consent to the operation of a notice to quit an agricultural holding unless he is satisfied as to certain matters)—'(1) The Agricultural Land Tribunal shall consent under the last foregoing section to the operation of a notice to quit an agricultural holding or part of an agricultural holding if, but only if, they are satisfied as to one or more of the following matters, being a matter or matters specified by the landlord in his application for their consent, that is to say—(*a*) that the carrying out of the purpose for which the landlord proposes to terminate the tenancy is desirable in the interests of good husbandry as respects the land to which the notice relates, treated as a separate unit; or . . . (*d*) that greater hardship would be caused by withholding than by giving consent to the operation of the notice; . . .'"

loss of the disputed land and, exercising their discretion, they consented, by a majority, to the operation of the notice to quit on the ground of greater hardship: In arriving at that conclusion, however, they stated this: "He [the tenant] says that "to lose the disputed land would upset the whole of his economy, "and that the possession of it is almost vital to his farming "economy, and that he would go to any lengths to retain it, but "he had to admit in cross-examination that three years ago he "negotiated with his then landlord to surrender this 328 acres "[the 328 acres included the 115 acres, the land in dispute] that "he was willing to surrender that if he was paid £3,000 and that "in February of this year [that is, just before the notice to quit "was served] through his agents, he again negotiated with the "landlord's agents to surrender the disputed land."

D. A. Grant for the tenant.
Alan Fletcher for the landlord.

The following cases, in addition to those appearing in the judgment, were cited in argument: *Reg.* v. *Bolton*[2]; *Reg.* v. *Medical Appeal Tribunal, Ex parte Gilmore*[3]; *Baldwin & Francis Ltd.* v. *Patents Appeal Tribunal.*[4]

LORD PARKER C.J., having stated the facts, continued: I find it unnecessary to go into the details of the matter as disclosed in the reasons given by the tribunal. The ground upon which the order of certiorari is sought is really this: that those negotiations in February between the landlord and tenant were, if we were entitled to look at them, negotiations conducted without prejudice. Accordingly, it is said here that the tribunal had no right to allow evidence to be given in regard to them, and that they were taking into consideration matters which they were not entitled to take into consideration. I think that if one got as far as that, it would be impossible to say that those negotiations in February, of which evidence was given, did not affect the tribunal's mind. However, the first question is whether we are entitled to look behind the reasons. As has been said many times, certiorari is a special remedy. It goes when there has been a want of jurisdiction, and in that expression, "want of jurisdiction," matters akin thereto are covered, such as a decision obtained by fraud or bias on the part of members of the tribunal or, indeed, a case where there has been a breach of some principle of natural justice like receiving evidence from one party in the absence of the other. The other main ground on which certiorari may be served is when there is a speaking order, as there is here, and there is an error of law on the face of the record. There is, however, this vital distinction between the two main grounds: where it is said

[2] (1841) 1 Q.B. 66.
[3] [1957] 1 Q.B. 574; [1957] 2 W.L.R. 498.
[4] [1959] A.C. 663; [1959] 2 W.L.R. 826; [1959] 2 All E.R. 433.

1960

Reg. v. Agricultural Land Tribunal for the South Eastern Area. *Ex parte* Bracey.

Lord Parker C.J.

that the tribunal have gone wrong in law while acting within their jurisdiction, this court can only interfere if they can see that error on the face of the record; whereas if certiorari is moved for want of jurisdiction the court is entitled to look at affidavit evidence to see whether or not there was jurisdiction. Here, I am quite satisfied that, on the face of this order, it is impossible to say that there was any error of law. There is nothing here to disclose whether these negotiations were without prejudice negotiations or not. Looking at the face of this record, it discloses no error of law, and accordingly, on well-known principles it would be impossible for this court to go behind it and look at affidavit evidence.

Mr. Grant—and the court is indebted to him for his argument—maintains that, on the assumption for this purpose that the negotiations were without prejudice, it is a matter which goes beyond, as he puts it, a mere rule of evidence, and means that the tribunal are taking into account matters which have been referred to in the cases as "sacred." He refers to *Hoghton* v. *Hoghton*,[1] and says that certiorari will then lie on the basis that there has been a want of jurisdiction. He relied very strongly on a dictum, and I think that it was only a dictum, of Lord Goddard C.J. in his judgment in this court in *Rex* v. *Fulham, Hammersmith and Kensington Rent Tribunal, Ex parte Hierowski*.[2] It is unnecessary to refer to the facts, but in that case, reported in The All England Reports, there is a passage which reads as follows[3]: "But there is another ground on which, in my opinion, "the court is bound to grant certiorari. If it can be shown that "an inferior tribunal has come to its decision by taking into "account matters which it ought never to have taken into account "and are virtually extraneous to what they have to decide, that "is a ground for granting certiorari. The chairman, in his "affidavit, has frankly stated that the tribunal acted as they did "on grounds which appear to this court to be entirely irrele-"vant. . . ." I confess that when I was referred to that passage with which, I, as a member of the court, had agreed, I was worried; but I notice that in the Law Reports,[4] when the matter was revised, that particular passage is omitted.

There is a clear distinction between a tribunal which acts without jurisdiction and one which goes wrong in law while acting within its jurisdiction, for example, acting on no evidence or acting on evidence which ought to have been rejected, or failing to take into consideration evidence which ought to have been considered. Those are all matters of law, and unless the error appears on the record, no order for certiorari can be obtained.

I think that it is unnecessary to read the well-known passages in Lord Sumner's speech in the Privy Council in *Rex* v. *Nat Bell*

[1] (1852) 15 Beav. 278, 321.

[2] [1953] 2 Q.B. 147; [1953] 2 W.L.R. 1028; [1953] 2 All E.R. 4, D.C.

[3] [1953] 2 All E.R. 4, 6.

[4] [1953] 2 Q.B. 147; see also [1953] 2 W.L.R. 1028.

Liquors Ltd.,[5] nor do I think it necessary to refer to another decision of this court, *Rex* v. *Paddington and St. Marylebone Furnished Houses Rent Tribunal, Ex parte Kendal Hotels Ltd.*,[6] where the position is again fully set out and where the difference between certiorari and mandamus in regard to a matter of this sort is clearly drawn. I am quite satisfied that we are not entitled to look at any affidavit evidence, in other words to go behind the record in this case, and on the record I can see no error of law. Accordingly, I would refuse this application.

BYRNE J. I agree, for the reasons already stated by my Lord.

DONOVAN J. I agree.

Application refused with costs.

Solicitors: *Robbins, Olivey & Lake for Burges, Salmon & Co., Bristol; Pennington & Son for Lemon, Humphreys, Parker & Mather, Swindon.*

[5] [1922] 2 A.C. 128, 151, 152; 38 2 T.L.R. 541, 547, 548, P.C.

[6] (1947) 63 T.L.R. 239; [1947] 1 All E.R. 448, D.C.

[PROBATE, ETC., DIVISION.]

* SCOTT *v.* SCOTT (QUINE CITED).

1960
May 12, 13.
Karminski J.

Husband and Wife—Condonation—Revival of condoned offence—Pleading—Adultery unknown to condoning spouse and not pleaded—Whether capable of constituting revival—Matrimonial Causes Act, 1950 (14 *Geo.* 6, *c.* 25), *s.* 4.

A wife committed adultery with the party cited. The husband condoned that adultery. Subsequently, the wife, unknown to the husband, committed adultery with a man other than the party cited. The husband, not knowing of this latter adultery, had not pleaded it against the wife.

Held, that it was the duty of the court to take into account the unpleaded adultery, in determining the question whether the earlier adultery, which had been condoned, had been revived.

DEFENDED SUIT for divorce.

The parties married in 1947. In 1957, the wife petitioned for divorce on the ground of the husband's desertion, alleging that in March, 1954, the husband left her without cause and had never returned to her. She prayed for the exercise of the court's discretion in respect of her adultery both before and after the parting. The husband, by his answer, admitted leaving the wife in March, 1954, but alleged that he was forced to leave by the

[Reported by D. R. ELLISON, Barrister-at-Law.]

1960

Scott v. Scott (Quine cited).

wife's expulsive words and conduct. He alleged adultery between the wife and the party cited from June, 1953, onwards. The husband conceded that he had condoned the wife's adultery by taking her back when he knew that she had committed adultery with the party cited in 1953, but pleaded that the condoned adultery had been revived by the wife's desertion. At the hearing of the suit, the wife's evidence disclosed adultery by her in 1956 and 1957, with a man other than the party cited. The husband did not know of this adultery and had not alleged it in his answer. The question arose whether that unpleaded adultery should be taken into account by the court as reviving the condoned adultery with the party cited.

A. C. Goodall for the wife.
Miss Elaine Jones for the husband.
The party cited appeared in person.

Karminski J. referred to the facts and the pleadings and continued: In the course of the hearing it became apparent from the wife's evidence that she had committed adultery long after the husband left, with a man, not the party cited, over a period of months between October, 1956 and 1957, in Wales. The husband had no knowledge of that and has not charged it, but it is said, I think with force, by Miss Jones, that looking at the condonation problem in this case I must have regard to the fact that after she had been forgiven by her husband and after they had parted, whatever the merits or de-merits of the parting, she destroyed the condonation by committing adultery with this other man. With all deference to what Mr. Goodall said, I think Miss Jones's argument on that is well founded because under section 4 of the Matrimonial Causes Act, 1950, it is the duty of the court to inquire into the facts and to ascertain whether there has been any condonation on the part of the petitioner. "The petitioner," for the purpose of this case, means "the respondent," who seeks relief on the ground of adultery. Section 4 (2) provides: "If the "court is satisfied on the evidence that—(*a*) the case for the peti- "tion has been proved; and (*b*) where the ground of the petition "is adultery, the petitioner has not . . . condoned, the adul- "tery . . . . ; the court shall pronounce a decree of divorce, but "if the court is not satisfied . . . it shall dismiss the petition." The section then goes on to deal with the discretionary powers of the court.

I am bound to say that the duty of the court, as set out above, makes it imperative to ascertain whether or not at the time of the hearing, the adultery admittedly at one time condoned, still remains condoned. Although I appreciate that the adultery of 1956 and 1957 with another man in Cardiff has not been pleaded, I cannot ignore it when determining whether the wife's earlier adultery with the party cited has or has not been condoned. On the facts before me, that adultery took place and I hold as a

matter of law that it has not been condoned, although it was for a period condoned but was subsequently revived.

Decree nisi on the petition.

Solicitors: *Weigall & Inch, Margate; H. H. H. Wiggett, Law Society, Divorce Department, London.*

1960

SCOTT v. SCOTT (QUINE CITED).

[HOUSE OF LORDS.]

* FISCHLER . . . . . APPELLANT;

AND

ADMINISTRATOR OF ROUMANIAN PROPERTY . . . . . RESPONDENT.

H. L. (E.)†

1960 *May* 23, 24, 25, 26; *June* 23.

Trading with the Enemy—Distribution of enemy property—Claim—Debt—Assignment—Ownership—Export in 1939 *of dried peas from Roumania to United Kingdom — Import-Export restrictions between the two countries—Price of peas paid into compensation transaction account—Roumanian exporter assigns right to price to another Roumanian merchant—On outbreak of war money paid over to Custodian of Enemy Property—On cessation of hostilities money transferred to Administrator of Roumanian Property—Whether assignee entitled to recover sterling in question—"Owner"—Meaning—Debts Clearing Offices and Imports Restrictions Act,* 1934 (24 *&* 25 *Geo.* 5, *c.* 31), *s.* 1—*Clearing Office (Roumania) Order,* 1936 (*S.R. & O.,* 1936, *No.* 427)—*Clearing Office (Roumania) Amendment Order,* 1939 (*S.R. & O.,* 1939, *No.* 750)—*Trading with the Enemy Act,* 1939 (2 *&* 3 *Geo.* 6, *c.* 89)—*Clearing Office (Roumania) Amendment Order,* 1940 (*S.R. & O.,* 1940, *No.* 963)—*Treaties of Peace (Italy, Roumania, Bulgaria, Hungary and Finland) Act,* 1947 (10 *&* 11 *Geo.* 6, *c.* 23)—*Treaty of Peace (Roumania) Order,* 1948 (*S.I.* 1948, *No.* 118), *art.* 1 (5) (*g*).

Restitution—Unjust enrichment—Enemy property—Received by bank to use of enemy person—Claim after Peace Treaty.

Words and Phrases—"Owner"—Treaty of Peace (Roumania) Order, 1948, *art.* 1 (5) (*g*).

In 1939 G., a Roumanian merchant, exported a quantity of dried peas, the price of which was over £2,200, to a merchant in the United Kingdom. By virtue of the provisions of section 1 of the Debts Clearing Offices and Imports Restrictions Act, 1934, and the Orders made thereunder, the buyer was required to and did so pay the price of the goods to the Anglo-Roumanian Clearing Office (A.R.C.O.) who credited it in their books to the sub-account of the Roumanian Commercial Bank, who had been nominated by G. as the authorised bank to act as "beneficiary" in respect of the price. In consequence of such payment the Roumanian exporter was entitled to spend the price in buying certain classes of goods for import into Roumania, the function of an authorised bank under Roumanian law being to see that (a) the sterling proceeds were not

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† *Present*: VISCOUNT SIMONDS, LORD REID, LORD RADCLIFFE, LORD COHEN and LORD DENNING.

H. L. (E.)
1960
Fischler v. Administrator of Roumanian Property.

expended otherwise than for the purchase of goods authorised to be imported into Roumania in compensation for goods exported to the United Kingdom; (b) in default of such import the sterling was duly surrendered to the National Bank of Roumania as required by Roumanian law. Subsequently, G. assigned his rights in respect of £2,193 of the sum in question to the appellant, then a Roumanian merchant, who paid G. for these rights in Roumanian currency. In June, 1940, the appellant gave instructions to the Roumanian Commercial Bank to make the price available to a British company from which he had bought rubber for export to Roumania. Thereupon the bank cabled A.R.C.O. instructing them to pay the £2,193 to the British exporter. A.R.C.O. paid as directed but, owing to the sale falling through, the money was refunded on January 25, 1941, to A.R.C.O., who credited it once again in their books to the bank, and there it remained until the outbreak of war between the United Kingdom and Roumania. Thereupon, pursuant to section 8 of the Trading with the Enemy Act, 1939, this sum was paid over to the Custodian of Enemy Property. After the conclusion of hostilities money so paid over could not be recovered by the original Roumanian owners as under article 1 (2) and (3) of the Treaty of Peace (Roumania) Order, 1948, it was made subject to a charge which made it available to meet the claims of British creditors of Roumanians, and it was transferred, accordingly, to the respondent, the Administrator of Roumanian Property.

On June 17, 1940, the payments agreement between the United Kingdom and Roumania was abrogated, and by the Clearing Office (Roumania) Amendment Order, 1940, proceeds of debts which had reached A.R.C.O. before that date were left to be applied in accordance with the existing provisions of the clearing scheme, subject to a provision (which never took effect) making the fund applicable in accordance with any arrangements which might be made between the respective countries with a view to winding up and making a final distribution of the sums received by A.R.C.O. In 1948 the clearing office itself was abolished by the Debts Clearing Offices Act, 1948, the effect of which was to vest the rights and liabilities of A.R.C.O. (so far as material) in the Crown.

In 1951 the appellant settled in Israel and became a citizen of that country. In consequence of this and the fact that he suffered persecution in Roumania, the Board of Trade, acting under statutory authority, released the charge on property (if any) belonging to him in the hands of the respondent.

In proceedings in which the appellant claimed to be entitled to recover the sum in question:—

Held, that the appellant was the only person who could have any right, interest or property in this sum, as neither A.R.C.O. nor the bank had any beneficial right of property in it, and that the appellant had a right, which English law would recognise and enforce, to compel the bank to give effect to his instructions and direct the disposition of the fund pro tanto as he should require, since (*per* Viscount Simonds, Lord Radcliffe and Lord Cohen) (a) the bank's rights as nominated beneficiary were purely ministerial and came to an end on the termination of the clearing scheme and could no longer determine the rights of the holder of the fund; (b) the clearing legislation by impounding the proceeds of G.'s debt and vesting them in A.R.C.O.'s fund, created no new owner of them in the beneficial sense—it merely created over them certain rights of control, out of which he would have got full value in the use of his sterling within the terms of the scheme (post, p. 943); accordingly, the determination of the scheme without the

winding up of the fund meant that the restrictions on the free use of the proceeds of his debt were removed, subject only to the impediment by way of the charge imposed by the Treaty of Peace Order, 1948; that, since the charge had been removed, the appellant as G.'s assignee emerged as the true owner of the sterling to which he was entitled accordingly; (*per* Lord Reid) there was nothing in the Act of 1934, nor in the Order of 1939 made thereunder, which took away the beneficial interest in the sum in question from G. or the appellant as his assignee, and that, as the word "owner" in the context of article 1 (5) (*g*) of the Order of 1948 must mean beneficial owner, the charge having been removed, the appellant was entitled to recover the money (post, p. 934); (*per* Lord Denning) the sum in question was money had and received to the appellant's use, for A.R.C.O. was nothing more than a statutory collector of moneys owing to Roumanians. Further, the bank, although the nominated beneficiary, was not the beneficial owner of the money since it had to act on the instructions of the Roumanian creditor who had the right to say how it was to be applied. Hedged round with limitations, as it was, nevertheless it remained money received to his use post, p. 946).

Decision of the Court of Appeal reversed.

APPEAL from the Court of Appeal (Lord Evershed M.R., Sellers and Pearce L.JJ.).

This was an appeal by leave of the House of Lords from an order of the Court of Appeal dated November 18, 1958, (a) allowing an appeal by the respondent, the Administrator of Roumanian Property, from an order of Glyn-Jones J., dated December 20, 1957, whereby judgment was entered in favour of the appellant, Israel Fischler, against the respondent for the sum of £2,193 6s. 8d., (b) directing that the said order dated December 20, 1957, be set aside and that judgment be entered for the respondent with costs.

The question for determination in this appeal was whether the appellant had any proprietary interest, legal or equitable, in certain property, namely, property represented by a sum of £2,193 6s. 8d., formerly part of a general balance standing on February 15, 1941 (the date Roumania became enemy territory) to the credit of the Anglo-Roumanian Clearing Office with the Bank of England and (in accordance with the Clearing Office (Roumania) Amendment Order, 1939) recorded in the books of the clearing office in a separate sub-account in the name of the Roumanian Commercial Bank, it being conceded by the respondent that if the appellant had any such interest he was entitled to succeed in the action.

The following statement of facts is substantially taken from the judgment of Glyn-Jones J.

The appellant, Israel Fischler, was of Roumanian origin. He was formerly a Roumanian national living in Roumania and carrying on business there as an importer. In May of 1940 he was minded to import a consignment of raw rubber into Roumania. He acquired a right, the nature of which was in dispute in these proceedings, to cause the sum of £2,193 6s. 8d.,

H. L. (E.)
1960
FISCHLER v. ADMINISTRATOR OF ROUMANIAN PROPERTY.

being part of a gross sum standing in the books of the Bank of England in the name of the Controller of the Anglo-Roumanian Clearing Office in London, to be paid to the Midland Bank in London to open a letter of credit in favour of the exporter in the United Kingdom of the rubber. The exporter was unable to obtain an export licence and the transaction was not completed, and the sum paid for the letter of credit was repaid to the Bank of England and recredited to the account in the name of the Controller of the Clearing Office.

After the outbreak of war between the United Kingdom and Roumania the sums held by the Bank of England in the name of the clearing office, including this sum of £2,193 6s. 8d. (which had been reduced by certain charges to £2,190 11s. 10d.) were transferred to the Custodian of Enemy Property, and after the signature of the Treaty of Peace between the United Kingdom and Roumania these funds passed to the respondent to be administered pursuant to the terms of the Treaty of Peace (Roumania) Order, 1948. By that Order the property, rights and interests in England of Roumanian nationals were charged with the amounts due at the date when the Treaty of Peace with Roumania came into force in respect of claims by the British Crown or British nationals against the Roumanian Government or Roumanian nationals. Article 1, sub-paragraph (1), read as follows: "In this Article the expression 'property, rights or "'interests' includes real and personal property, and any estate "or interest in real or personal property, any negotiable instru-"ment, any debt or other chose in action, and any other right or "interest, whether in possession or not."

The appellant was a Jew who suffered persecution under the Government of Roumania between 1940 and 1945, and thereafter he was refused permission to leave Roumania until 1950 when he succeeded in leaving. He then settled permanently in Palestine. In view of these facts, the Board of Trade, acting in pursuance of sub-paragraph (2) of article 1 of that Order, released from the charge the property of the appellant, if any, in this sum, leaving to be determined by the courts in the United Kingdom the question whether or not the appellant had any property therein. The contention of the respondent was that the sum was properly credited in the books of the clearing office to the account of the Commercial Bank of Roumania, and that the courts of the United Kingdom could not recognise any person other than that bank as possessed of any property or interest of any kind in the sums so credited.

It is necessary to set out briefly the history of foreign exchange control in Roumania. Exchange control was first introduced in Roumania in October, 1932, and took the form of a law requiring Roumanian nationals to surrender to the National Bank of Roumania all sterling currency, inter alia, owned by them, and forbidding the acquisition of sterling thereafter save from the

bank. Proceeds in sterling of exports from Roumania had to be surrendered to the National Bank of Roumania in exchange for Roumanian currency, and the sterling, or part thereof, thus acquired by the National Bank was used to pay for goods to be imported from the sterling area into Roumania. Import licences were required by importers and were issued only to registered importers, that is to say, persons whose names appeared on the register of importers kept by the Chamber of Trade, and to registered importers having import licences the National Bank allocated a quota of the sterling available. From time to time these rules were modified so as to permit an exporter to retain control, or a measure of control, over the whole or a portion of the sterling proceeds of exports by him of Roumanian goods, he being permitted to use the whole or that portion as the case may be to pay in sterling for goods to be imported into Roumania by him or by some registered importer over and above that importer's quota. This was done to encourage exports of particular classes of goods, particularly agricultural produce. But the exporter's control was limited. Appended to Ministerial Decision No. 60955, dated October 3, 1935, were two lists of goods, namely, List A of "Products which may be exported in compensation for "the import of products in List B"; and List B of "Products "which may be imported in compensation for the export of pro-"ducts in List A." The permits to make such exports were described as "compensation" permits and the trade as "com-"pensation" trade; and the same description, "compensation," appears in the corresponding legislation in the United Kingdom hereafter referred to.

On September 3, 1938, a decision of the Council of Ministers of Roumania was made concerning the export of dried peas, namely, "Journal of Council of Ministers No. 2172 of Septem-"ber 3, 1938, concerning the export of peas by compensation." Under this decision an exporter of dried peas was not required to surrender to the National Bank of Roumania any of the proceeds in sterling which became available from the export, but that sterling could be used only in payment for the import of goods in List B or otherwise described or defined in the journal cited.

Towards the end of 1939 or at the beginning of 1940 a Roumanian national named Halpern, who traded under the name of "Granimex," was granted a compensation permit under the provisions of that Journal 2172 to export to the United Kingdom from Roumania a quantity of dried peas. He was required by Roumanian law to carry out the transaction through "the inter-"mediary of an authorised bank who would guarantee the "execution of the compensation." [Quoted from the translation of article 5 of the text of Roumanian Ministerial Decision No. 59101 of October 3, 1935, and see also article 1, sub-paragraph (2) of the Journal 2172 of September 3, 1938, which provided that permitted exports of dried peas pursuant to that decision "will be

"guaranteed by the authorised Banks."] Certain banks in Roumania were authorised banks for the purpose of compensation trade, and the collection of foreign currency arising from the export as well as the making of payment for compensation imports in respect of that export had to be effected through one of the authorised banks. The function of the bank was to see to it that (1) the sterling proceeds of sale were not expended otherwise than for the purchase of goods authorised to be imported in compensation, and (2) that in default of such import the sterling was duly surrendered to the National Bank of Roumania as required by Roumanian law.

It appeared from the evidence that the word "guarantee" was not used in the meaning it might bear in English law. The bank was not a surety required out of its own funds to make good any default by the exporter, but was put in a position to see to it, and was required to see to it, that the sterling was not paid out save either in payment for permitted compensation imports into Roumania or to the National Bank as the case might be.

Granimex, therefore, delivered to an authorised bank, the Commercial Bank of Roumania, the customary shipping documents together with a "pink form" which was a copy of the export declaration made to the Roumanian authorities by the exporter and containing information about the transaction, including the name of the exporter and the name of the Commercial Bank as the authorised bank. These documents the bank forwarded to a correspondent in London who presented them to the importer of the peas. The importer, pursuant to the requirements of the English law, paid the sum due in sterling to the Bank of England which credited that sum to a Compensation Transactions Account kept by the bank in the name of the clearing office. At the same time the pink form was delivered to the bank and passed by the bank to the clearing office.

It is now necessary to refer to the provisions of English law governing the constitution and functions of the clearing office. Where a foreign government instituted control over the acquisition by its nationals of British currency the result might be to cause damage to persons residing or carrying on business in the United Kingdom. The rule that exporters of Roumanian goods were required to surrender the sterling proceeds to the National Bank of Roumania made it difficult or even impossible for Roumanian debtors to acquire sterling with which to pay debts due to British creditors.

By the Debts Clearing Offices and Import Restrictions Act, 1934, power was given to the Treasury, if it appeared that in the case of any foreign country payments or transfers to persons ordinarily resident or carrying on business in the United Kingdom were subject to restrictions or prohibited or discontinued, to set up by order a clearing office to deal with the collection of debts due or to become due to persons ordinarily resident or carrying

on business in that country in respect, inter alia, of goods imported into the United Kingdom from that country. Where such an order had been made every person in the United Kingdom from whom such debt was due was required to pay that debt or such part of it as might be specified in the order to the clearing office, whose receipt should be a good discharge.

The clearing office was then required to apply the sums so received either (a) in discharging various classes of debts due from persons in the foreign country to which the order related to, inter alia, persons resident or carrying on business in the United Kingdom, etc., or (b) in such manner as might be provided for in any agreement entered into between His Majesty's Government, as it then was, in the United Kingdom and the Government of the foreign country to which the order related.

Pursuant to that statute, the Clearing Office (Roumania) Order, 1936, was made on May 28, 1936, whereby an Anglo-Roumanian Clearing Office was set up. By article 8 of the Order the Clearing Office was required to apply the sterling received in manner provided by two agreements between the respective Governments, and these agreements, called Anglo-Roumanian Payments Agreements, were published as schedules to the Order. Agreements were made from time to time between the two Governments varying the terms of the original payments agreements, and orders were duly made requiring the clearing office to give effect to those agreements. It is unnecessary to make further reference to these agreements or orders apart from that which was in force at the material time.

This was the Clearing Office (Roumania) Amendment Order, 1939, dated July 13, 1939, and appended to it were the terms of the Anglo-Roumanian Payments Agreement dated July 12, 1939. Article 10 of that payments agreement refers to "(1) Such "facilities as may be granted in Roumania for the special "exportation of goods to provide foreign exchange for . . . the "importation of goods into Roumania." This is a reference to compensation trade. By article 3, sub-article (ii), it was provided that so much of any payment received in respect of the price of Roumanian goods under the facilities provided by article 10 as was not required to be surrendered was to be transferred to an account at the Bank of England in the name of the Controller of the Clearing Office known as the "Compensation "Transactions Account." Article 11 of that order provided: "(1) All amounts credited to the Compensation Transactions "Account in accordance with Article 3 (ii) shall be recorded in "the books of the Clearing Office in separate Sub-Accounts in the "names of the persons or banks in Roumania respectively "nominated at the time of payment as the beneficiaries in respect "of the corresponding payments made to the Bank of England. "Subject to the provisions of paragraph (2) of this Article, pay-"ment shall be made from the Compensation Transactions

H. L. (E.)
1960
Fischler v. Administrator of Roumanian Property.

"Account at the sole request of such persons or banks in "Roumania or of their nominees to the extent of the amounts "standing to the credit of their respective Sub-Accounts." Sub-article (2) dealt with the nature and origin of the goods which might be bought with the money in the Compensation Transactions accounts for import into Roumania exported from "a "British overseas territory, colony, or territory under British "protection or mandated territory in respect of which a madate" was exercised by the Government of the United Kingdom. Sub-article (5) provided: "A copy of the export declaration"—that is the pink form—"made to the National Bank of Roumania in "the case of the export of goods from Roumania under the pro-"visions of Article 10 shall accompany such goods imported into "the United Kingdom. The said export declaration should be "attached to the form used for making payment to the Bank of "England in accordance with Article 2 or forwarded direct to the "Clearing Office."

Article 2 provided: "(1) All debts due . . . from persons in "the United Kingdom to persons ordinarily resident or ordinarily "carrying on business outside the United Kingdom in respect of "the price of Roumanian goods imported into the United King-"dom shall be paid in sterling to a non-interest-bearing account "at the Bank of England in the name of the Controller of the "Anglo-Roumanian Clearing Office (hereinafter referred to as the "Clearing Office)."

The nominated beneficiary mentioned in article 11 meant the authorised bank through "the intermediary of which" by Roumanian law the transaction was carried out or, in some exceptional cases where the Roumanian exporter was absolved from the obligation to do business through an authorised bank, the exporter himself.

To revert to the export of peas by Granimex, the pink form having been sent to the clearing office by the Bank of England the payment was credited in the books of the clearing office to a compensation sub-account in the name of the Commercial Bank. Up to this stage no payment had been made to or received from the Commercial Bank by Granimex other than, it may be, whatever sum the bank was entitled to charge for its services in forwarding the documents. Granimex then sought to find a registered importer in Roumania to whom he might dispose, in return for a payment in Roumanian currency, of his right to cause the sterling proceeds of his peas to be used to pay for goods to be imported into Roumania.

In the cross-examination of one of the appellant's witnesses it was suggested by counsel, and denied by the witness, that the transfer by Granimex of the right to use this sterling was a breach of article 3 of the Roumanian Ministerial Decision 59101 of October 3, 1935; but the suggestion was not pressed. That article provided that compensation permits, that is, permits to

export compensation goods, and import licences might not be transferred; but Granimex did not transfer the permit but used it to export the peas; nor did Granimex transfer any import licence, for the import licence was not granted to that firm but to the appellant. The judge accepted evidence that it was the right to dispose of the benefit of the sterling proceeds which gave compensation trade its value to the exporter. The agricultural exporter might have no wish to import goods and no knowledge of how to set about doing so; but he could readily find an importer willing and eager to acquire an opportunity to import goods in excess of his quota, and to pay for the right to use sterling for that purpose a rate exceeding the official rate of exchange.

Granimex then made contact with the appellant—whose trade name was Chimicalia—and sold to Chimicalia for Roumanian lei the right to make use of £2,193 6s. 8d. sterling, part of the proceeds of the export of peas, that sum then forming part of the sum standing in the compensation sub-account kept by the clearing office in the name of the Commercial Bank of Roumania.

Chimicalia applied for and obtained an import licence for the import of raw rubber, and Granimex on Chimicalia's instructions then required the Commercial Bank to direct the clearing office to pay on behalf of Chimicalia the sum of £2,193 6s. 8d. to the Midland Bank in London to open a letter of credit in favour of the United Baltic Corporation Ltd., who were the exporters in the United Kingdom of the rubber. The Commercial Bank of Roumania was informed that Chimicalia was the importer. Again there was no need for any transfer of funds or other payments save possibly for charges to the Commercial Bank by Chimicalia or vice versa.

Glyn-Jones J. held that, as a result of the events above referred to, the relation of banker and customer never came into existence between Fischler and the Commercial Bank. The bank was no more than the channel through which Fischler's order to cause sterling to be paid to the United Baltic Corporation Ltd. or, rather, to the Midland Bank the letter of credit, was transmitted to the clearing office. There was no evidence that Fischler ever authorised Granimex to make a contract between him, Fischler, and the Commercial Bank so as to create the relation of banker and customer between them. Granimex had chosen to effect the transaction through the Commercial Bank. Having done so, it was impossible to secure payment out of the sterling proceeds unless the instruction passed through the Commercial Bank, and the Commercial Bank had no freedom to refuse to transmit the instruction and Fischler had no freedom to transmit the instruction through any other channel. In his Lordship's view the relation of banker and customer must have been dehors the contract. The contract required agreement, and there was no evidence whatever of any agreement at any time between the Commercial Bank and Fischler whereby the ordinary commercial

H. L. (E.)
1960
FISCHLER v. ADMINISTRATOR OF ROUMANIAN PROPERTY.

relationship of banker and customer between Fischler and the Commercial Bank had ever come into existence at all. If it never came into existence at all in the first instance the learned judge was at a loss to see why the repayment of the sum to the Bank of England by the Midland Bank in London should then have created or brought into existence the relationship of banker and customer between the Commercial Bank of Roumania and Chimicalia or Fischler, the appellant.

The transfer of the £2,193 6s. 8d. by the Bank of England to the Midland Bank to finance the letter of credit was made on June 1, 1940. On January 22, 1941, the Midland Bank repaid this sum to the Compensation Transactions Account kept by the Bank of England less charges reducing the sum to £2,190 11s. 10d. On November 26, 1945, the Commercial Bank wrote a letter to the appellant Chimicalia as follows: "Messrs. Chimicalia I. "Fischler" at the address in Bucharest. "Credit No. 2209 of "£2,193 6s. 8d. in favour of Messrs. United Baltic Corporation, "London. We received from the Controller of the Anglo-"Roumanian Clearing Office, London, a letter dated January 25, "1941, in which we are informed that the sum forming the "object of the credit above has been returned by the Midland "Bank Limited, London, as the credit has not been utilised. "We therefore credit to you in account Compensation Trans-"actions Account any goods with: £2,193 6s. 8d., less £2 15s. 3d. "confirmation commission of our correspondent," which equals £2,190 11s. 5d. "For your guidance we inform you that all sums "which were in the custody of the Controller were paid by the "latter in 1941, to the Custodian of Enemy Property, London." It is to be noticed that the sum is said to be credited in sterling and not in Roumanian lei.

One other clearing office order of the United Kingdom remains to be mentioned. In June, 1940, the Clearing Office (Roumania) Amendment Order, 1940, was made giving effect to the Anglo-Roumanian Payments Agreement of June 6, 1940. This abrogated the Anglo-Roumanian Payments Agreement of July, 1939, but provided that moneys held on June 17, 1940, in accounts opened for the purposes specified in the agreement of 1939 (or, it would seem, repaid thereafter into such accounts) should continue to be applied in the manner provided for in that agreement unless the two Governments should otherwise agree. The order contemplated that the two Governments would make further arrangements to wind up and finally distribute the sums which had been received by the clearing office; but no further agreement was ever made. Accordingly, this money, when repaid to the Bank of England, was once more credited to the Compensation Transactions Account by the Bank of England and to the compensation sub-account kept by the clearing office in the name of the Commercial Bank and remained subject to the provisions of the 1939 Order.

On February 15, 1941, Roumania became enemy territory for the purpose of the Trading with the Enemy Act, and from December 7, 1941, the United Kingdom and Roumania were at war. On February 15, 1941, the total amount to the credit of the Compensation Transactions Sub-Account in the name of the Commercial Bank of Roumania with the clearing office was over £18,000, which included the said sum of £2,190 11s. 10d.

The position then just before the outbreak of war was that the Bank of England was the legal owner of the fund credited to the Compensation Transactions Account. The clearing office had no power to deal with this money save to direct either (a) payment to United Kingdom exporters for compensation imports into Roumania pursuant to the instructions of the nominated beneficiaries of such amounts as stood to the credit of the nominated beneficiaries in their respective compensation transactions sub-account, or (b) the transfer of the amounts not used for compensation imports into Roumania to the account kept at the Bank of England of the National Bank of Roumania, but again it was for the nominated beneficiaries to direct such transfer, and in this case no such transfer had ever been directed. The nominated beneficiary, which was usually, and certainly was in this case, the authorised bank in Roumania, had no control over these funds except (a) a right and duty on the instructions of the Roumanian exporter and holder of the compensation permit who had exported goods, to direct the clearing office that a sum not exceeding the sterling made available by his export should be paid on his behalf or on behalf of any registered Roumanian importer to whom the exporter had disposed of his right, in payment for goods of the permitted class to be imported into Roumania; and (b) a right and duty to direct the transfer to the account at the Bank of England of the National Bank of Roumania of the available sterling proceeds of any compensation export where, under Roumanian law, the right to make a corresponding compensation import had lapsed. If the sterling were transferred to the National Bank's account at the Bank of England, the National Bank would make available in Roumania the equivalent in Roumanian currency for payment to the Roumanian exporter or registered importer to whom that exporter had transferred his right.

The appellant on September 17, 1954, brought an action against the respondent in the High Court of Justice, Queen's Bench Division.

The appellant claimed:

(1) That at all material times prior to October 18, 1950, the appellant was a Roumanian subject resident in Roumania.

(2) In or about the month of May, 1940, there was a sum amounting to not less than £2,193 credited to the Compensation Transactions Account of the Anglo-Roumanian Clearing Office in the name of (one Halpern or alternatively in the name of) the

H. L. (E.)
1960
Fischler
v.
Administrator of Roumanian Property.

Roumanian Commercial Bank acting on behalf of and/or as trustees for the said Halpern. The said sum was so credited and was held by the Anglo-Roumanian Clearing Office upon the terms of the Debts Clearing Offices and Import Restrictions Act, 1934, and the Orders made thereunder and, in particular, article 6A of the Clearing Office (Roumania) Amendment Order, 1937 (S.R. & O., 1937, No. 510).

(3) Thereafter, on or about June 1, 1940, the right and interest of the said Halpern and of the Roumanian Commercial Bank in the said sum of £2,193 was, with the consent of the Anglo-Roumanian Clearing Offices, transferred and assigned to the appellant for the purpose of enabling the appellant to open with the Midland Bank Ltd., London, a letter of credit in favour of the United Baltic Corporation Ltd., London, for the said sum of about £2,193 in respect of the price of certain goods agreed to be sold by the United Baltic Corporation Ltd. to the appellant.

(4) The said letter of credit was thereupon opened by the Midland Bank Ltd. on or about June 1, 1940, but was not in fact used, the said proposed sale being prevented by cancellation of the necessary export licence. Accordingly, on or about January 22, 1941, the Midland Bank Ltd. repaid the said sum of £2,193 6s. 8d. to the Anglo-Roumanian Clearing Office who at all material times thereafter held the same under the terms of the said Act and Orders on the said Compensation Transactions Account in the name of the appellant or, alternatively, in the name of the Roumanian Commercial Bank acting on behalf of and/or as trustees for the appellant.

(5) The said sum was, together with other sums, subsequently paid by the Anglo-Roumanian Clearing Office to the Custodian of Enemy Property who, in turn, on or about August 19, 1954, paid the same to the respondent, who has wrongly contended and contends that the same is subject to a charge under the Treaty of Peace (Roumania) Order, 1948, as being, on the coming into force of such Order, the property of the Roumanian Commercial Bank.

(6) By reason of the matters set forth, however, the appellant was at all material times the "owner" of the said sum of £2,193 6s. 8d. within the meaning of the Treaty of Peace (Roumania) Order and was entitled to recover the said sum from the respondent under article 1 (*g*) of the said Order. The respondent had released the interest of the appellant in the said sum from any charge under the said Treaty of Peace (Roumania) Order.

(7) The appellant thereupon claimed a declaration that the said sum of £2,193 6s. 8d. was not subject to any charge under the Treaty of Peace (Roumania) Order, 1948, and that he should be paid the said sum of £2,193 6s. 8d.

The respondent by way of defence pleaded:

(1) That at the material time there was a sum exceeding £2,193, but not any specifically identifiable of that amount or approximate amount, to the credit of the Roumanian Commercial Bank in the Compensation Transactions Account of the Anglo-Roumanian Clearing Office, and that such credit was subject to the terms of the said Act and of the said Order (as amended) mentioned in the statement of claim.

(2) The respondent denied that either the said Halpern or the said bank had any right or interest in the said sum or any sterling sum capable of transfer or assignment to the appellant.

(3) That the said sum was at no material time either held in the name of the appellant by the Anglo-Roumanian Clearing Office, or was held in any capacity of trustee or agent for the appellant by or on behalf of the Roumanian Commercial Bank.

(4) That the said sum was subject to a charge under the Treaty of Peace (Roumania) Order, 1948, as being on the coming into force of such Order the property of the Roumanian Commercial Bank.

(5) That the respondent was content for the purpose solely of the present action to concede a release of the interest of the appellant in the said sum from any charge under the said Treaty of Peace (Roumania) Order, if any.

The action was heard before Glyn-Jones J.

In the course of such hearing the respondent conceded that if the appellant could establish that he had any right, title or interest to the said part of a larger sum admittedly standing at the material time in the books of the Anglo-Roumanian Clearing Office to the credit of the Roumanian Commercial Bank, or any proprietary right of any kind in such part, whether legal or beneficial, he was entitled to succeed in the action; but the respondent contended that no such right, title or interest had been established by the appellant, and that the evidence showed that the only person who had any right, title or interest, legal or beneficial, in the whole of the property represented by such credit was the Roumanian Commercial Bank. Accordingly, the issue in the action was whether it was the appellant or the Roumanian Commercial Bank that at the material time was "the owner" in law or equity of the property represented by that part of the said credit.

On December 20, 1957, Glyn-Jones J. entered judgment for the appellant with costs for the sum of £2,190 11s. 10d. The judge disallowed the claim by the appellant for interest on the said sum under the Law Reform (Miscellaneous Provisions) Act, 1934.

The respondent appealed to the Court of Appeal and the appellant cross-appealed on the question of interest. On November 18, 1958, the Court of Appeal allowed the said appeal and ordered that the appellant's action should be dismissed.

H. L. (E.)
1960
FISCHLER
v.
ADMINISTRATOR OF ROUMANIAN PROPERTY.

John Foster Q.C. and *Mark Littman* for the appellant.

Eustace Roskill Q.C. and *J. R. Cumming-Bruce* for the respondent.

The following case was cited in argument: *Bank voor Handel en Scheepvaart N.V.* v. *Administrator of Hungarian Property.*[1]

Their Lordships took time for consideration.

June 23. VISCOUNT SIMONDS. My Lords, I have had the privilege of reading the opinion of my noble and learned friend, Lord Radcliffe, which will shortly be read. I agree so fully with him in his reasoning and conclusion that I do not think it necessary to add anything. In due course I shall move that the appeal be allowed, and the judgment of the learned trial judge restored. My noble and learned friend, LORD COHEN, who is unable to be here, desires me to say that he also agrees with the opinion of Lord Radcliffe.

LORD REID. My Lords, in 1939 a Roumanian firm, Granimex, exported peas to a buyer in this country. By reason of legislation, which I shall deal with later, the buyer was required to pay the price to the Anglo-Roumanian Clearing Office (A.R.C.O.) and did so. Granimex could then spend the price in buying certain classes of goods for export to Roumania. In fact, Granimex assigned £2,193 of the price to the appellant, and it is not now disputed that this was lawful. As a result of directions given by the appellant this sum was paid by A.R.C.O. to a British company from which the appellant had bought rubber for export to Roumania, but this sale fell through and the money was repaid to A.R.C.O. Nothing more was done about the money before the outbreak of war between Britain and Roumania in 1941. Then under the Trading with the Enemy Act, 1939, this money was paid to the Custodian of Enemy Property. Then under legislation following on the Peace Treaty with Roumania the money was paid to the respondent who now holds it, and the appellant seeks in this action to recover it.

Money in the hands of the respondent is normally subject to a charge which makes it available to meet the claims of British creditors of Roumanians and the original Roumanian owners cannot recover it. But in 1951 the appellant was able to go to Israel and he is now a citizen of that country. In consequence of this and of the fact that he suffered persecution in Roumania, the Board of Trade, acting under statutory authority, have released the charge on property belonging to him, and the question in this case is whether he is the owner of this sum of £2,193. If he is, this appeal must succeed.

The respondent contends that the appellant is not the owner,

[1] [1954] A.C. 584; [1954] 2 W.L.R. 867; [1954] 1 All E.R. 969, H.L.

and it is for him to prove that he is. The first matter to be considered is the legal position when the price of the peas was paid to A.R.C.O. This payment was made by reason of the provisions of section 1 of the Debts Clearing Offices and Imports Restrictions Act, 1934. Certain countries had adopted forms of exchange control which made it difficult or impossible for British creditors to recover their money and for British exports to those countries to continue unless some way was found to enable the exporters to be paid. The scheme of the Act was to require the price of goods imported from such countries to be paid to a clearing office: it authorised the clearing office to sue and to give a good discharge to a person who paid to the office a debt due to a foreign creditor. The Act did not provide how money received by the clearing office was to be dealt with but left that to be determined by Orders to be made under subsection (6).

It was argued that the effect of these provisions was to deprive the foreign creditor of all right or interest in money paid to a clearing office and to vest in the clearing office not only the legal title but the whole beneficial right in the money. Certainly the legal title was vested in the clearing office, but I am unable to agree that these provisions vested any beneficial right in the office or the Crown. I can see no sign of any intention to confer a financial benefit on the Crown. I think that the effect was merely to impound the money leaving it to Orders to be made under the Act to determine whether or to what extent the foreign creditor's rights were taken away or limited. The respondent's argument appeared to be that it is impossible for a person to retain any property or beneficial right in money if his right to obtain payment of it is taken away. But statutory restrictions on the way in which a person can use his property are a commonplace, and the only effective way of preventing a person from using his money in forbidden ways is to prevent him from getting possession of it: preventing a person from obtaining immediate payment of his money does not cause it to cease to be his money.

So I turn to the relevant Orders to see whether they deprived Granimex of its beneficial right or interest in the price of the peas. The first Order which I need consider is the Clearing Office (Roumania) Amendment Order, 1939. This Order incorporated an agreement between the British and Roumanian Governments, and it provided what was to be done with money of Roumanian creditors paid to A.R.C.O. In some cases deductions were to be made but that did not apply in this case. In fact Granimex could use the whole price of the peas in one or other of two ways but in no other way. Granimex could either direct it to be paid to a British exporter as the price of goods of certain kinds to be exported to Roumania or direct it to be transferred to the National Bank of Roumania so that Granimex would receive in Roumania the equivalent in Roumanian currency at the official rate of exchange. But it seems that the latter was the less profitable way of using the money.

H. L. (E.)
1960
Fischler v. Administrator of Roumanian Property.
Lord Reid.

I have stated the substance of the matter but it is said that we must not look at that because of the terms of the Order. The greater part of the Order is concerned with matters which do not arise in this case and there is no need to consider any of its provisions except those of Article 11. Article 3 required the price of the peas to be "transferred to a non-interest-bearing account "at the Bank of England, in the name of the Controller of the "Clearing Office (hereinafter referred to as the Compensation "Transactions Account) for distribution in accordance with Article "11 of this Agreement." The relevant parts of Article 11 are:

"(1) All amounts credited to the Compensation Transactions "Account in accordance with Article 3 (ii) shall be recorded in "the books of the Clearing Office in separate Sub-Accounts in the "names of the persons or banks in Roumania respectively nomi-"nated at the time of payment as the beneficiaries in respect of "the corresponding payments made to the Bank of England. "Subject to the provisions of paragraph (2) of this Article, pay-"ment shall be made from the Compensation Transactions "Account at the sole request of such persons or banks in "Roumania or of their nominees to the extent of the amounts "standing to the credit of their respective Sub-Accounts.

"(2) Of the amounts credited to each Sub-Account in accord-"ance with paragraph (1) of this Article, 30 per cent. shall be "available for payments to persons in the United Kingdom in "respect of goods grown, produced or manufactured in the United "Kingdom and exported to Roumania, and 70 per cent. shall be "available for payments to persons in the United Kingdom in "respect of any goods imported into Roumania, provided that the "debt in respect of which any such payment is made is due to a "person in the United Kingdom. The amount of sterling avail-"able for payments in respect of any goods if not used for the "purchase of United Kingdom goods shall be utilised so far as "possible for payments in respect of goods grown, produced or "manufactured in a British overseas territory, colony or territory "under British protection or mandated territory in respect of "which a mandate is exercised by the Government of the United "Kingdom of Great Britain and Northern Ireland.

"(3) Any sum standing to the credit of a Sub-Account of the "Compensation Transactions Account may, at the request of the "person or bank in whose name such sum is recorded in accord-"ance with paragraph (1) of this Article be surrendered to the "Special Account."

To comply with Article 11 (1) Granimex nominated the Commercial Bank of Roumania as their "nominated beneficiary," and the price of the peas was credited by A.R.C.O. to the sub-account of that bank. The documents which had to be sent to A.R.C.O. disclosed that Granimex was the seller of the peas and there was nothing in Article 11 to prevent Granimex nominating itself. Indeed, it appears that in some cases Roumanian traders were

permitted to nominate themselves. But it appears that Roumanian law required Granimex to nominate a Roumanian bank, in order that the bank should be responsible for seeing that Roumanian regulations were observed. The bank had no financial interest in the money: it was there as a "watch-dog." The relationship between the bank and Granimex was governed by Roumanian law and it is clear from the evidence, first, that the bank was bound to make to A.R.C.O. any request for payment which Granimex might require the bank to make provided that such request was lawful; secondly, that it would have been illegal for the bank to make any request to A.R.C.O. for payment of this money without the consent of Granimex; and thirdly, that if for any reason the money was not forthcoming from A.R.C.O. the loss would have fallen on Granimex and not on the bank. The bank was not a "beneficiary" in any ordinary sense of that word.

It was not argued that the use of the word "beneficiaries" in Article 11 meant or implied a requirement that only persons with a beneficial interest in money received by A.R.C.O. could lawfully be nominated. Such money was the proceeds of trading and it was to be paid out to pay for exports. Roumanian banks were mentioned as beneficiaries and it could not have been supposed that these banks were going to export peas or import rubber or other permitted goods. Moreover, A.R.C.O. was aware from the documents in this case and presumably in other cases that the bank was not the trader, and A.R.C.O. had no reason to suppose that this or other banks had acquired a financial interest in these transactions. Article 11 is part of an agreement between the British and Roumanian Governments and the Roumanian Government at least was aware of its own regulations under which the banks merely acted to see that the law was observed.

Nevertheless, it was argued that the only persons entitled to claim that they were owners of money in the hands of A.R.C.O. were the nominated beneficiaries, and this agreement was accepted by the Court of Appeal reversing the decision of Glyn-Jones J. The Court of Appeal held that there was "no room for considera-"tion of agency or trust" and said: "In order to succeed, the "plaintiff must establish some right, some proprietary or other "interest, by virtue of which the defendant Administrator is "accountable to the plaintiff for the sum of money by him "claimed; and that he cannot do. The rights, duties and obliga-"tions of the Anglo-Roumanian Clearing Office with respect to "the Compensation Transactions Sub-Account in the name of the "Commercial Bank of Roumania were exclusively defined and "limited by the terms of the Act of 1934 and the Clearing Office "(Roumania) Amendment Order, 1939, which give no recognition "to any rights in any other persons on the Roumanian side. We "refer particularly to the use of the word 'shall' in section 1, "subsections (1) and (6), of the Act—which we have read and "do not take time by re-reading. The terms of the 1939 Order "are similarly categorical. As appears from the Order itself and

H. L. (E.)
1960
FISCHLER v. ADMINISTRATOR OF ROUMANIAN PROPERTY.
Lord Reid.

"paragraph 1 thereof in particular, the Order was directed to "giving statutory effect to the Anglo-Roumanian Payments Agree-"ment. All the sums received by the Clearing Office had to be "applied ('*shall* be applied') in the manner provided by that "Agreement and in no other manner and for no other purpose. "The language of the Articles of the Agreement which we have "read is no less categorical. By virtue of those provisions the "Clearing Office were by force of statute or its equivalent account-"able to no person except as provided by the Orders which were "exclusive of any right in the plaintiff: and the defendant "Administrator as the successor in title of the Clearing Office can, "in our judgment, be in no different position."

It is true that A.R.C.O. was not directly accountable to Granimex, or to the appellant who now stands in its place: any requisition by Granimex for payment by A.R.C.O. had to be made through the Commercial Bank of Roumania. But the question in this case is not whether A.R.C.O. was directly accountable to the appellant. It is whether under the Treaty of Peace (Roumania) Order, 1948, 1948 S.I. 118, the appellant was "owner" of the property held by the respondent, and I can find nothing in the 1939 Order enacting an irrebuttable presumption that the nominated beneficiary is the beneficial owner or otherwise preventing inquiry into the true facts of the case. Let me suppose that it was the nominated beneficiary who had had the charge on his property released. If direct accountability by A.R.C.O. were the sole criterion it would seem that the nominated beneficiary could now claim to be paid not only money which truly belonged to him, but also all other money which was in his sub-account with A.R.C.O. although the whole beneficial interest in it had always been in other persons still in Roumania. I cannot hold that we are driven to a result so completely contrary to the purposes of the Treaty of Peace Order.

Then it was said that because the law of Roumania has nothing corresponding to our law of trust we must regard the nominated beneficiary as the only person who can be called an "owner." But under the law of Roumania the bank could not under any circumstances have treated this money as its own and there was no question of any banker and customer relationship between it and the appellant. If the money were lost the loss would fall on the appellant, and so long as it was available the bank was bound to give to A.R.C.O. such directions for its application as the appellant might require it to give and no others. There would be something far wrong with our law if we had to shut our eyes to these facts and treat the bank as beneficial owner merely because there is no doctrine of trust in Roumania.

It is clear that when the Treaty of Peace Order speaks of an owner it means beneficial owner. The Order was made to give effect to provisions of the Peace Treaty entitling the British Government to seize or retain the property of Roumanians. It charged property rights and interests belonging to or held or

managed on behalf of the Roumanian Government or Roumanian nationals with sums due to the British Government or British nationals by the Roumanian Government or Roumanian nationals; and it authorised the respondent to require such property to be transferred to him. Under this authority the sum for which the appellant sues was transferred to the respondent in 1954. Then the Board of Trade directed the respondent to release from the charge the property rights and interests, if any, of the appellant.

Article 1 (5) (*g*) of the Treaty of Peace Order provides that if it is proved that property rights or interest transferred to the respondent were not subject to the charge "the owner thereof "shall be entitled to recover the same from the Administrator." In view of the release in favour of the appellant, it is admitted that he is entitled to recover this money if he can prove that he had property right or interest in it. "Owner" must in this context mean beneficial owner because this provision only applies where the respondent has become legal owner, the title to the property having vested in him.

I have stated my reasons for holding that the beneficial interest in the price of the peas was not taken away from Granimex or from the appellant, his assignee, by the Act of 1934 or the Order of 1939. But at a late stage the respondent submitted arguments that, even if that were so, that beneficial interest was taken away either by the Debts Clearing Office Order, 1940, or by the transfer of the money to the Custodian of Enemy Property under the Trading with the Enemy Act, 1939. I shall not deal in detail with the 1940 Order because I am satisfied that there is no substance in the point based on it. But I think it worth while to draw attention to the reference in it to arrangements to be made "with "a view to the winding up and final distribution of the sums "received by the clearing office by virtue of the principal Order." That appears to me to assume that in 1940 the clearing office had no beneficial interest in the sums held by it and to confirm the conclusion at which I have already arrived.

The argument based on the transfer to the Custodian of Enemy Property seemed to me at first sight to have more substance. Different opinions about the legal effect of such transfer were expressed in this House in *Bank voor Handel en Scheepvaart N.V.* v. *Administrator of Hungarian Property.*[1] Lord Asquith of Bishopstone expressed his view that such transfer extinguished former proprietary rights. I thought it unnecessary in that case to decide that matter and I think it equally unnecessary to do so in this case. Even if rights were extinguished the Crown was entitled to restore them. The Peace Treaty and consequent legislation clearly proceed on the assumption that property which had been Roumanian property before the war was still Roumanian property and it is only on that basis that the respondent had any authority to take it. I do not think that it matters whether

[1] [1954] A.C. 584; [1954] 2 W.L.R. 867; [1954] 1 All E.R. 969, H.L.

H. L. (E.)
1960
FISCHLER v. ADMINISTRATOR OF ROUMANIAN PROPERTY.

the property rights had been extinguished and restored or had persisted throughout. The respondent is quite entitled to submit an argument which, if right, would mean that the provisions of the Peace Treaty and consequent legislation were misconceived and ineffective, but I cannot find any good ground for accepting it.

In my judgment this appeal should be allowed and the judgment of Glyn-Jones J. restored.

LORD RADCLIFFE. My Lords, I regard this as a complicated case arising out of the special situation created by the institution of the Anglo-Roumanian Clearing Office (which I will refer to as "A.R.C.O.") and its subsequent dissolution. I do not think that it can be decided exclusively according to the ordinary conceptions of property, legal or equitable, that prevail in more normal commercial transactions. It is rather that a scheme of this sort, when set up under statutory or governmental authority, generates certain rights and duties in respect of the use of property which may itself have for the time being no "owner" in the accepted sense; and the special problem with which the present case has confronted the courts is to determine where ownership resides or in what sense it arises when the scheme and its purposes are brought to an end.

The first thing that I must refer to is the clearing office system itself. I propose to do so in language as simple as possible and with a minimum of citation. The judgment of the trial judge, Glyn-Jones J., contains a comprehensive statement of the basic facts relating to this and other aspects of the case, and I think that I can make my view clear without covering them again in detail.

A.R.C.O. was set up under the authority of the Debts Clearing Offices and Imports Restrictions Act, 1934. The origin of this Act lay in the difficulties which exporters in the United Kingdom were experiencing at that time in getting sterling payments out of the importers in certain countries with whom they had been doing business. The function of a clearing office, when established under the Act, was to impound debts owed or owing on or after a prescribed date in respect of produce or manufactures entering the United Kingdom from the country affected, and to collect the proceeds in an account at the Bank of England in the name and under the control of the clearing office itself. The sterling which thus became available in this fund was intended to be used for the purpose of "facilitating trade and payments" between the United Kingdom and the other country or, to use the accepted jargon, of unfreezing the frozen remittances and thus to make it possible for trade to continue upon a viable basis. In the case of Roumania, at any rate, the means adopted was to make the sterling collected from United Kingdom importers from that country available to satisfy the debts incurred by traders in that country to United Kingdom exporters whether existing at the inauguration of the scheme or arising later. Under this

system goods could go into and go out of the country, but the medium of payment itself was not capable of expatriation and the purposes for which it could be employed within the United Kingdom were controlled.

The system was regulated, as was intended, by the provisions of a payments agreement between the Government of the United Kingdom and the Government of Roumania. There were more than one of these agreements, but the only one that matters for the purpose of this appeal is the one that was entered into on July 12, 1939, and was scheduled to the Clearing Office (Roumania) Amendment Order, 1939. The effect of that Order was to provide that any sums received by A.R.C.O. after July 17, 1939, were to be applied in accordance with the terms of this new agreement.

The agreement was of considerable complexity but its relevant provisions can be summarised under the following heads:

(a) All debts due and owing on June 12, 1936, and all debts falling due after that date from persons in the United Kingdom to persons ordinarily resident or ordinarily carrying on business outside the United Kingdom in respect of the price of Roumanian goods imported into the United Kingdom were to be paid in sterling to a non-interest-bearing account at the Bank of England in the name of the Controller of A.R.C.O.

(b) Any payment so made was to constitute a discharge to the debtor for the corresponding amount of the debt.

(c) The moneys coming into the A.R.C.O. account at the Bank of England were to be allocated between several different accounts specified in the agreement. Of these the one that is relevant for our purpose was to be styled the Compensation Transactions Account and (subject to a deduction for the benefit of the National Bank of Roumania of a certain percentage of the sterling received in respect of some classes of debt) this account was to have allocated to it the proceeds of all payments received by A.R.C.O. in respect of the price of Roumanian goods exported under special facilities granted in Roumania for the exportation of goods to provide foreign exchange for the settlement of outstanding trade debts or for the importation of goods into Roumania. It was under these special facilities, which were the subject of article 10 of the agreement, that there was made the export of goods from Roumania which I shall mention later and which is the source of the appellant's claim.

(d) All amounts credited to the Compensation Transactions Account were to be recorded in the books of A.R.C.O. in separate sub-accounts, which were to stand in the names of such persons or banks in Roumania as were nominated at the time when the money was paid into the Bank of England as "beneficiaries in "respect of the corresponding payments made to" that bank. The source of such a nomination must in fact have been the Roumanian exporter: but the formal nomination was presumably made by the United Kingdom debtor acting on his instructions.

H. L. (E.)
1960
Fischler v. Administrator of Roumanian Property.
Lord Radcliffe.

(e) The permitted use of the sterling standing to each sub-account was controlled in the sense that 30 per cent. was available for payments to persons in the United Kingdom in respect of goods grown, produced or manufactured in the United Kingdom and exported to Roumania, and 70 per cent. was available for payments to persons in the United Kingdom in respect of goods of any kind imported into Roumania. Subject to this limitation, the nominated beneficiary in Roumania was to have the sole right of directing payments out of the fund at the Bank of England to the extent of the credit of his sub-account in the Compensation Transactions Account. Thus he could call money out of it so long as he enjoyed a credit with A.R.C.O. but only for the purpose of discharging sterling debts to United Kingdom creditors and according to the proportions specified.

(f) Lastly, any sum standing to the credit of a sub-account of the Compensation Transactions Account could be surrendered to the Special Account of the National Bank of Roumania if the nominated beneficiary so requested.

I now turn to the transaction with which the appellant's claim is connected. Towards the end of the year 1939 or at the beginning of the year 1940 a Roumanian national named Halpern, who traded under the name "Granimex," obtained a permit from the Roumanian authorities to export to the United Kingdom a consignment of dried peas. The permit was obtained, apparently, under the special facilities régime contemplated by article 10 of the Payments Agreement, and the sterling due from the United Kingdom importer passed into the Compensation Transactions Account at the Bank of England. The exact sum paid in is not known, full records not now being available, but it is not in question that it exceeded the £2,193 6s. 8d. which is the subject of the appellant's claim. The sub-account holder to the credit of whose account the money was placed was the Commercial Bank of Roumania.

The evidence called at the trial of the action seems to me to establish with sufficient certainty what was Mr. Halpern's position under the Anglo-Roumanian clearing scheme. First, he lost his right to recover his debt from the United Kingdom importer. Secondly, although, so far as the scheme itself went, it was open to him to be registered with A.R.C.O. as the nominated beneficiary, the Roumanian authorities would not permit the entry in this capacity of any person's name except that of one of a select list of Roumanian banks. Therefore, any directions that he might wish to give as to the disposal of his sterling in the sub-account would have to be given through the bank whom he nominated, the Commercial Bank. On the other hand, having made this export with the approval of the Roumanian authorities, he was entitled to receive and did receive from them in due course an import licence covering a consignment of rubber from the United Kingdom in payment for which he would be able to use

his "frozen" sterling. Rubber was one of the commodities specified on an agreed list, the import of which could constitute "compensation" for his export of dried peas.

Mr. Halpern did not want to do business himself in rubber: but it was open to him in Roumania to sell for Roumanian currency the benefit of his import licence and the use of the accompanying sterling. That is what he did and this is where the appellant, who himself carried on business under the name of "Chimicalia," became connected with the transaction. He paid Mr. Halpern in lei for his rights (Mr. Halpern receiving under the Roumanian regulations a preferential rate of conversion for his sterling) and thereupon became entitled as between himself and his vendor to the benefit of the latter's position. In form, however, the import transaction had to be completed in Mr. Halpern's name. In any disposition of the sterling there would thus have to be put in motion a chain of directions passing from the appellant to Mr. Halpern, from Mr. Halpern to the Commercial Bank of Roumania, from that bank to A.R.C.O. and from A.R.C.O. to the Bank of England.

Much has been made to turn in this case upon the position of the Commercial Bank. That was a matter of evidence as given at the trial, and I follow the learned trial judge in the conclusion to which he came. The bank was nominated as beneficiary for the purposes of the scheme simply because the Roumanian authorities would not have it otherwise. Banks so nominated were brought in to act as "watch-dogs" for the authorities. Their function, to quote from the judgment of Glyn-Jones J. was "to "see to it that (1) the sterling proceeds of sale were not expended "otherwise than for the purchase of goods authorised to be "imported in compensation, and (2) that in default of such "import the sterling was duly surrendered to the National Bank "of Roumania as required by Roumanian law." The Commercial Bank, therefore, acquired no personal interest in the sub-account by the fact of nomination. No assignment of the right to or to dispose of the sterling was involved in any sense analogous to that of a transfer of property. It could not use its rights over the sterling as part of its general assets or for the benefit of any of its customers or other persons having business with it. Its duty was to hold those rights as "mandataire" on behalf of the exporter or his assignee, and to accept and implement whatever instructions might be given to it, if consistent with the requirements of Roumanian law, as to the operation of the sub-account in the furtherance of his business and to the extent of his claim on that account. The conception of trust property is not accepted in the law of Roumania. It would be wrong therefore to speak of the Commercial Bank as holding its right or power in trust for Mr. Halpern or the appellant: it would not be wrong, on the other hand, to speak of it as holding such right or power as an agent or as under a duty to exercise it only on behalf of its principal.

H. L. (E.)
1960
FISCHLER v. ADMINISTRATOR OF ROUMANIAN PROPERTY.
Lord Radcliffe.

In fact, the appellant came very near to getting his benefit out of the A.R.C.O. fund. He made a contract with a United Kingdom firm for the export of a consignment of rubber to Roumania and on his instructions, transmitted through the Commercial Bank, A.R.C.O. caused to be paid to the Midland Bank from the account at the Bank of England the sum of £2,193 6s. 8d. to cover a letter of credit in favour of the exporters. In the end shipping space could not be found for the consignment, export licences from the United Kingdom were cancelled. and in January, 1941, the Midland Bank returned the amount so paid to the A.R.C.O. account and it was reinstated in the Commercial Bank's sub-account. The contemplated transaction was thus never completed and the sterling which the appellant was to use remained in the A.R.C.O. fund.

The A.R.C.O. fund came into the hands of the respondent in the following manner. I do not think that the process has any bearing upon the true rights in the present appeal, so I summarise it shortly. The various sub-account balances which made up the balance of the Compensation Transactions Account were transferred from the control of the clearing office to the Custodian of Enemy Property after a state of war was established between the United Kingdom and Roumania. The authority for this transfer was (a) section 8 of the Trading with the Enemy Act, 1939, under subsection (1) (*b*) of which clearing office funds of this kind were deemed for the purposes of the Act to be money which would, but for the existence of a state of war, be payable to or for the benefit of an enemy, and (b) the Trading with the Enemy (Custodian) Order, 1939, made under the powers of the Act. The sub-account balance in the name of the Commercial Bank was £18,222 3s. 11d., but, to my mind, nothing turns on this, since the A.R.C.O. records were sufficient to identify the separate transactions, such as Mr. Halpern's export of dried peas. out of which the several credits arose, and it has not been suggested that the total is anything but the sum of the individual parts.

A Peace Treaty was made with Roumania on February 10, 1947; and the Treaty of Peace (Roumania) Order, 1948, made under statutory authority, set up the office of Administrator of Roumanian Property, and charged with the claims of His Majesty's Government and British nationals against the Government of Roumania and Roumanian nationals all property rights and interests within the dominions of His Majesty (other than the Dominions themselves) belonging to or held or managed on behalf of the Roumanian Government or a Roumanian national. By article 1 (8) (*g*) of the Order the Administrator was given power, on certificate, to call in and vest in himself any property, rights or interests as being subject to the charge: and this power he exercised on August 18, 1954, by calling in from the Custodian of Enemy Property the sum of £27,921 10s. 1d. as being money derived from A.R.C.O. which, but for the existence of a state of

war, would have been held for account of the Commercial Bank under the Compensation Transactions provisions and other provisions of the pre-war Anglo-Roumanian Payments Agreement.

The Administrator's certificate, though effective to vest the fund in him, was declared by the Order to be no more than prima facie evidence of the facts which it stated and sub-clause (5) (*g*) of article 1 concluded as follows: " . . . if it is subsequently " proved that the property, rights or interests were not subject " to the charge the owner thereof shall be entitled to recover the " same from the Administrator, or if it has been sold, the " proceeds of sale, but not to any other remedy."

There has never been any dispute between the parties that if the appellant does own a right or interest in the A.R.C.O. fund now vested in the respondent, that right or interest is free from the Peace Treaty charge, because on August 18, 1954, the Board of Trade, exercising a special power given to it by proviso (ii) to sub-clause (2) of article 1 of the Order, directed the Administrator to release any such right or interest that he might possess from the burden of the charge. This power was exercised in recognition of the fact that the appellant had been a victim of both Nazi and Communist persecution while in Roumania, and had ultimately left that country and taken refuge in Israel. The question which became the issue in the litigation was therefore reduced to the short point, was he at the date of the commencement of his action the " owner " of any such property, right or interest as would entitle him to a judgment for the sterling sum of £2,193 6s. 8d.?

The learned trial judge held that he was, and was consequently entitled to his judgment. In his view, the only person who could have any right, interest or property in this sum, forming part of the A.R.C.O. fund, was the appellant, since neither the clearing office nor the Commercial Bank had any beneficial right of property in it, and the appellant had a right, which English law would recognised and enforce, to compel the Commercial Bank to give effect to his instructions, and direct the disposition of the fund pro tanto as he should require. I am bound to say that I have found great force in his cogently expressed opinion and, though I might not at all points adopt his reasoning, I agree with the substance of the conclusion to which it led him.

The Court of Appeal did not agree that the appellant could succeed. The basis of their view was that the terms of the Debts Clearing Offices and Imports Restrictions Act, 1934, and the system established by the consequent Order left no room for admitting the existence of any trust or agency of the Commercial Bank on the appellant's behalf. The rights, duties and obligations of A.R.C.O. were exclusively defined and limited by the Act and Order, and if, under them, no recognition was permitted of any Roumanian owner except the Commercial Bank, the nominated beneficiary, the Administrator, who had inherited the

H. L. (E.)
1960
FISCHLER v. ADMINISTRATOR OF ROUMANIAN PROPERTY.
Lord Radcliffe.

position of the Controller of the Clearing Office, could not be treated as having any other or different liabilities. There is, no doubt, much to be said for this view of the case. In the end I find that, difficult as the question is, I do not share it. To put my reason for disagreeing with it in one sentence, it is this. While I think that the Court of Appeal's analysis is undoubtedly correct as a statement of the position while the clearing scheme and its attendant legislation remained in operation, that statement does not, in my opinion, conclude the question of the appellant's rights and the Administrator's duties now that the scheme has come to an end and the legislation has been recalled. That circumstance, I think, produces a new situation in which it may be necessary for the purposes of justice to recognise old rights that had been placed in abeyance, or to admit new rights which are the logical expression of their former existence.

It is simpler to analyse the situation without bringing in Mr. Halpern's assignment to the appellant, since it is common ground that the appellant has no better and no worse rights than Mr. Halpern would have had. One must begin with the Act of 1934 and Mr. Halpern's export of dried peas. He parted with his peas and obtained in exchange a right to be paid sterling. The clearing office scheme impounded that sterling and discharged his debtor. It impounded it, however, for the purposes of clearing and the furtherance of Anglo-Roumanian trade, not for confiscation. The use of the sterling for the purpose of acquiring goods or equivalent value in the United Kingdom was not denied to Mr. Halpern: on the contrary, on getting his import licence and giving the appropriate instructions to the Commercial Bank, he could have bought for himself with the sterling the intended consignment of rubber. He could not, of course, have claimed to take the money out of the control of A.R.C.O. and, consequently, he could not have got judgment for the £2,173 against A.R.C.O. at any time while the scheme was in operation: but that was because the terms of the scheme both dictated the permitted uses of the clearing office fund and authorised or directed A.R.C.O. to recognise no instructions except those issued to it by the Commercial Bank.

But the clearing office scheme has now come to an end. In fact, the payments agreement between the United Kingdom and Roumania was abrogated as from June 17, 1940, and by an Amendment Order debts in respect of Roumanian goods imported after that date were to be free from clearing. So far as concerned the proceeds of debts which had reached the fund prior to that date, they were left to be applied in accordance with the existing provisions of the scheme, so that Mr. Halpern could still have used his sterling if he could have secured his rubber or another permitted export: but the Order also added a provision making the fund applicable in accordance with any arrangements that might be made in the future between the respective governments

with a view to the winding up and final distribution of the sums which had come into A.R.C.O. under the clearing scheme.

No such arrangements ever were made. A.R.C.O.'s fund, as we know, passed through the Custodian of Enemy Property to vest in the Administrator of Roumanian Property, and in 1948 the clearing office itself was abolished by Act of Parliament [Debts Clearing Offices Act, 1948], any outstanding debts which had not been paid into the fund were released to the creditors who owned them, and existing rights and liabilities of the office were declared to be henceforth rights and liabilities of the Crown.

The whole question is, therefore, who ought to be treated in the courts of this country as owners of the fund now that the clearing scheme has finally come to an end and the debts impounded can never be used for clearing purposes. It is not unfair to say that the argument of the respondent on this, the central issue, wavered between two inconsistent positions. At one time it was said that the effect of vesting a debt under the clearing legislation was to destroy all connection between it and its previous owner, and that there was a legal and beneficial ownership of the fund in A.R.C.O., subject only to any permitted use of it under the clearing scheme by the directions of the nominated beneficiary. At another time—and this, I think, represents the respondent's main position which throughout he has been concerned to assert—it was argued that though, indeed, there were Roumanian owners of the funds, whose interests as such were charged under the Peace Treaty, the effect of the clearing scheme was to exclude Mr. Halpern from any rights of ownership of the proceeds of his debt and to constitute the Commercial Bank the only owner whom the law could recognise.

To take the second argument first. In my opinion it would be quite wrong, now that the clearing scheme is at an end, to treat the Commercial Bank as owning an interest in the fund. We know from the evidence that it was not introduced as nominated beneficiary for any such purpose: it came in merely as Government watch-dog and without any right to treat its sub-account credits as if they were in any sense assets of its own. The nominated beneficiary's rights to direct applications of the fund were ministerial rights accorded for the purpose of the administration of the fund. When those purposes are no longer capable of being given effect to and the legislation which sanctioned them is recalled, the rights which the nominated beneficiary had are no longer of significance in determining the rights and duties of the holder of the fund.

But has Mr. Halpern any surviving right? In my opinion he has. I do not take the view that the clearing legislation, by impounding the proceeds of his debt, destroyed his interest in those proceeds for all purposes. By vesting them in A.R.C.O.'s fund, the legislature created no new owner of them in any beneficial sense: it merely created over them certain rights of control

H. L. (E.)
1960
FISCHLER v. ADMINISTRATOR OF ROUMANIAN PROPERTY.
Lord Radcliffe.

and disposition, out of which he would have got full value in the use of his sterling within the terms of the scheme. I regard that as the crucial point. For, if that is so, the determination of the scheme without the winding up of the fund meant that the restrictions on the free use of the proceeds of his debt were removed, the purposes for which they had been impounded were frustrated, and his original ownership rights which had been placed in suspense during the currency of the scheme revived without any remaining impediment to their exercise except that imposed by the Peace Treaty charge. As that has now been released, I think that he, or rather his assignee, the appellant, emerges as the true owner of the sterling and is entitled to the judgment which he obtained on the trial of the action.

I would allow the appeal accordingly.

LORD DENNING. My Lords, the appellant is a Jew who used to live in Roumania. He suffered persecution there during the war at the hands of the Nazis and later at the hands of the Communists. But in 1950 he succeeded in getting to Israel where he now lives. He seeks in this action to recover the sum of £2,193 6s. 8d. which he claims belonged to him before the war and is now, he says, in the hands of the Administrator of Roumanian Property.

To see the origin of the transaction your Lordships have to carry your minds back to the period before the war when financial transactions between England and Roumania were subject to a strict exchange control. The Roumanian Government did not allow Roumanian currency to be exported from Roumania to England. So our Government did not allow sterling to be exported from England to Roumania. Trade between the two countries would therefore have been at a standstill but for arrangements that were made for a clearing office to be set up. These arrangements, so far as material here, were as follows:

If a Roumanian exporter sold, say, dried peas to a person in England, the English importer had to pay the price in sterling to the Anglo-Roumanian Clearing Office: and he thereupon got a good discharge for the debt. The Roumanian exporter could not demand payment of this sterling in cash, but he could use it so as to buy goods in England for import into Roumania. He could use it, for instance, to buy raw rubber. Or if he was not a rubber merchant himself, he could transfer his import licence to another Roumanian citizen who was a rubber merchant. The transferee could then use the sterling so as to buy raw rubber for import into Roumania. The Roumanian merchant was not, however, allowed to give directions himself to the clearing office. He had to do it through an authorised bank. He had to nominate the bank as the "beneficiary" in respect of the sterling. This was done so as to enable the authorities to keep a watch on these transactions and see that the currency regulations were not evaded. When the

time came for payment out of the sterling to the English seller, so as to pay for the raw rubber, the Roumanian merchant gave instructions to the authorised bank, who passed on the request to the clearing house. The clearing house had to act "at the "sole request" of the authorised bank. It could not accept instructions from the Roumanian merchant direct.

The facts in this case can be simply stated: About the end of 1939 a Mr. Halpern, who lived in Roumania and traded under the name of Granimex, exported dried peas to a merchant in England at a price of over £2,200. He nominated the Roumanian Commercial Bank as the authorised bank to act as "beneficiary" in respect of the price. The English buyer paid the sum to the Anglo-Roumanian Clearing Office, who credited it in their books to the sub-account of the Roumanian Commercial Bank. Mr. Halpern afterwards transferred his rights in respect of this sum to the appellant, who also lived in Roumania, but traded under the name of Chimicalia. The appellant paid Mr. Halpern for these rights in Roumanian currency. Having thus got the import rights, the appellant gave an order for raw rubber to an English firm, the United Baltic Corporation Ltd. of London. About June 1, 1940, he gave instructions to the Roumanian Commercial Bank to make the price available to the English firm. In consequence that bank cabled to the clearing office and asked them to pay £2,193 6s. 8d. for the rubber. The clearing office did so. They paid the sum to the United Baltic Corporation. But, unfortunately, that company could not obtain shipping space so as to export the rubber. And on June 25, 1940, all export licences from this country were cancelled. So the United Baltic Corporation refunded the sum to the clearing office. They refunded it on January 25, 1941: and on that day the clearing office credited it once again in their books to the Roumanian Commercial Bank.

Three weeks later on February 15, 1941, Roumania became enemy territory. The money which was held by the clearing office became subject to the Trading with the Enemy legislation. An order was made under which it was paid to the Custodian of Enemy Property: see section 8 of the Act of 1939. After the war when a peace treaty was signed between England and Roumania, the money was not restored to its owners. It was made subject to a charge in favour of British nationals: see article 1 (2) and (3) of the Treaty of Peace (Roumania) Order, 1948. It was transferred accordingly to the Administrator of Roumanian Property. And there it will remain, and it will presumably be made available for British nationals unless the appellant can make good his claim to part of it.

As a first step in making good his claim, the appellant says that, although he was during the war a Roumanian national and therefore to be regarded as an enemy, the Board of Trade have released him from the charge. It has released from the charge any right or interest which he has to this £2,193 6s. 8d. He has

H. L. (E.)
1960
FISCHLER v. ADMINISTRATOR OF ROUMANIAN PROPERTY.
Lord Denning.

produced a release to this effect dated August 18, 1954. The Board of Trade are, no doubt, satisfied that the appellant has throughout been well disposed to the Allied cause and should not suffer the loss of the money if he was the owner of it. The effect of this release is, I think, that your Lordships can disregard all the Trading with the Enemy legislation, and inquire simply whether this money did belong to the appellant. It may be that during the war his right to it may have been extinguished or in statutory abeyance, but on the charge being released, his right is restored just as if the war had never come to deprive him of it.

The question, therefore, is simply whether this sum of £2,193 6s. 8d. belonged to the appellant on January 25, 1941, when it was recredited by the clearing office to the Roumanian Commercial Bank? Mr. Roskill, on behalf of the Administrator of Roumanian Property, said that the appellant was not entitled to this sum of sterling at all. He had at most a very limited right, namely, a right to require the Roumanian Commercial Bank to request the clearing house to pay that sum of money to an English firm in return for goods to be exported from England to Roumania.

My Lords, I am clearly of opinion that this sum of £2,193 6s. 8d. belonged to the appellant: for the simple reason that it was money had and received to his use. It seems to me that the Anglo-Roumanian Clearing Office was nothing more than a statutory collector of moneys owing to the Roumanian creditors. It was enabled by the statute to give a good discharge to the English debtors, but the money which is received was the money of the Roumanian creditors. It held this money in a sub-account of which the nominated beneficiary in this case was the Roumanian Commercial Bank. But the Roumanian Commercial Bank was not the beneficial owner of the money. It could not do as it liked with it. It had to act on the instructions of the Roumanian creditor who had the right to say how it was to be applied. The Roumanian creditor was, of course, much circumscribed as to the use to which he could apply it. But it was, after all, only *his* use to which it could be put. It could not be applied to the use of anyone else. Hedged round with limitations, as it was, nevertheless it remained money received to his use. Test it this way. Suppose that the Anglo-Roumanian Clearing Office had refused to apply the money as the Roumanian Commercial Bank requested them to do. That bank would, of course, have made its request on the directions of the Roumanian creditor. In such a case would the creditor have any remedy against the clearing office? My answer is "Yes." He could have sued the clearing office either in the name of the Roumanian Commercial Bank, or in his own name, joining the Roumanian Commercial Bank as a party: see *Rahimtoola* v. *Nizam of Hyderabad*.[2] And his remedy against the clearing office would

[2] [1958] A.C. 379, 394, 400; [1957] 3 W.L.R. 884; [1957] 3 All E.R. 441, H.L.

have been for money had and received to his use. This remedy for restitution is of wide scope. Its width was well shown by those most learned pleaders, Edward Bullen and Stephen Leake, who in the year 1868 described it in these words: "This is the "most comprehensive of all the common counts. It is applicable "whenever the defendant has received money which in justice "and equity belongs to the plaintiff under circumstances which "render the receipt of it a receipt by the defendant to the use of "the plaintiff": see the 3rd ed., p. 44. Those words fit the case exactly. There is only one person to whom in justice and equity this money belongs. It is not the clearing house. Nor is it the Roumanian Commercial Bank. It is the appellant. The money belongs to the appellant and should be returned to him.

I would therefore be in favour of allowing this appeal and restoring the order of Glyn-Jones J.

Appeal allowed.

Solicitors: *Herbert Smith & Co.; Solicitor, the Board of Trade.*

J. A. G.

[COURT OF APPEAL.]

* CHING GARAGE LTD. *v.* CHINGFORD CORPORATION.

C. A.
1960
June 30; *July* 1, 4.
Sellers, Pearce and Devlin L.JJ.

Highway—Access—Adjoining owner—Proposal by highway authority to erect "refuge" at point where means of access emerged on to highway.

Highway—Refuge—Power to erect—Power of highway authority to erect "refuge" at point where means of access emerged on to highway—"Carriageway"—Whether refuge prevented access to highway—Highways Act, 1959 (7 & 8 *Eliz.* 2, *c.* 25), *ss.* 67 (1) (2) (3), 68 (1), 85 (1) (*a*), (3) (*d*), 295 (1).

Court of Appeal—Jurisdiction—New Act coming into force after hearing below—Whether applicable on appeal—Powers of highway authority—Declaration—Highways Act, 1959.

Practice—Declaratory judgment—Discretion—Change in law pending—New Act not yet in force.

The plaintiffs who, in 1932, had erected a garage at the junction of two main roads, had also constructed at their own expense, and to plans approved by the highway authority, a means of access to the highway at the road junction. At the point where the means of access emerged on to the highway there was a gap of 60 feet where there was no kerb, granite sets being set down into the road to form the plaintiffs' means of access. The highway authority now proposed partially to obstruct the plaintiffs' means of access by erecting a structure (which they described as a street refuge) at the road junction and in the middle of the 60-foot-wide gap forming the means of access.

In an action by the plaintiffs for a declaration that the highway authority had no power to obstruct, limit or interfere with the means of access from the garage to the highway:—

C. A.
1960
Ching Garage Ltd. v. Chingford Corpn.

Held, that the proposed construction was not in relation to "places of refuge" within section 68 (1) of the Highways Act, 1959,[1] for the protection of pedestrians crossing the "carriageway" as defined in section 295 (1), but was to provide a proper and sufficient footway as part of the highway under section 67; and as the proposal did not, apart from a slight diversion, interfere with the plaintiffs' access to the highway, the restrictions imposed by section 85 (3) did not apply and, accordingly, the corporation was entitled to carry out the construction subject to the payment of compensation under section 67 (6) (post, pp. 952, 953, 954, 956).

Decision of Lord Parker C.J. [1959] 1 W.L.R. 959; [1959] 3 All E.R. 175 reversed on different grounds.

Appeal from Lord Parker C.J.

The plaintiffs, Ching Garage Ltd., were the owners of the Ching Garage sited at the junction of Sewardstone Road and Lea Valley Road, Chingford. Both roads were highways repairable by the inhabitants at large. Sewardstone Road ran from north to south and Lea Valley Road from east to west. The defendants, Chingford Corporation, were the highway authority for both roads. According to a statement of facts agreed between the parties the plaintiffs or their predecessors erected the garage in 1932, having obtained permission from the corporation as required by the Town Planning Act, 1925 (the Act then in force). The verge between the plaintiffs' land and the carriageway of Sewardstone Road, which had originally belonged to the Conservators of Epping Forest, had been dedicated by the Conservators as part of the highway in 1928. There was no kerbed or paved footway on Sewardstone Road nor had such ever existed, but Lea Valley Road had had a kerbed and paved footway since before

[1] Highways Act, 1959, s. 67: "(1) It shall be the duty of a highway authority to provide, in or by the side of a highway maintainable at the public expense by them, being a highway which consists of or comprises a made-up carriageway, a proper and sufficient footway as part of the highway in any case where they consider the provision thereof necessary or desirable for the safety or accommodation of pedestrians; . . . (2) A highway authority may provide and maintain in a highway . . . such raised paving, . . . as they think necessary for the purpose of safeguarding persons using the highway. (3) The powers conferred by the foregoing provisions of this section to provide any works shall include power to alter or remove them. . . . (6) A highway authority or council shall pay compensation to any person who has sustained damage by reason of the execution by them of works under subsection (2) of this section."

S. 68: "(1) A highway authority may, in relation to a highway maintainable at the public expense by them, being a highway which consists of or comprises a made-up carriageway, construct and maintain works in that carriageway for providing places of refuge for the protection of pedestrians crossing the carriageway. . . ."

S. 85: "(1) Subject to the provisions of this section, a highway authority may erect and maintain fences or posts for the purpose of preventing access to—(*a*) a highway maintainable at the public expense by them, . . . (3) The powers conferred by this section shall not be exercised so as to . . . (*d*) obstruct any means of access which was constructed, formed or laid out before the first day of July, 1948. . . ."

S. 295: "(1) . . . 'carriageway' means a way constituting or comprised in a highway, being a way (other than a cycle track) over which the public have a right of way for the passage of vehicles."

1932. After the erection of the garage the plaintiffs or their predecessors applied to the corporation under section 18 of the Public Health Acts Amendment Act, 1907, to carry out works of access. Those works were approved on May 2, 1932, and were ultimately carried out and certified as having been properly carried out by the corporation's surveyor. Means of access were created to Sewardstone Road and at the junction of Sewardstone Road and Lea Valley Road. The latter led first of all on to that part of the highway dedicated by the Conservators of Epping Forest and then over a frontage of about 60 feet on to the carriageway at the junction of the two roads. At that point the kerb along the Lea Valley Road was set down into the road with inset granite blocks.

The corporation now proposed to erect a structure which they termed a street refuge at the junction of the Sewardstone and Lea Valley Roads right in the middle of the 60 feet stretch where the access from the plaintiffs' garage emerged on to the carriageway. The structure proposed would be about 20 feet long, somewhat pear-shaped, and about 15 feet at its greatest width. It would all be raised, at the height of its kerb, 4 inches, and adjoining the carriageway would be a footpath similar to the footpath at each side of the entrance to the garage with a verge at the back. It would be some 15 feet from the garage, that is the plaintiffs' boundary at its nearest point, and so would not prevent access to the highway from any point on the plaintiffs' premises. There would be two wide means of access from the garage to the carriageway on each side.

The plaintiffs claimed that their premises had at all times enjoyed a right of access to the highways in Sewardstone Road and Lea Valley Road. The existing means of access at the junction of the two roads was laid out, formed and constructed, when the premises were erected, at the plaintiffs' expense in accordance with town planning control then exercisable and had at all times since its construction been used as formed, laid out and constructed. They claimed that the corporation now proposed to obstruct their means of access by placing an island in the carriage crossing and to curtail or limit the use of the carriage crossing and that the corporation had not obtained and had not endeavoured to obtain any order under section 26 of the Town and Country Planning Act, 1947, to impose conditions on the use of the means of access. Accordingly, they claimed (1) a declaration that the corporation was not entitled to obstruct, interfere with or otherwise limit the use of the means of access which the plaintiffs enjoyed with their premises; (2) an injunction restraining the corporation from causing any such obstruction, interference or limitation.

The corporation contended that they proposed to execute works of highway improvement including the erection of a street refuge at and near by the junction of the Sewardstone and Lea

C. A.
1960
CHING GARAGE LTD. v. CHINGFORD CORPN.

Valley Roads and that the works would be executed partly on the land dedicated in 1928 and partly on the existing carriageway. They admitted that the effect of the works on the plaintiffs' existing means of access would be to cause a partial obstruction thereof by a street refuge. They claimed that it was unnecessary to obtain an order under section 26 of the Town and Country Planning Act, 1947, by reason of the statutory powers conferred upon the corporation, in particular by section 149 of the Public Health Act, 1875; section 18 of the Public Health Acts Amendment Act, 1907; section 55 of the Road Traffic Act, 1930; and section 45 of the Road Traffic Act, 1956. They denied that the plaintiffs were entitled to the reliefs claimed.

At the trial, the corporation relied upon the statutory powers conferred on them by section 149 of the Public Health Act, 1875, and section 45 of the Road Traffic Act, 1956, to do what they proposed. Lord Parker C.J. held that neither of those Acts gave them the power to erect the street refuge which they had proposed, and he granted the plaintiffs a declaration that the corporation were not by virtue of their powers under either of the sections relied upon entitled to obstruct, interfere with or otherwise limit the use of the means of access enjoyed with the plaintiffs' premises known as the Ching Garage, at the junction of Sewardstone Road and Lea Valley Road, Chingford, as constructed, formed and laid out. The corporation appealed.

G. D. Squibb Q.C. and *D. P. Kerrigan* for the plaintiffs.
C. E. Scholefield Q.C. and *G. Ponsonby* for the corporation.

The following cases were referred to in argument: *Marshall* v. *Blackpool Corporation* [2]; *Sellors* v. *Matlock Bath Local Board* [3]; *St. Mary, Newington* v. *Jacobs* [4]; *Chaplin (W. H.) & Co. Ltd.* v. *Westminster Corporation* [5]; *R.* v. *Pratt* [6]; *Curtis* v. *Geeves* [7]; *Hamilton Gell* v. *White* [8]; *Abbott* v. *Minister for Lands* [9]; *Heston & Isleworth Urban District Council* v. *Grout.* [10]

SELLERS L.J. stated the facts and continued: The structure proposed would appear to be of great advantage to pedestrians and, to my mind, of no apparent disadvantage to those using the garage or the plaintiffs themselves. It would, however, take up part of the surface laid down in 1932, of which the plaintiffs or their predecessors paid the cost of laying, and would be a small island in the mouth of the wide exit on to the road junction. It is accepted that the corporation cannot do what they propose to do unless they have statutory powers which permit it with or

[2] [1935] A.C. 16; 50 T.L.R. 483, H.L.
[3] (1885) 14 Q.B.D. 928.
[4] (1871) L.R. 7 Q.B. 47, D.C.
[5] [1901] 2 Ch. 329; 17 T.L.R. 576.
[6] (1867) L.R. 3 Q.B. 64.
[7] (1930) 46 T.L.R. 187; 143 L.T. 48; 28 L.G.R. 103, D.C.
[8] [1922] 2 K.B. 422; 38 T.L.R. 829, C.A.
[9] [1895] A.C. 425, P.C.
[10] [1897] 2 Ch. 306; 13 T.L.R. 416, 504, C.A.

without compensation. Their efforts to establish adequate powers have been subject to various changes and, to avoid confusion, I will endeavour to state them. Of the numerous statutory powers set out in the defence, only section 149 of the Public Health Act, 1875, with the assistance of section 18 (1) (*c*) of the Public Health Acts Amendment Act, 1907, and section 55 of the Road Traffic Act, 1930, and section 45 of the Road Traffic Act, 1956, were raised at the trial. Lord Parker C.J. would have found,[1] as I read his judgment, in favour of the corporation under section 55 of the Road Traffic Act, 1930, but before his judgment to that effect was concluded, it was discovered that the section had been amended and could no longer be relied upon for this purpose. He found against the corporation on the other powers on which they relied. Between that judgment and the hearing in this court, both section 149 of the Act of 1875 and section 45 of the Act of 1956 which were finally considered by Lord Parker C.J. were repealed and replaced by provisions in the Highways Act, 1959. We, therefore, gave leave for the defence to be amended accordingly.

The question now is whether the corporation have power to do what they propose to do, not under those various enactments on which they have previously relied, but under two sections of the Highways Act, 1959, and they pleaded it in this way "under "section 67 or, alternatively, under section 68 of that Act." So pleaded, their claim is a reversal of their previous claims, for it seems they have throughout contended they could do this work without compensation. It has further never been in dispute, at least perhaps right up until the last moment, that if the corporation were to proceed under their statutory powers arising out of the Town and Country Planning Act, 1947, they could succeed in what they wish to do, but with the obligation to pay that compensation which would be appropriate under that Act. Whilst it has been recognised that the power to do what they wish to do is not to be found in the Act of 1947 directly, I understand Mr. Squibb to recognise that, if properly invoked, power can be found to do that which they want to do once the machinery of the Act of 1947 is brought into force.

Section 68 of the Act of 1959, with which I will deal first, although it is the second submission made on behalf of the corporation, reads as follows: "A highway authority may, in "relation to a highway maintainable at the public expense by "them, being a highway which consists of or comprises a made-"up carriageway, construct and maintain works in that carriage-"way for providing places of refuge for the protection of pedes-"trians crossing the carriageway. . . ." If that section applies, then there appears to be no provision for compensation. This road junction does comprise a made-up carriageway, the Lea Valley Road, and in so far as it forms part of the junction, the

[1] [1959] 1 W.L.R. 959, 963; [1959] 3 All E.R. 175.

C. A.
1960
CHING GARAGE LTD. v. CHINGFORD CORPN.
Sellers L.J.

other road intersecting, Sewardstone Road. Does that carriageway include the access to the plaintiffs' premises constructed in 1932? That access is certainly made up and as serviceable for the use of vehicles as the carriageway on the road but it is also part of the highway, for that consists of the carriageway plus the footpath from one side to the other. But the area in question was originally a footpath for the use of the public at large with the right of access to the garage in the plaintiffs as occupiers of the abutting garage. "Carriageway" is defined in section 295 (1) of the Act of 1959 in this way: "'carriageway' means a way "constituting or comprised in a highway, being a way (other than "a cycle track) over which the public have a right of way for the "passage of vehicles." I do not find that it has been shown that the public have a right of way for the passage of vehicles over this access. The only contention I think advanced in support of that was to be found in section 18 of the Act of 1907, under which this access was made up at the expense of the plaintiffs in 1932. Section 18 (1) (*c*) provides: "After the completion of the "works the new means of access may be used, subject to the "conditions which, in pursuance of any provisions of the law "relating to highways, attach to the use for the like purpose of "any carriageway forming part of a highway repairable by the "inhabitants at large."

I accept the argument of Mr. Squibb that that subsection does not give the public any right; it is relating solely to the rights of user by the occupiers who have constructed the means of access. That is a right given to the plaintiffs and a right, which I apprehend, they can exercise to include themselves, their customers and their friends. It may be somewhat odd that this area, which has so many of the attributes of a carriageway and which requires, as a matter of safety, a place of refuge for pedestrians in like manner to the undisputed carriageway, should not fall within the ambit of section 68, but I think the public have the right to use it as a footway only subject to the rights of the plaintiffs to move vehicles in and out across it, and the public have not the right of user as a carriageway under section 68. Therefore, in my view, the corporation fail under section 68.

Turning to section 67, the first three subsections seem to me material, they read: "(1) It shall be the duty of a highway "authority to provide, in or by the side of a highway maintain-"able at the public expense by them, being a highway which "consists of or comprises a made-up carriageway, a proper and "sufficient footway as part of the highway in any case where they "consider the provision thereof necessary or desirable for the "safety or accommodation of pedestrians; and a highway autho-"rity may light any footway provided by them under this sub-"section. (2) A highway authority may provide and maintain in "a highway maintainable at the public expense by them, being a "highway which consists of or comprises a carriageway, such

"raised paving, pillars, walls, rails or fences as they think necessary for the purpose of safeguarding persons using the highway. "(3) The powers conferred by the foregoing provisions of this "section to provide any works shall include power to alter or "remove them." Subsection (1) therefore imposes a duty on the corporation (and I emphasise "duty") to provide a proper and sufficient footway for the safety or accommodation of pedestrians where there is a made-up carriageway and they think it is necessary and desirable to make such provision. In the present case there is a made-up carriageway. Subsection (2) covers just what they propose to do here. This can be done at any time. What they propose to do in order to carry out their duty under subsection (1) is to raise some paving over the area, which I have previously described, which will form eventually the island refuge. It falls also under subsection (3) because this work would be an alteration of the condition which has prevailed since 1932, and, if I understand the facts aright, a restoration to a condition of footpath with verge behind it which existed prior to the work which the plaintiffs had undertaken with permission.

Section 67 (6) provides: "A highway authority or council shall "pay compensation to any person who has sustained damage by "reason of the execution by them of works under subsection (2) "of this section." Mr. Squibb referred the court to section 85 of the Act of 1959 and submitted that that section indicated that the obstruction, which was proposed to be put up, could not be put up because it was exempted expressly by the terms of that section. Section 85 reads as follows: "(1) Subject to the pro-"visions of this section, a highway authority may erect and "maintain fences or posts for the purpose of preventing access to— "(*a*) a highway maintainable at the public expense by them." Then, by subsection (3), it is provided: "The powers conferred "by this section shall not be exercised so as to— . . . (*d*) obstruct "any means of access which was constructed, formed or laid out "before July 1, 1948, unless it was constructed, formed or laid "out in contravention of restrictions in force under section 1 or "section 2 of the Restriction of Ribbon Development Act, 1935." He read as part of his argument in association with that section 85 (3) (*c*)—". . . shall not be exercised so as to (*c*) obstruct any "means of access for the construction, formation or laying out of "which planning permission has been granted under Part III of "the Town and Country Planning Act, 1947."

I think that argument must be rejected. Section 85 is not applicable here. It is dealing with the prevention of access to the highway and what is proposed here in no way prevents access to the highway, nor indeed to the carriageway, except by one direct line and the slightest diversion would give access thereto. This section, as I understand it, is not concerned with access to the carriageway but access to the highway, and there is complete unfettered and unrestricted access to the highway, which includes both footpath and carriageway, and there is a distance of at least

C. A.
1960
Ching Garage Ltd. v. Chingford Corpn.
Sellers L.J.

15 ft. before one comes from the boundary line of the plaintiffs' property to this proposed island, which has been referred to as a street refuge.

That brings me to Mr. Squibb's other argument and perhaps his main argument. It has been submitted by him that if what is proposed is a refuge, then it must be erected under what is now section 68 or not at all. That, in my view, is a very narrow and unsustainable contention. Quite why the corporation chose to refer to it as a street refuge I do not know. I think the argument rather indicated that there was something sinister about it because there was an effort to avoid compensation. A footpath is in one sense a refuge and the present Act does not make any reference to a street refuge. In section 68 it says in the appropriate circumstances there may be constructed works in a carriageway for providing places of refuge for the protection of pedestrians crossing the carriageway. Its purpose is for the safety of pedestrians, to define their area from the carriageway. What the defendants propose to do is in my view amply covered by section 67. It is the provision of a footway, indeed the restoration of a footway and an alteration back to what it was before, and whether it is called a street refuge or not, it has the characteristics of one. As it happens there is a wide mouth across this means of access, and an island footpath would resemble in many ways what would be described as a refuge if it was out in the highway. As I see it, the plaintiffs' right of access to the highway still remains intact. Their access to the carriageway is subject only to the slightest diversions of the direct line from any point of the made-up way in their access. On the other hand, if the structure does cause any interference with their rights, then I think the statute impliedly authorises interference with those rights in the public interest and in the present case provides for compensation if any damage has been sustained, and I do not repeat the extract to that effect which was taken by Lord Parker C.J.[2] from the standard work of Pratt & Mackenzie on the Law of Highways, 19th ed. (1952), p. 127.

In my judgment, section 67 defeats the plaintiffs' contention and I would allow the appeal and enter judgment for the corporation.

I do not propose to consider, further, whether the view I have taken of section 67 of this latest Act of 1959 means that I would have allowed the appeal if section 149 of the Public Health Act, 1875, had been in force. I do not feel in all the circumstances that the corporation should have the costs of their defence here or below in any event. They failed on the major issue of compensation, which I am inclined to think has been the real point in issue between the parties, and throughout the powers on which they relied were ill-defined, although I recognise that the Highways Act, 1959, only came into operation after the trial and the

[2] [1959] 1 W.L.R. 959, 962.

corporation cannot be blamed for that. I think the matters referred to by Devlin L.J. at the conclusion of the argument[3] are equally to be taken into consideration on the question of costs, for this does seem to me a case, having regard to the proximity of the Act of 1959 coming into force, where it might well have been put before Lord Parker C.J. that no declaration as a matter of discretion should have been granted even on the view which he held of the rights or the lack of rights of the corporation.

For these reasons, I would allow the appeal but allow it without costs either here or below.

PEARCE L.J. I agree with what my Lord has said. The proposed construction is intended to be put on a part of the highway that is admittedly the footway and not the carriageway. For that part of the highway does not come within the definition of "carriageway" in section 295 (1) of the Highways Act, 1959.

Section 68 of the Act of 1959 deals with such constructions in the carriageway under the name of "places of refuge for the "protection of pedestrians." No compensation is payable under that section, presumably because it was anticipated that under it there would be no interference with a private owner but only an interference with the public in their capacity as users of the carriageway.

Section 67 deals with the provision of a proper and sufficient footway with power to alter. It provides for compensation if any person sustains damage thereby. By common law, the plaintiffs have a right of access to the highway, but the proposed construction would not deprive them of their right of access to the highway. Although that common law right includes a right of access to the carriageway, it does not, as I think, include a right to cross the footway at every place in a direct line from the place where they emerge on to the highway to the place where they debouch on to the carriageway. Even when this construction is built, the plaintiffs will still have a clear and convenient means of access to the carriageway. The construction will to some extent diminish that means of access. In so far as this damages them, they are entitled to damages. The right of compensation under section 67 shows that Parliament anticipated that in providing proper and sufficient footway for pedestrians, the highway authority might cause damage to some adjoining owner.

The plaintiffs' particular means of access that was constructed in 1932 does not I think give them any special vested rights. Once a highway, always a highway. The plaintiffs seek to rely on the fact that section 85 specifically preserves the means of

[3] Devlin L.J. said that, in his view, the proceedings below were a waste of time. Had Lord Parker C.J. been informed that the Acts he was considering had been repealed by the Highways Act, 1959, which was at the time of his judgment on the Statute Book though not yet in force, he thought Lord Parker C.J. would not, in his discretion, have granted a declaration.

C. A.
1960
Ching Garage Ltd. v. Chingford Corpn.
Pearce L.J.

access of such persons as the plaintiffs who obtained their permitted means of access to the carriageway prior to 1948. But that section is directed to the fencing off of the highway to prevent access to it. It is concerned with the prevention of access to the highway and not access to the carriageway. It provides no compensation. It is, therefore, reasonable, when the authority are setting out to fence off persons from the highway without compensation, they should be compelled to respect the rights of persons who had for some time used a permitted lawful means of access constructed for the purpose. Section 67, however, is directed to quite another purpose. It is directed to the safety or accommodation of pedestrians as its objective, and the authority are entitled to provide raised paving as they may think necessary for the purpose of safeguarding persons using the highway. If the accomplishment of that objective entails damage to adjoining owners, the highway authority must pay compensation. I see no reason why under that section the highway authority should not put this isolated raised piece of paving on the footway for the safety of pedestrians. For, in spite of the fact that for the convenience of the plaintiffs this wide area has been constructed and used since 1932 as a carriageway approach, it is still the footway.

Devlin L.J. I agree with the judgments which my Lords have delivered for the reasons which they have given.

Appeal allowed. No order as to costs below or as to costs of appeal. Leave to appeal to the House of Lords refused.

Solicitors: *Hillearys; C. G. Dennis, Town Clerk, Chingford Corporation.*

N. P.

[CHANCERY DIVISION.]

1960
May 26, 27; *June* 22.
Buckley J.

* A. E. FARR LTD. *v.* MINISTRY OF TRANSPORT.

[1960 A. No. 231.]

Building—Contract—I.C.E. form—Engineer's certificate—Reference of "dispute" to arbitration—No reference to arbitration "except as "to the withholding by the engineer of any certificate . . . until "after the completion . . . of the works unless with . . . consent "of the employer and the contractor"—Refusal by engineer to include certain claims not in certificate—Whether "dispute"—Whether certificate withheld.

A contract to carry out certain civil engineering works in connection with the construction of a dual carriageway vehicular underpass was comprised in articles of agreement, a form of tender,

certain drawings, the I.C.E. General Conditions of Contract, a specification and bills of quantities. Clause 60 of the general conditions provided for monthly payments to the contractor on interim certificates of the engineer, and empowered the engineer to withhold certificates if the works were not being carried out to his satisfaction and to withhold retention money in certain circumstances. Clause 66 provided that in the event of a dispute between the employer or the engineer and the contractor the matter should be referred to the engineer whose decision should be final, but that if either the employer or the contractor were dissatisfied with a decision they could require the matter to be referred to an arbitrator. The clause continued: "Such reference except as to the "withholding by the engineer of any certificate or the withholding "of any portion of the retention money under clause 60 hereof to "which the contractor claims to be entitled . . . shall not be opened "until after the completion or alleged completion of the works "unless with the written consent of the employer and the "contractor."

Before completion of the works a dispute arose, the contractors claiming to be entitled to payment for excavation not only of the space to be occupied by the retaining walls of a tunnel but also the necessary working space, which latter item was not included in the form of tender. The engineer refused to include this claim in his certificate and the contractor procured the appointment of an arbitrator. The employer contended that the dispute could not be referred to arbitration under clause 66 until the works had been completed. On a summons to determine whether, on the true construction of clause 66, the dispute was a dispute as to the withholding by the engineer of a certificate within the meaning of that clause:—

Held, (1) that the words in clause 66 "the withholding by the "engineer of any certificate" were not qualified by the words "under clause 60" but were unrestricted in their context and apt to apply wherever the circumstances were such that the engineer should have given a certificate (post, pp. 965, 966).

(2) That any dispute relating to something in consequence of which a certificate had been refused, which on one view of the question ought to have been given, was a dispute as to the withholding of that certificate; that by refusing to certify for the excavation of the working space the engineer had withheld a certificate and that, therefore, the dispute was a dispute as to the withholding by the engineer of a certificate within the meaning of clause 66. Accordingly, the reference to arbitration might be opened before the completion of the works without the consent of the employer (post, p. 967).

Adjourned summons.

A contract for the construction of an underpass, dated September 9, 1958, and made between the plaintiff company, A. E. Farr Ltd., and the Minister of Transport and Civil Aviation (now the Minister of Transport), incorporated the plaintiffs' tender, certain drawings, the I.C.E. General Conditions of Contract, 4th ed. (1955), approved by the Institution of Civil Engineers and the Federation of Civil Engineering Contractors, and the specification and bill of quantities relating to the works. The works contracted for consisted of the construction of a dual carriageway vehicular underpass about 2,300 feet long including approaches as well as

1960

A. E. Farr Ltd.
v.
Ministry of Transport.

pedestrian subways and ground-level slip roads, together with ancillary works, at the intersection of Western Avenue and Hanger Lane, Middlesex, on the London to Fishguard trunk road. At that point Western Avenue and Hanger Lane were cross roads, and the underpass was to be a tunnel below ground level to carry traffic proceeding east and west along Western Avenue without its coming into contact with traffic travelling north and south along Hanger Lane or changing direction at the cross roads. The tunnel was to be approached at each end by a decline from the level of the traffic way of Western Avenue to the level of the floor of the tunnel, the entrances of these approaches being situated in the centre of the traffic way of Western Avenue. The approaches were to be flanked by retaining walls containing the faces exposed by the excavation of the declining carriageways. The retaining walls had to be built before the core of the excavation was extracted, and to enable that to be done a trench had to be dug along the line of each retaining wall of such a width as to contain not only the space to be occupied by the wall itself, but also a sufficient working space on at least one side of the intended retaining wall to enable the builders to carry out the operation of erecting the wall in the trench. When the retaining walls had been built, but not before, the process of excavating the approaches could be undertaken.

The plaintiffs' tender contained general directions, the effect of which was that the price at which the contractor tendered for the contract would not necessarily be the contract price of the work, since the tender was based on quantities which were not to be treated as final, and it provided that excavation for the structure was normally to be priced and paid for on the basis of the cubic capacity of the relevant structure and that excavation for working space was to be paid for on a different basis measured by the area of the sides of the excavation.

The items relating to retaining walls were as follows: Item 38: "Description: Excavate in trench for retaining walls to 6 in. "above formation level to depth not exceeding 10 ft. Unit—"cubic yard. Amount—5,850. Rate or Price—6s. Total "£1,755." There were similar items numbered 39, 40 and 41 for excavation to depth exceeding 10 ft. but not exceeding 20 ft., exceeding 20 ft. but not exceeding 30 ft., and exceeding 30 ft. but not exceeding 40 ft. respectively. There was no item relating to excavating working space. There were items relating to "ex-"cavation in dumpling between trenches for retaining walls" to various depths which related to the main excavation to form the approach roads. The items relating to pedestrian subways included items relating to "excavation in trench" priced on a cubic capacity basis, that is, excavation to provide space to be occupied by actual structure, and also item 68 in the following terms: "Description: Excavate to allow working areas alongside walls of "subways, ramps and steps and also on concourse, including "breaking out existing roads and all consequent refilling and

"making good. Unit—square yard. Amount—1,320. Rate or "price—120s. Total—£7,920."

The I.C.E. General Conditions of Contract defined the engineer for the purposes of the contract as meaning a named firm or such other engineer appointed from time to time by the employer (that was, the Ministry) and notified in writing to the contractor as the engineer for the purposes of the contract in the place of the named firm.

By clause 6 of the general conditions the several documents forming the contract were to be taken as mutually explanatory of one another and in case of ambiguities or discrepancies were to be explained and adjusted by the engineer. Clause 12 (1) provided that the contractor should be deemed to have satisfied himself before tendering as to the correctness and sufficiency of his tender for the works and of the rates and prices stated in the priced bill of quantities and any schedule of rates and prices. By clause 13, save in so far as it was legally or physically impossible, the contractor was to execute, complete and maintain the works in strict accordance with the contract to the satisfaction of the engineer and should comply with and adhere strictly to the engineer's instructions and directions on any matter. Clause 42 required the employer to give the contractor possession of the site in such a way as to enable him to carry out the works in accordance with the programme, and provided that: "If the contractor "suffered delay or incurred expense from failure on the part of "the employer to give possession in accordance with the terms "of this clause the engineer shall grant an extension of time for "the completion of the works and certify such sum as he con-"siders fair to cover the expense incurred which sum shall be "paid by the employer."

Clause 46 provided that the materials, plant and labour were to be provided by the contractor, and the mode of execution and maintenance of the works were to be of a kind and conducted in a manner approved of by the engineer, and clause 48 provided that as soon as in the opinion of the engineer the works had been substantially completed and had satisfactorily passed any prescribed final test the engineer, on receiving a written undertaking by the contractor to finish any outstanding work during the period of maintenance, should issue a certificate of completion and that the period of maintenance should commence from the date of the certificate. The period of maintenance meant twelve months from the date of any such completion certificate, and provision was also made for completion certificates relating to parts of the works.

By clause 49 (2) the contractor was to execute any work of repair that was required by the engineer during the period of maintenance or within fourteen days after its expiration, and clause 50 contained provisions of an ancillary nature requiring the contractor to search for the cause of any defect. Clause 52 (4) provided that the contractor should send to the engineer once

1960

A. E. Farr Ltd. v. Ministry of Transport.

in every month an account giving full particulars of claims for any additional expense to which he considered himself entitled and of extra work ordered by the engineer which he had executed during the preceding month.

Clause 60, the only clause which provided in terms for withholding any payment or any certificate was in the following terms: "(1) The contractor shall submit to the engineer after "the end of each month a statement showing the estimated "contract value of the permanent work executed up to the end "of the month (if such value shall justify the issue of an interim "certificate) and the contractor will be paid monthly on the "certificate of the engineer the amount due to him on account "of the estimated contract value of the permanent work executed "up to the end of the previous month together with such amount "(if any) as the engineer may consider proper on account of "materials for permanent work delivered by the contractor on "the site and in addition such amount as the engineer may "consider fair and reasonable for any temporary works or "constructional plant for which separate amounts are provided "in the bill of quantities subject to a retention of the percentage "named in the tender until the amount retained shall reach "the 'limit of retention money' named in the tender (hereinafter "called 'the retention money'). Provided always that no "interim certificate shall be issued for a less sum than that "named in the tender at one time. (2) One half of the retention "money shall become due and shall be paid to the contractor "when the engineer shall certify in writing that the works have "been substantially completed and the other half shall be paid "to the contractor fourteen days after the expiration of the period "of maintenance notwithstanding that at such time there may "be outstanding claims by the contractor against the employer. "Provided always that if at such time there shall remain to be "executed by the contractor any works ordered during such "period pursuant to clauses 49 and and 50 hereof the employer "shall be entitled to withhold payment until the completion of "such works of so much of the second half of the retention money "as shall in the opinion of the engineer represent the cost of "the works so remaining to be executed. Provided further that "in the event of different maintenance periods having become "applicable to different parts of the works pursuant to clause 48 "hereof the expression 'expiration of the period of maintenance' "shall for the purposes of this sub-clause be deemed to mean "the expiration of the latest of such periods. (3) Payment upon "each of the engineer's certificates shall be made by the "employer within the number of days named in the tender after "such certificate has been delivered to the employer and in the "event of failure by the employer to comply with the provisions "of this sub-clause or to pay the retention money or any part "thereof at the times prescribed by sub-clause (2) of this clause "he shall pay to the contractor interest at the rate of 5 per cent.

"per annum upon all overdue payments from the date on which "the same should have been made. (4) The engineer may by "any certificate make any correction or modification in any pre-"vious certificate which shall have been issued by him and shall "have power to withhold any certificate if the works or any part "thereof are not being carried out to his satisfaction."

Clause 61 provided that no certificate other than the maintenance certificate referred to in clause 62 should be deemed to constitute approval of any work or other matter in respect of which it was issued or should be taken as an admission of the due performance of the contract or of the accuracy of any claim made by the contractor or of additional or varied work having been ordered by the engineer, nor was any other certificate to conclude or prejudice any of the powers of the engineer. By clause 62: "(1) The contract shall not be considered as "completed until a maintenance certificate shall have been signed "by the engineer and delivered to the employer stating that the "works have been completed and maintained to his satisfaction. "The maintenance certificate shall be given by the engineer "fourteen days after the expiration of the period of maintenance "or as soon thereafter as any works ordered during such period "pursuant to clauses 49 and 50 hereof shall have been completed "to the satisfaction of the engineer and full effect shall be given "to this clause notwithstanding any previous entry on the works "or the taking possession working or using thereof or any part "thereof by the employer. Provided always that the issue of the "maintenance certificate shall not be a condition precedent to "payment to the contractor of the second half of the retention "money in accordance with clause 60 hereof. (2) The employer "shall not be liable to the contractor for any matter or thing "arising out of or in connection with the contract or the execu-"tion of the works unless the contractor shall have made a claim "in writing in respect thereof before the giving of the mainten-"ance certificate under this clause. (3) Notwithstanding the "issue of the maintenance certificate the contractor and (subject "to sub-clause (2) of this clause) the employer shall remain "liable for the fulfilment of any obligation incurred under the "provisions of the contract prior to the issue of the maintenance "certificate which remains unperformed at the time such certi-"ficate is issued, and for the purposes of determining the nature "and extent of any such obligation the contract shall be deemed "to remain in force between the parties hereto."

Clause 63 entitled the employer to forfeit the contract in certain events, including the event of the engineer certifying that the contractor has abandoned the contract or been guilty of certain defaults in carrying it out, and to require the engineer, in the event of the contract being forfeited, to certify the amount, if any, which the contractor had earned and the cost to which the employer had been put in completing the works and the amount

1960

A. E. Farr Ltd.
v.
Ministry of Transport.

of any damages to which the employer was entitled. Clause 65 provided for the engineer certifying certain amounts in the event of an outbreak of war during the currency of the contract for the purpose of adjusting the rights of the parties in the altered circumstances.

Clause 66 provided: "If any dispute or difference of any kind "whatsoever shall arise between the employer or the engineer and "the contractor in connection with or arising out of the contract "or the carrying out of the works (whether during the progress "of the works or after their completion and whether before or "after the determination abandonment or breach of the contract) "it shall be referred to and settled by the engineer who shall "state his decision in writing and give notice of the same to the "employer and the contractor. Such decision in respect of every "matter so referred shall be final and binding upon the employer "and the contractor until the completion of his work and shall "forthwith be given effect to by the contractor who shall proceed "with the works with all due diligence whether notice of dissatis-"faction is given by him or by the employer as hereinafter "provided or not. If the engineer shall fail to give such decision "for a period of three calendar months after being requested to "do so or if either the employer or the contractor be dissatisfied "with any such decision of the engineer then and in any such case "either the employer or the contractor may within three calendar "months after receiving notice of such decision or within three "calendar months after the expiration of the said period of three "months (as the case may be) require that the matter shall be "referred to an arbitrator to be agreed upon between the parties "or failing agreement to be nominated on the application of "either party by the President for the time being of the Institu-"tion of Civil Engineers and any such reference shall be deemed "to be a submission to arbitration within the meaning of the "Arbitration Act, 1950, or the Arbitration (Scotland) Act, 1894, "as the case may be or any statutory re-enactment or amend-"ment thereof for the time being in force. Such arbitrator shall "have full power to open up review and revise any decision "opinion direction certificate or valuation of the engineer and "neither party shall be limited in the proceedings before such "arbitrator to the evidence or arguments put before the engineer "for the purpose of obtaining his decision above referred to. The "award of the arbitrator shall be final and binding on the parties. "Such reference except as to the withholding by the engineer "of any certificate or the withholding of any portion of the "retention money under clause 60 hereof to which the contractor "claims to be entitled or as to the exercise of the engineer's "power to give a certificate under clause 63 (1) hereof shall not "be opened until after the completion or alleged completion of "the works unless with the written consent of the employer and "the contractor. Provided always: (i) that the giving of a certi-"ficate of completion under clause 48 hereof shall not be a

"condition precedent to the opening of any such reference; "(ii) that no decision given by the engineer in accordance with "the foregoing provisions shall disqualify him from being called "as a witness and giving evidence before the arbitrator on any "matter whatsoever relevant to the dispute or difference so "referred to the arbitrator as aforesaid."

On October 3, 1958, the plaintiff company wrote to the engineer claiming to be paid for excavation of working space in the trenching for the retaining walls. On November 7, 1958, the engineer replied: "As no separate item was in fact included in "the bill for working space required for the main deep excava-"tions we agree that some additional item should be negotiated "with you." The parties, however, failed to agree upon how this separate item should be calculated. On January 5, 1959, the engineer wrote that if the plaintiff company did not accept the engineer's proposal the matter would have to be held over until the end of the contract and submitted as a claim. After some further discussion the plaintiff company on May 21, 1959, stated that they wanted the matter to be submitted to arbitration and asked the engineer for his decision in conformity with clause 66. On July 17, 1959, the plaintiff company propounded their claim in a reasoned written form and quantified it at £85,080 in respect of work done to June 30, 1959. On October 23, 1959, the engineer wrote confirming the complete rejection of this claim. On November 19, 1959, the plaintiff company gave notice to the Ministry of its dissatisfaction with the engineer's decision and that they required the claim to be referred to arbitration in accordance with clause 66. They also procured the appointment by the President of the Institution of Civil Engineers of an arbitrator. The plaintiff company had, however, not completed the works and the Ministry contended that the dispute could not be referred to arbitration under clause 66 until the works had been completed. The plaintiff company contended that the dispute was a dispute as to the withholding by the engineer of a certificate and so came within the words of exception.

The plaintiff company had put in, under clause 60, monthly statements including amounts calculated under items 38–41 of the form of tender in respect of excavations in trench for the retaining walls. These amounts, calculated on a cubic capacity basis, related to the cubic capacity of the retaining walls themselves. The plaintiff company had also included in their statements a claim in respect of excavation to allow working areas alongside the retaining walls. The engineer had included in the total amounts of his certificates the amounts calculated on cubic capacity referred to above but had not included any amount claimed in respect of working areas.

The plaintiffs took out a summons against the Ministry as defendants to determine whether, on the true construction of clause 66, the dispute was a dispute as to the withholding by the engineer of a certificate within the meaning of that clause.

1960

A. E. Farr Ltd.
v.
Ministry of Transport.

R. D. Stewart-Brown Q.C. and *J. Stuart Daniel* for the plaintiffs.

E. Blanshard Stamp for the defendants.

The following cases were cited in argument: *Tharsis Sulphur and Copper Co.* v. *M'Elroy & Sons* [1]; *Nobel Brothers Petroleum Co.* v. *P. Stewart & Co.* [2]

Cur. adv. vult.

June 22. Buckley J. read the following judgment: In this case I have to decide a question of construction arising on clause 66 of the general conditions of contract for use in connection with works of civil engineering construction which are commonly known as the I.C.E. conditions of contract and are, I understand, incorporated by reference in a large number of civil engineering contracts.

[His Lordship stated the facts, read the general conditions of contract substantially as set out above, and continued:] I am not concerned with the merits of either party's case or contentions in the dispute, but in order to determine whether the dispute is one which falls within the words of exception it has been necessary for me to state the facts in sufficient detail to demonstrate the nature of the dispute and to refer to the relevant parts of the contract.

Mr. Stewart-Brown, on behalf of the plaintiff company, contends that in clause 66 the words "withholding by the engineer of "any certificate" mean the withholding of any certificate which in accordance with the contract the engineer ought in the circumstances to have given. His contention involves that if for any reason the contractor at any time argues that the engineer has under-certified (it may be as a result of misinterpreting the contract, or as a result of under-measuring the work or of some other cause) a difference will have arisen as to the withholding by the engineer of the certificate which he ought to have given, and such difference would be referable to arbitration before the completion of the works. The good faith of the engineer in giving his certificate is, according to this submission, irrelevant.

It would require very clear language to make me accept this contention in relation to a bona fide difference of opinion between the engineer and the contractor about measurements. The reason why the monthly payments are to be made on the engineer's certificates is clearly to enable the engineer to say how far the contractor's claims are justified, and, if only as a matter of convenience, one would not expect certificates given in good faith to be open to question, particularly having regard to the wide and arbitrary powers conferred upon the engineer by other provisions of the contract. The alternative view would open the door to constant references to arbitration during the currency of the contract. Interim certificates of this kind are not final and conclusive determinations of rights, as clause 60 (4) makes clear,

[1] (1878) 3 App.Cas. 1040, H.L. [2] (1890) 6 T.L.R. 378.

and for this reason also are not, in my opinion, likely to have been intended to be the subject-matter of arbitration while the contract is running. But the dispute in the present case is not, of course, about measurements. The engineer has refused to include certain claims in his certificate at all and may be said pro tanto to have withheld a certificate.

There has been some debate before me as to whether in clause 66 the words "under clause 60 hereof" qualify (a) "the "retention money" only, or (b) "the withholding of any "portion of the retention money" only, or (c) "the withholding "by the engineer of any certificate" in addition to (b).

Mr. Stamp, for the Ministry, has contended in favour of (c). He says that "under clause 60" means pursuant to or in accordance with clause 60 and that this is inappropriate to construction (a), which treats the words "under clause 60" as being equivalent to "referred to in clause 60." He points out that in clause 60 one does find references both to withholding a certificate (clause 60 (4)) and to withholding a portion of the retention money (clause 60 (2)), and that these are the only places where any provisions for withholding a certificate or any retention money are to be found.

On the other hand, Mr. Stewart-Brown points out that clause 60 (2) only refers to a withholding of payment of part of the second half of the retention money, and so must refer to a period later than 14 days after the end of the period of maintenance; that is to say, after the end of 12½ months from the date of the certificate of completion. This, he says, makes it clear that the words of exception in clause 66 cannot relate back to clause 60 (2) because proviso (i) to clause 66 says that the giving of a certificate of completion shall not be a condition precedent to arbitration. Moreover, the giving of a certificate of completion presupposes that the works have then been substantially completed, and that the contractor has undertaken to finish any outstanding work during the period of maintenance. Consequently the works ought to be, and presumably would probably be, entirely completed before the date of payment of the second half of the retention money arrived, so that it would only be in an exceptional case, and one in which the contractor was in default under his undertaking to complete outstanding work, that a dispute about withholding any retention money under clause 60 (2) would arise until after the actual completion of the works.

These seem to me to be strong arguments for not adopting construction (b) and a fortiori for not adopting construction (c). I prefer construction (a). Although "the retention money under "clause 60" may not be very artistic language, it does not, I think, do a violence to it to construe it as meaning either "the "retention money referred to in clause 60" or "the retention "money retained under clause 60."

I therefore reach the conclusion that the words "under "clause 60" do not qualify the words "the withholding by the

1960

A. E. Farr Ltd. v. Ministry of Transport.

Buckley J.

"engineer of any certificate," and that the latter words are unrestricted by their context. They are, in my judgment, apt to apply, for instance, to a withholding of a certificate under clause 42. They are also apt, in my judgment, to apply to a withholding of a monthly certificate under clause 60 if the circumstances are or may be such that the engineer should have given the certificate.

I turn, therefore, to consider whether the dispute in the present case is a dispute as to the withholding of a certificate within the construction which I have put upon clause 60. Mr. Stamp says that it is not, because the dispute is primarily about the true interpretation of the provisions of the contract relating to payments for trenching. The engineer has certified in full in accordance with the prices stated in the bill of quantities for all trenching that the plaintiff company claims to have done. In these circumstances, says Mr. Stamp, there has been no withholding of any certificate, although there is a dispute as to whether in giving his certificate the engineer has properly construed the contract. In other words, Mr. Stamp says that the words of exception in clause 66 say nothing about disputes which relate to the alleged incorrectness of a certificate. Moreover, Mr. Stamp says, even if the engineer can be said to have withheld a certificate in respect of the excavation of working space, the dispute is still not as to such withholding but as to whether under the contract the Ministry is liable to pay anything for this excavation. The withholding of the certificate is said to be merely incidental to the subject-matter of the dispute.

I have already indicated that I should be disinclined to reach the conclusion that, if the engineer, acting in good faith and on proper principles, were to consider that the contractor was not entitled to a certificate to which the latter claimed to be entitled, or to a certificate for the whole amount so claimed, the engineer in acting on that view could be said to be withholding a certificate. In such a case when refusing a certificate or giving a certificate only for a lesser sum, he would, in my view, be discharging his proper function under the contract and could not (at any rate when certifying for a lesser sum) be properly described as withholding anything. But suppose that the engineer, being satsified that the contractor is entitled to a certificate for, say, a sum of £20,000 claimed by the contractor, for some inadmissible reason (as, for instance, that he knows the employer to be in financial difficulties) refuses a certificate altogether, or refuses to certify for more than £15,000: he would, in the one case, manifestly be withholding a certificate, and in the other he would, in my judgment, be withholding his certificate in respect of £5,000 worth of certifiable work. Suppose again that the engineer, acting in good faith but in accordance with mistaken principles, because he has misdirected himself about the law, refuses a certificate altogether or refuses to certify more

than £15,000 of a proper claim to £20,000: he would again, in my judgment, in the one case be withholding a certificate, and in the other be withholding a certificate in respect of £5,000 worth of certifiable work. Mr. Stamp would, however, I think, contend that in such case the dispute between the employer, represented by the engineer, and the contractor would not be a dispute as to the withholding of a certificate but a dispute as to the question of principle, the engineer's mistaken view of which has resulted in the certificate being withheld. But the important aspect of the engineer's view of the question of principle is that for the time being by reason of the consequent withholding of the certificate the employer has not to pay and the contractor will not receive so much money. In my judgment, any dispute or difference which relates to something in consequence of which a certificate has been refused, which on one view of the question ought to have been given, is a dispute or difference as to the withholding of that certificate.

Whether the certificate has or has not been rightly withheld is a matter to be arbitrated. It therefore cannot be a question for me in the present case whether the plaintiff company's view as to their right to payment on interim certificates for excavation of working space is correct or not. They contend that under the contract they should be paid for this work on monthly certificates over and above what they are entitled to be paid on a cubic capacity basis for excavation of the space required for the actual structure. The engineer has refused to certify for this work. This is the subject-matter of the dispute or difference. Rightly or wrongly he has withheld a certificate so far as the excavation of working space is concerned. This has given rise to what is, in my judgment, a dispute or difference as to the withholding by the engineer of a certificate. The fact that in the event the engineer may be held rightly to have withheld the certificate does not make it any less such a dispute. Only if it were perfectly clear that the contractor's view could not be upheld, could there be said to be no genuine dispute about the withholding of the certificate. I could not take that view in this case.

For these reasons I reach the conclusion that, upon the true construction of clause 66 of the general conditions, the dispute in question in the present case is a dispute as to the withholding by the engineer of a certificate or certificates within the meaning of that clause, and I will so declare accordingly, and will further declare that the reference of that dispute to arbitration may consequently be opened without the consent of the Minister before the completion of the works which are the subject-matter of the contract.

Declaration accordingly.
Defendants to pay plaintiffs' costs.

Solicitors: *Henry Boustred & Sons; Treasury Solicitor.*

M. G. T.

[PROBATE, ETC., DIVISION.]

1960
April 7.

Wrangham J.

*HAYNES *v.* HAYNES AND SAWKILL.

Husband and Wife — Adultery — Evidence — Incriminating question — "Proceedings instituted in consequence of adultery"—Party cross-examined charged with cruelty—Party cross-examined alleging adultery—Question relevant to cruelty charge—Matrimonial Causes Act, 1950 (14 *Geo.* 6, *c.* 25), *s.* 32 (3).

Husband and Wife—Adultery—Connivance—Meaning—Husband turning wife out knowing she would return to lover—Absence of "corrupt" intention.

Husband and Wife—Divorce—Cross-petition—"Proceedings instituted "in consequence of adultery"—Whether cross-petition for cruelty part of procedings—Meaning of "proceedings"—Question relevant to cruelty tending to show adultery—Matrimonial Causes Act, 1950, *s.* 32 (3).

Husband and Wife—Conduct conducing—Desertion, as—Constructive desertion — Wife's adultery condoned — Wife then turned out — Subsequent adultery.

A husband was held to have condoned his wife's prior adultery with the co-respondent during a brief period of reconciliation and to have then turned her out, knowing that she would be likely to return to the co-respondent. Upon his subsequent petition for divorce on the ground of adultery the wife alleged connivance and sought a decree of divorce on the ground of the husband's alleged cruelty. A question was put to the husband in cross-examination upon the cruelty allegation tending to show that he had committed adultery; and objection was taken on the ground that the husband was protected by section 32 (3) of the Act of 1950:—

Held, (1) that the question, though relevant to the cruelty allegation, was inadmissible, for there was one set of proceedings only before the court, and that set of proceedings had been instituted in consequence of adultery.

(2) That a spouse who acts, foreseeing that one of the natural results of his act is adultery on the part of the other spouse, and in that sense intending it, is conducing to his spouse's adultery; but that if the motive for his action is a wish to bring that result about, he may be held not merely to be conducing to the adultery, but conniving at it.

(3) That in the present case the husband had not acted to encourage his wife to commit adultery; he had not cared whether she did nor not. His motive had been to get her out of the house; but there had been no corrupt intention to encourage the continuance of her adultery, and therefore, while there had been misconduct conducing, there had been no connivance.

(4) That the husband should in the circumstances of the case be granted a decree nisi of divorce.

Defended divorce suit, in which the husband by his petition dated June 26, 1958, sought a decree of divorce on the ground of adultery with the co-respondent, and in which the wife by her answer dated December 18, 1958, admitted adultery, but alleged that her adultery prior to April 6, 1958, had been condoned by the husband and that he had connived at her subsequent adultery when he turned her out on April 10, 1958, knowing that she would

return to the co-respondent. She cross-prayed for divorce on the ground of cruelty, and alleged that the husband had conduced to her adultery.

The parties were married in 1945 and had three children born in 1946, 1949 and 1951. On April 19, 1957, the wife left the matrimonial home and the children, and it was accepted by the court that she met the co-respondent for the first time on May 11, 1957. Adultery at this stage was denied. Later in May, 1957, she returned home for a short period, leaving again in June, 1957. She continued to keep in touch with the co-respondent, and in September, 1957, she began to live with him in adultery. On April 6, 1958, after negotiations between the parties for a reconciliation during which the assistance of a religious organisation was obtained, the wife returned to the matrimonial home. It was held that marital intercourse took place and that the prior adultery was condoned. On April 10, 1958, the wife again left the home and went back to live with the co-respondent. The facts relating to this period are set out in the judgment: it was held that the husband was determined to get rid of her and that he knew that she would resume her adultery.

After the separation in June, 1957, the husband employed a housekeeper to look after the children, who remained in the home except for the period in April, 1958, when the parties were together.

During the cross-examination of the husband a question was tendered in cross-examination which tended to show that he had been guilty of adultery: his Lordship ruled that the question was inadmissible, and said that he would give his reasons in his judgment.

The case is reported upon the issues arising from the allegation of connivance and the dispute as to the admissibility of the question in cross-examination. (The allegation of cruelty was rejected.)

R. J. A. Temple Q.C. and *H. S. Law* for the husband.
Neil McKinnon Q.C. and *Neil Taylor* for the wife.
The co-respondent in person.

The cases cited are referred to in the judgment.

WRANGHAM J. referred to the pleadings and continued: The parties were married on October 6, 1945, and they have three children, all boys, and—with intervals caused by absences of the wife from the matrimonial home—they lived together until June, 1957, and again for a short period in April, 1958. Since June, 1957—omitting the interval in April, 1958—the husband has had a housekeeper to look after the three little boys.

It is perhaps convenient at this moment to deal with the question which arose upon the law of evidence during the course of the trial, on which I ruled at the time but indicated that I

1960

HAYNES
v.
HAYNES AND
SAWKILL.

Wrangham J.

would give my reasons in my judgment. Mr. McKinnon, appearing for the wife, tendered in cross-examination of the husband a question, of which I need say no more than this, that, by common consent, it tended to show that the husband had been guilty of adultery. It was not contended by Mr. Temple, for the husband, and could not be contended, in view of that which has been said by the Court of Appeal in *Lewis* v. *Lewis*,[1] and by Pearce J. in *Sims* v. *Sims*,[2] that the question or the answer to it would be irrelevant. On the contrary, it was conceded that the question and answer must be relevant to the issue of cruelty which arose upon the cross-prayer of the answer. But Mr. Temple objected to this question on the ground that the husband was entitled to the protection of section 32 (3) of the Matrimonial Causes Act, 1950, which provides that "in any proceedings instituted in con-"sequence of adultery . . . no witness . . . whether a party thereto "or not, shall be liable to be asked or be bound to answer any "question tending to show that he or she has been guilty of "adultery" with a proviso, which does not apply in this case. Mr. Temple relies, in support of that contention, upon the fact that the petition in this case is a petition based on adultery.

Mr. McKinnon's answer was that the question was not asked in the issue arising out of the prayer for dissolution based upon adultery, but it was, he says, asked in the issue arising out of that part of the answer which was a cross-prayer for dissolution on the ground of cruelty. The question therefore arises whether it can be said that there was one set of proceedings before me at the trial, or more than one set of proceedings. Upon that question there is not, so far as I have been able to find, any direct authority. *Taylor* v. *Taylor and King*[3] and *S.* (*orse. G.*) v. *S.*[4] are not, as they might at first sight appear to be, authority upon this point because they turn upon the wording of the Evidence (Further Amendment) Act, 1869, which is not the same in a relevant particular as the wording of section 32 (3) of the Matrimonial Causes Act, 1950. Nor can much reliance be placed upon *M.* v. *D.*[5] In that case a petitioner in a nullity petition was held not to be protected by the statute against being cross-examined about adultery, although there was another suit set down for hearing apparently immediately after the nullity suit in which the husband was alleging adultery against his wife. Not much reliance, as I have said, can be placed on that because it appears that the two suits were separate suits which had not been consolidated, but had been set down to be heard, the one after the other. I therefore have to form my own impression as to whether the proceedings before me were one or more than one. Mr. McKinnon's argument involves a separation of the proceedings, of that which goes on at the trial, into various issues, each one of which issues constitutes a proceeding; though, indeed, it is to be remarked

[1] [1958] P. 193; [1958] 2 W.L.R. 747; [1958] 1 All E.R. 859, C.A.
[2] [1949] W.N. 208.
[3] (1923) 39 T.L.R. 173.
[4] [1907] P. 224; 23 T.L.R. 460.
[5] (1886) 10 P.D. 175.

that the word in the section is not "proceeding" but "proceedings," which suggests comprehensiveness. Of course, if an issue is ordered to be tried separately there is authority that it constitutes separate proceedings: *Evans* v. *Evans and Blyth*.[6] That seems to me to be a long way from holding that a trial can be dissected into a number of issues arising thereat, and that each one of those issues can be called separate proceedings. In many cases, and indeed in this one, only an artificial result would be produced, for if Mr. McKinnon is right in his arguments that the husband could have been cross-examined as to adultery and that answer taken into account in the cruelty proceedings, as they are on this hypothesis deemed to be, the question would arise whether the tribunal was entitled to regard his answer to that question upon the issue of connivance at adultery, which was also raised by the answer, and to which, in the circumstances of this case, such answer might well be directly relevant. If Mr. McKinnon is right, either the husband would lose the protection of the statute upon the very question whether he should obtain a decree for adultery, because the tribunal took into account his answer in cross-examination and was therefore able to find connivance, or was assisted in finding connivance; or the tribunal would have to regard his answer for one purpose of the trial and not for the other; and although the tribunal is expected sometimes to perform artificialities of some kind, it seems to me that Mr. McKinnon's argument is less likely to be sound, if it would produce another artificiality.

Apart from that, the matter is all one of impression. The word "proceedings" is apt to describe that which goes on at the trial. I do not say that it is limited to that, but it is apt to describe the whole of that which goes on at the trial. If the legislature had intended that the protection of the statute should be limited to particular issues arising at the trial, I think the legislature would have said so. I note that in *Lewis* v. *Lewis*,[7] to which I have referred, where the proceedings began with a petition by a husband based upon cruelty, met by an answer, also based upon cruelty, which was subsequently sought to be amended by adding adultery to the cruelty, Hodson L.J., discussing the question which arose in that case, said[8]: "These proceedings not "having been instituted in consequence of adultery but in con-"sequence of cruelty, that express statutory provision does not "apply and does not become applicable now that the amendment "has taken place." (The question had been asked in that case before the amendment had been allowed.) "The answer was "given in the witness-box when the proceedings were proceedings "for cruelty." Although the question did not directly arise in *Lewis* v. *Lewis*,[7] there is, at least, in Hodson L.J.'s words, no trace of a suggestion that proceedings could be dissected for the purposes of the statute into separate issues each constituting

[6] [1904] P. 378; 20 T.L.R. 516.
[7] [1958] P. 193.
[8] Ibid. 200.

1960

HAYNES
v.
HAYNES AND
SAWKILL.

Wrangham J.

separate proceedings. In my judgment there was one set of proceedings only before me; that set of proceedings was instituted in consequence of adultery. They may have been instituted also in consequence of other things, but that they were instituted in consequence of adultery seems to me to be plain. For those reasons I disallowed the question that was tendered.

[His Lordship then considered the history of the relations between the parties, leading up to the wife's return in April, 1958, and the allegations of cruelty, stating that the wife had left in April, 1957, because there had been constant disharmony. His Lordship continued:] I come back now to the last four days of the matrimonial cohabitation [in April, 1958]. The husband said that the moment the wife had arrived he had noticed that the children did not want her, and that he had changed his mind about a reconciliation and refused to allow his wife to sleep with him. She had, he said, protested about it, but he had slept in one room and she had slept in the other, and after a day or two she had said that she was not prepared to accept the responsibilities of a wife and mother, that that life was not for her, and that she was returning to the co-respondent. She had telephoned the co-respondent and gone back to him. The wife gave evidence that it was quite untrue; that she and her husband had slept together on the first night; that there had been some sort of celebration with a bottle of wine; that they had gone to bed and that marital intercourse had taken place between them and sealed the reconciliation. But the next day, when her husband received a letter from his housekeeper, together with three cards from the housekeeper and the children, he had changed his mind and said that he would have the housekeeper back, preferring her to his wife, and that his wife would have to go, and that he would "play her up." She had accordingly telephoned the co-respondent and gone back to him.

It is impossible, of course, to make a confident finding as to the precise details of what occurred during those four days before she went back to the co-respondent on April 10, 1958. But judging as best I can from the demeanour of the witnesses, and the probabilities of the case, I have come to these conclusions. First, that there was a reconciliation on the first night, that intercourse took place between husband and wife, and that by doing that the husband condoned the wife's adultery, which had of course been no secret from him. I may add that even if I had not found that intercourse had taken place, I would still have found that by restoring the wife to the position of mistress of his household and mother of his children the husband was condoning her previous adultery. Secondly, that the initiative in putting an end to the reconciliation lay with the husband and not with the wife. Precisely what form that initiative took it is impossible to determine; but I think that he made it perfectly clear to his wife that she had got to go, and that he would see to it one way or another that it was too uncomfortable for her to stay. He was

determined to get rid of her. It may well be that one of his reasons for coming to that conclusion was that the children were upset. One would not be surprised that the children were upset. They had enjoyed the attention of the housekeeper who, so far as I could judge from seeing her in the witness-box, would be likely to be a much more stable and sensible guardian for them than the mother was. The mother had left several times and had come back again, and that no doubt would be very upsetting for the children. I have little doubt that the children were upset by the mother's arrival, and that they did regret the fact that the housekeeper had left and that the mother had come. It is very unfortunate that that should be so, but the mother was herself to blame. It may be that that was a leading reason why the husband had determined that the reconciliation would not do and that he would get rid of his wife and replace her by the housekeeper. He knew, of course, as a sensible man, that the result would be that the wife would go back to the co-respondent; indeed, no secret was made of that for she had telephoned to find out whether she could do so.

In those circumstances, it is contended on behalf of the wife that the husband had not merely conduced to her subsequent adultery but that he had connived at it. That his conduct conduced to her subsequent adultery seems to me to be plain beyond argument. He was, as I find, driving her out without just cause, and driving her out in circumstances in which he must, as a sensible man, have foreseen that she would be likely to go back to her lover.

The question is whether in those circumstances it should be held that he had connived at her adultery. It is said (see Rayden on Divorce, 7th ed., at p. 209) that the distinction between conduct conducing to adultery and connivance at adultery is one which it is difficult to define; and I was not referred to any authority which assists me to define it. In *Churchman* v. *Churchman* Lord Merriman P., delivering the judgment of the Court of Appeal, said [9] that the issue on an allegation of connivance was whether on the facts of the particular case the husband had or had not been guilty of corrupt intention in promoting or encouraging either the initiation of or the continuance of the wife's adultery. In this case there is no question of the husband conniving at the initiation of the adultery: it is said that he connived at its continuance. It is to be observed that Lord Merriman P. qualified the word "intention" by the adjective "corrupt"; and it appears from *Woodbury* v. *Woodbury* [10] that at least in that case "corrupt intention" was to be interpreted as meaning a willing consent. I hope that I have rightly interpreted Lord Merriman P. if I say that a corrupt intention to encourage the continuance of adultery implies an intention to act with the motive of encouraging the wife's adultery. In other words, a

[9] [1945] P. 44, 52; 61 T.L.R. 464; [1945] 2 All E.R. 190, C.A.

[10] [1949] P. 154; 64 T.L.R. 549; [1948] 2 All E.R. 684, C.A.

1960

HAYNES
v.
HAYNES AND
SAWKILL.

Wrangham J.

spouse who acts, foreseeing that one of the natural results of his act is adultery on the part of his spouse and in that sense intending it, is conducing to his spouse's adultery; but if the motive for his action is a wish to bring that result about, then he may, at any rate, be held to be not merely conducing to the adultery but conniving at it. There is a difference between motive and intention, as explained in *Lang* v. *Lang*.[11]

In this case I do not think that the husband acted as he did from any motive of encouraging the wife's adultery. I do not think that he cared in the least whether she continued to commit adultery or not. His motive was to get her out of the house and to get the housekeeper back again, as he did get her out, and the housekeeper back again, in 48 hours. He might, of course, have acted from the motive of encouraging the wife's adultery because he wished to divorce her; but in this case I do not draw the inference that he did act from any such motive. Had he been at this stage particularly anxious to divorce his wife, he would probably have done so without ever entering into the reconciliation at all. In those circumstances I am not prepared to find that the husband was moved by a corrupt intention to encourage the continuance of the wife's adultery, although I think he foresaw that the continuance of her adultery was likely enough to be the result of what he did.

I need only add that the wife and co-respondent continued to live in adultery from the time that the wife left the husband, in April, 1958, until a date in October, 1959. The result therefore in this case is this: I am satisfied that adultery is proved, both up to April 6, 1958, and between April, 1958, and October, 1959, between the wife and the co-respondent. I am not satisfied that the husband ever connived at that adultery. I am satisfied that the husband constructively deserted his wife by turning her out in April, 1958, and that he thereby conduced to her adultery —not that desertion necessarily conduces to adultery, but in this particular case it did. I am not satisfied that the wife has proved any cruelty against the husband, despite a serious incident of violence which occurred in January, 1956. I do not think that it would be right, in view of the fact that the matrimonial life had continued for two years after that without any other incident of violence at all (indeed, without any other cruelty at all) to find the husband guilty of cruelty. Indeed, the only form of conjugal unkindness that I find proved against him relates to the last three or four days. If I had found that the husband's assault in January, 1956, had been revived by his conduct in April, 1958, so as to amount to cruelty I would nevertheless have refused to exercise my discretion in favour of the wife, because I do not regard the cruelty in any sense as the reason for the break-up of this marriage.

In spite of that which I have found against the husband, I

[11] [1955] A.C. 402; [1954] 3 W.L.R. 762; [1954] 3 All E.R. 571, P.C.

think that it would be right to exercise my discretion in his favour in respect of both the desertion and the misconduct conducing, which indeed are in effect the same thing; and in the discretion of the court to grant him a decree nisi in respect of the proved adultery of his wife. The prayer of the answer will therefore be rejected and a decree nisi granted to him.

Decree nisi to husband; no party and party order for costs.

Solicitors: *George L. Barnett & Co.; Cliftons.*

J. B. G.

[PROBATE, ETC., DIVISION.]

* BULLOCK *v.* BULLOCK.

1960
Jan. 27.

Lord Merriman P. and Collingwood J.

Presumption—Death—Long absence—Spouse not heard of for 14 *years despite police inquiries—Subsequent marriage—Present spouse aware of circumstances when marrying—Whether estopped from later alleging marriage bigamous.*

Estoppel — Conduct, by husband and wife — Bigamy — Circumstances fully disclosed to other spouse at "marriage."

The husband deserted the wife in 1926 and an order for maintenance was made against him in 1929 by the magistrates. In 1930 an order was issued for committal in respect of arrears, but the police were unable to find him and he was never heard of by his wife again, nor did she make inquiries. In 1944 she remarried, describing herself as a "widow." Her second husband knew of the history of her first marriage, but lived with her as husband and wife until 1959, when he left her. Upon the hearing of the wife's complaint that he had deserted her he raised for the first time the suggestion that she was not his wife at all as the marriage had been bigamous and was therefore void. The magistrates held that the marriage was valid and made an order accordingly. The husband appealed:—

Held, that, having regard to the lapse of time between the first husband's disappearance and the second marriage, he should be presumed to have died before that marriage, which was accordingly valid. The wife's failure to make inquiries was justified in the circumstances.

Quaere, whether there might be an estoppel in pais against a husband who sought in such circumstances to prove the marriage void.

Wilkins v. *Wilkins* [1896] P. 108; 12 T.L.R. 212, C.A.; *Woodland* v. *Woodland* [1928] P. 169; 44 T.L.R. 495; and observations in *G.* v. *M.* (1885) 10 App.Cas. 171, 186 considered.

Miles v. *Chilton* (*orse. Miles*) (1849) 1 Rob.Ecc. 684 distinguished.

APPEAL by a husband against the decision of the Sheffield City magistrates on November 4, 1959, when he was found guilty of desertion and ordered to pay the wife £2 10s. a week.

1960

Bullock
v.
Bullock.

In March, 1921, the wife, then aged 22 and a spinster, had married one Kelly, then aged 20 and a bachelor. In September, 1926 he left her a few days after the birth of their second child, and on December 6, 1929, the Sheffield magistrates made an order against him on the ground of desertion. He only made, however, a few payments under the order, and a committal order was issued accordingly on August 22, 1930. The police were unable to find him, and it had never therefore been executed. Thereafter nothing further was heard of him, and the wife herself made no inquiries as to his whereabouts.

On May 17, 1944, the wife married her second husband, the appellant, whom she had met soon after the police had failed to enforce the committal order, although there was no evidence of an improper association before marriage. She described herself as a "widow," and her second husband was fully aware of her history. They lived together as husband and wife until he left her in 1959. Both before the magistrates, and on appeal, the husband sought to establish that the second marriage was a bigamous one, and that the magistrates had therefore no jurisdiction to make an order against him. (The finding of desertion itself was not disputed on appeal.)

D. T. Lloyd for the husband.
G. H. Dixon for the wife.

The cases cited in argument are referred to in the judgments.

Lord Merriman P. stated the facts and continued: Thus we have, taking it in the broadest outline, between Kelly leaving the wife in 1926 and the marriage a period of about 18 years, and between the date of the order and the marriage a period of 15 years, which is reduced somewhat by an attempt in 1930 to enforce the order, and then from 1944 to 1959 a further period of 15 years, during which these people had been living together as reputed man and wife, and, so far as I know, it is only when he is threatened with a maintenance order on the ground of his admitted desertion of this woman—if she was his wife—that he raises for the first time the suggestion that she is not his wife at all. I say that in spite of the fact that the magistrates say on the strength of the wife's evidence—and I see no reason whatever to doubt this finding—that the husband knew every bit as much as the wife did about the history of her earlier marriage with Kelly and went through the ceremony of marriage in 1944 with full knowledge of those facts; and I do not think it depends only on what the wife said to the registrar, presumably in his hearing; I think this matter had been discussed between them; I think that is implicit in the evidence.

The magistrates have found, and it is important that one should look to see what they do say: "William Bullock"—that is the husband—"knew of all the circumstances when he

"went through the marriage ceremony with her in 1944." Now those circumstances alone inevitably call to mind the well-known opinion of Lord Selborne L.C. in *G.* v. *M.*[1] I do not propose to read the whole of it, but in reference to the use of the doubtful phrase "sincerity in the suit"—which was one of nullity—Lord Selborne said this: "I think I can perceive that the real "basis of reasoning which underlies that phraseology is this, and "nothing more than this, that there may be conduct on the "part of the person seeking this remedy which ought to estop "that person from having it; as, for instance, any act from "which the inference ought to be drawn that during the ante-"cedent time the party has, with a knowledge of the facts and "of the law, approbated the marriage which he or she afterwards "seeks to get rid of, or has taken advantages and derived benefits "from the matrimonial relation which it would be unfair and "inequitable to permit him or her, after having received them, "to treat as if no such relation had ever existed." Well, that explanation by Lord Selborne can be referred to known principles of equity, and, I may say, of general jurisprudence. Then he went on to describe the sort of circumstances which would raise that kind of estoppel, and was careful to say that this catalogue was by no means exhaustive but only illustrative, and I need not read any more detail of that. The principle is quite well known.

But it is said that although every word of what I have read could be said to apply to this particular case, the case of a man who for 15 years has lived with a woman whom he was content with full knowledge of the facts to marry as a widow, and then, when he is minded to desert her, seeks to throw the whole thing into the melting-pot, although every word of what Lord Selborne said could well apply to him, it cannot operate as any sort of estoppel in this case for this reason: it is said that there is no such thing as introducing estoppel when one is considering not a voidable marriage, as was the case in *G.* v. *M.*,[1] but a marriage which is void ab initio, in other words, because it is bigamous. Of course it stands to reason in this case, if the husband's case is right, that the ceremony of marriage in 1944 with him was a bigamous marriage. This proposition is said to be established by a decision of Dr. Lushington in *Miles* v. *Chilton* (*orse. Miles*).[2] I do not propose to examine that case beyond saying that it was a very plain case of bigamy, of a man setting up his own bigamy in order to get out of the position that he was in. I will read the headnote to show just what the point was. "Allegation on "behalf of a woman, responsive to a libel of nullity of marriage "by reason of bigamy, pleading deception, fraud and cognisance "by the man of the existence of the husband of the first marriage "at the date of the second fact of marriage, rejected. Miscon-"duct, however gross, of a party proceeding, by reason of

[1] (1885) 10 App.Cas. 171, 186, [2] (1849) 1 Rob.Ecc. 684.

1960

Bullock
v.
Bullock.

Lord Merriman
P.

"bigamy, is no bar to a sentence of nullity. A wife de facto, as "a fact of marriage, is necessarily pleaded in such a suit, is "entitled pendente lite to alimony."

Now if that case stood alone it would, of course, be authority for the proposition that where bigamy is involved even the plainest estoppel will not do. I need not go into the circumstances of that case to emphasise the point. But the case does not stand alone, and it is not, on examination, the law in my opinion that there can be no estoppel where you are dealing with a marriage void because of bigamy. On the contrary there are two cases in the opposite sense. One of them is *Wilkins* v. *Wilkins*,[3] and the other is *Woodland* v. *Woodland*.[4] I am not going in detail through those cases. It is sufficient to point out how the question arose. Here again, in *Wilkins* v. *Wilkins*[5] this was a case of nullity. The actual suit was a suit for nullity by the husband, but during the subsistence of the so-called marriage the wife had petitioned for judicial separation on the ground of the husband's adultery. The husband by his answer denied the adultery and alleged that at the time of his marriage to the petitioner she had a husband living. At the trial the jury found that the husband had committed adultery, and also that at the time of the marriage the first husband was dead. Well, in fact he turned up some years later, and the husband applied to the Court of Appeal to deal with the situation, which could only be dealt with, the Court of Appeal held, by getting rid of the original finding, which obviously, in effect, constituted estoppel per rem judicatam. The parties were husband and wife. If she had sued him as his wife on the ground of adultery it would be an irrelevancy unless they were adjudged to be husband and wife. So, to take it quite shortly, what happened was that on very strict terms about what the husband must do for this woman if leave to appeal long out of time was given by the Court of Appeal, the husband was given leave to appeal on the verdict of adultery and the finding that the husband had been dead. Of course, a new fact was now plain to all concerned, namely, that the husband was very much alive, and therefore had been alive at the time of the marriage, and therefore that the marriage was in fact bigamous. But the only point so far as we are concerned is that it is quite plain that unless this new trial had been ordered, so that the verdict and judgment could be set aside, the husband would have been estopped from denying the validity of the marriage, and, indeed, Lindley L.J. in his judgment, without going through the details, says[6]: "There must be some mode "of getting rid of the difficulty which is created by the verdict "and the decree in the first suit, and the proper mode is a new "trial of that suit"; and Kay L.J. says[7]: "The verdict of the "jury at the trial of the first suit a year ago found erroneously

[3] [1896] P. 108; 12 T.L.R. 212, C.A.

[4] [1928] P. 169; 44 T.L.R. 495.

[5] [1896] P. 108.

[6] Ibid. 116.

[7] Ibid. 114.

"that he was dead at the time of the second marriage," and he plainly indicates that that by itself would have been an estoppel; but he agreed that the estoppel could be got rid of by a new trial. So that it is not universally true, certainly as was assumed in *Miles* v. *Chilton*,[8] that merely because a bigamous marriage is involved that prevents an estoppel from operating.

The other case is the case of *Woodland* v. *Woodland*.[9] Now that is a rather curious case. There the ground of the estoppel was this: Again it was a husband who was praying for nullity of marriage on the ground that his marriage was bigamous, the wife having a husband living at the date of it, and again there had been an earlier suit. That was a suit by the wife for restitution of conjugal rights, which involved the usual finding that the parties were husband and wife, and it proceeded, naturally, upon the basis of their status being thus, as the headnote says, conclusively established inter partes. The husband had only stood by, as I understand it, and let that case go by default; but however that may be there was a decree for restitution of conjugal rights. Hill J.'s finding relies implicitly upon the decision of *Wilkins* v. *Wilkins*,[10] to which I have just referred, and the only difference between the two is that there was no appeal to the Court of Appeal to set aside the original decision which operated as the estoppel. Accordingly, the husband's petition was dismissed.

Now, it is said that there is a vital distinction between what is technically known as estoppel in pais of the kind which might be said to result from this case and an estoppel by record or estoppel per rem judicatam. Of course, the two are different; but I am not really convinced in my own mind that if the facts are strong enough to warrant an estoppel in pais, not less strong or cogent than is imported by a description of two parties in a restitution suit as husband and wife, and allowing that to go by default, it is impossible for an estoppel in pais to operate merely because what is being dealt with is a void marriage. However, I do not propose to proceed further with that part of the inquiry beyond saying that I am not convinced that this is not a case in which what Lord Selborne said in *G.* v. *M.*[11] could very properly be applied, and I do not pursue it because I think there is another very cogent reason for upholding the decision of these magistrates.

I have given the dates, and I have pointed out already that from the marriage in 1944 no less than 15 years elapsed before this case came before the Sheffield magistrates. I have pointed out that the magistrates have found, on what I think is quite valid evidence, that the husband knew of the circumstances regarding the wife's earlier marriage with Kelly, and that the magistrates plainly showed that they did not approve of a man who, having gone through that form of marriage with the wife,

[8] 1 Rob.Ecc. 684.
[9] [1928] P. 169.
[10] [1896] P. 108.
[11] 10 App.Cas. 171, 186.

1960

Bullock
v.
Bullock.

Lord Merriman
P.

knowing all the facts, had himself held out by his conduct that the complainant was a widow.

But the magistrates also plainly relied on the lapse of time. I do not propose to cite authority for saying that although the critical date is 1944, and that in 1944 only 18 years—I say "only" 18 years in contrast with the whole period—had elapsed since Kelly left the wife, during which time she had last heard of him, according to her evidence, in 1929, when she obtained the order in December of that year in the Sheffield magistrates' court, and although the ultimate issue is "Ought this husband "to be assumed to be alive or dead in May, 1944?" I consider that it is settled beyond all possibility of argument to the contrary that we are entitled at this stage in 1960 to consider the whole lapse of time from the time when Kelly was last heard of. Now it did occur to us that there was one way of testing the validity of the presumption which the magistrates have drawn, and which the wife was entitled to draw, and that was by recourse to the Sheffield magistrates' court. [His Lordship referred to the record of payments made and to the issue of the committal order, which was recorded as not being executed because Kelly could not be found, and continued:] There is one other thing which I think may be stated to be settled, and that is that reliance on the presumption that a man who is completely unheard of for seven years may be presumed to be dead does depend to some extent on the question whether all due inquiries have been made having regard to the circumstances; and that the circumstances may vary between one case and another is plain from various authorities which have been cited to us, quite properly, in the course of the argument.

In this case the importance of the failure to execute that warrant in the case of a man said to be living in or near Sheffield at the time when he left his wife, and certainly at the time of the celebration of the marriage and during the marriage, seems to me to be this, not merely that he could not be found then, but that he could not be found then in circumstances that he had the police, with all the resources that are open to them, after him; and if he could not be found by the police any woman might be fully justified in assuming that he could not be found by her, and it may be a very sensible and satisfactory explanation of the admitted fact that after that time, at any rate, she did not make any inquiries.

I do not want to rely on any particular case, because all these cases differ enormously in their circumstances, but there is no doubt that in one case [12]—it is one of these difficult cases under the Inheritance (Family Provisions) Act, 1938—which was tried by Harman J. he very markedly paid most attention to the lapse of time, and the lapse of time notwithstanding the fact that

[12] *In re Watkins, decd., Watkins* v. *Watkins* [1953] 1 W.L.R. 1323; [1953] 2 All E.R. 1113.

though other people were said to have made inquiries and given evidence, the wife herself, who had been in touch with the husband's relatives at one time, had never, apparently, even discussed the topic with them, and had herself made no independent inquiries at all. But mainly, I think, without reading the whole judgment, that it is plain from passages in it [13] that it was upon the total lapse of time that he came to the conclusion that it was established that there had been a valid marriage between the parties which qualified her for provision under that Act. Whatever one may feel about a husband being bound not to take what I may call this indecent point against his wife in order to escape liability for the consequence of having deserted her, on this ground alone, the lapse of time, and the lapse of time after the latest time at which she is shown to have known anything about him, or been party to any proceedings in connection with her order, I think that this decision of the magistrates can and should be upheld, and the appeal dismissed.

COLLINGWOOD J. I agree. The magistrates, after saying that "the main point at issue and the matter upon which most of the "hearing was concentrated was the question of whether the com-"plainant was lawfully married to the defendant on May 17, "1944," go on to say in the course of their reasons: "We noted "that 30 years have now elapsed since Edward Kelly was last "heard of, and that 15 years had elapsed before the time of the "second marriage. William Bullock having gone through a form "of marriage with the complainant knowing all the facts, had "himself by his conduct held out that the complainant was a "widow, and it appeared to us reasonable to infer that Edward "Kelly had died prior to May 17, 1944, and that the marriage on "May 17, 1944, was a valid marriage."

It is against that finding that the husband now appeals, and, put shortly, the ground of the appeal is that the magistrates were wrong in holding that that was a valid marriage on May 17, 1944, because, although the seven years had been exceeded by a good many years, no presumption can arise in a case where no inquiries have been made at all by the wife, and in the course of her evidence she said: "I have not seen or heard of him "since. I have not taken any steps since 1929 to find my "husband."

It is not, I think, unimportant to consider what was urged by Mr. Lloyd in what I hope he will allow me to describe as a most admirable argument. He went on to say that at this hearing the wife admitted that she made no inquiries. She did nothing; she did not even go to the police; she did not even go to the court with reference to the order which she had obtained in that court.

[13] [1953] 1 W.L.R. 1323, 1328, 1329.

1960

Bullock
v.
Bullock.

Collingwood J.

[His Lordship referred to the date of the order, and to the inquiries made by the police after the committal order had been issued in 1930, and continued:] Not only, therefore, did the wife go to the court but the services of the police were enlisted to try to find Kelly. Not only does that add the efforts of the police to find the man, but in addition to that, in my opinion, it affords justification for the wife's attitude of failing to take any further steps herself. Once it is brought to her notice that a warrant has been put into the hands of the police, and that they have been unable to execute it because they cannot find her husband, she may well be excused for failing herself to start looking for him, and be excused for not having any hope of succeeding where the police have failed. I think that that double reason, the fact of the committal order issued by the magistrates and the failure to serve it upon the man Kelly, meets the objection which counsel has made in this case—"There have been no inquiries as to the "whereabouts of this man."

I entirely agree with what Lord Merriman P. has said with regard to the decision of Harman J. in *In re Watkins, decd., Watkins* v. *Watkins*.[14] There the wife had made no inquiries herself. There were relations of the husband with whom she had been in touch until her death, and it was clear from her evidence that although she had seen them from time to time she had never discussed the question whether her husband was alive or dead. Harman J., however, found that she was in fact a widow, quite clearly basing his decision mainly on the long lapse of time, which was something in the neighbourhood of 22 years in that case. Here the total is 30 years, 15 prior to the marriage and 15 since, and I agree with what my Lord has said, that the decision of the magistrates here is correct.

With regard to the question of estoppel, that does not arise now, but I would add this, that I entirely agree with what Lord Merriman P. has said with regard to that matter. I agree that this appeal should be dismissed.

Appeal dismissed.

Solicitors: *Kingsford, Dorman & Co. for Wing, Keer, Bolsover & Morton Slack, Sheffield; Jackson & Jackson for Irwin Mitchell & Co., Sheffield.*

J. B. G.

[14] [1953] 1 W.L.R. 1323.

[PROBATE, ETC., DIVISION.]

* ONIONS *v.* ONIONS.

1960
May 31.

Collingwood J.

Husband and Wife—Divorce—Discretion—Failure to pay for exercise—Disclosure of petitioner's adultery after decree nisi but before decree absolute—Leave to amend notwithstanding.

A wife, by her petition, prayed for a divorce on the ground of desertion since 1946. Although she had made a full disclosure of her adultery before her petition was settled, her petition by inadvertence omitted the necessary prayer for discretion, and no discretion statement was therefore filed. After a decree nisi had been pronounced the mistake was realised by her solicitors, and application was made on summons for leave to amend her petition by praying for discretion, and to file a discretion statement. The court was also asked to make the decree nisi absolute. The application to amend was supported by the Queen's Proctor, who had fully inquired into the matter:—

Held, that in such circumstances it was appropriate to grant leave to amend, and to file the discretion statement, but that the application to make the decree nisi absolute should be made in the usual way.

Gill v. *Gill* [1957] P. 151; [1956] 3 W.L.R. 695; [1956] 3 All E.R. 240 distinguished.

SUMMONS in open court.

The following statement of facts is taken from the judgment: This was a summons by a wife petitioner calling upon the husband respondent and the Queen's Proctor to show cause why leave should not be granted for her to amend her petition without re-service, and to include therein a prayer that the discretion of the court should be exercised in her favour and that she might further be allowed to file a discretion statement. The petition was dated July 24, 1959, and asked for dissolution of the marriage upon the ground of the husband's desertion in September, 1946. The hearing of the petition was on November 4, 1959, when a decree nisi was granted.

The wife gave evidence at the hearing of the summons to the effect that when she first consulted her solicitor in regard to the preparation of the petition she made a full disclosure to him of the adultery which she had in fact committed. An application was then made for legal aid, which was granted. A member of the firm of solicitors representing her also gave evidence, and he agreed that when the wife consulted him she had given a full disclosure of her adultery, and that he had then sent the papers to the committee with the application for the grant of legal aid, forwarding the admission by the wife.

When the papers were returned from the legal aid committee, with a certificate granting legal aid, the partner who had interviewed the wife was away and the matter was then dealt with by an articled clerk in the firm. The result was that when instructions to settle the petition were sent to counsel, the wife's statement

1960

ONIONS
v.
ONIONS.

of her adultery had not accompanied them, so that, when the petition was in fact filed it did not contain any prayer for the exercise of the discretion of the court. This was only realised by the solicitors when the time came to apply for the decree nisi to be made absolute, and a search of the file in the office showed that this statement was not among the papers.

The partner who had taken the original instructions at once realised that an error had been made, and he took the perfectly proper course of at once reporting this matter to the Queen's Proctor and to the Law Society, telling them of the disclosure which had in fact been made to him, and accepting full responsibility for the inadvertent omission which had occurred. He not only expressed his regret to the Queen's Proctor and the Law Society and accepted the responsibility for it, but he repeated this in the witness-box and expressed a desire on behalf of his firm to pay the costs occasioned by this summons, including those of the Queen's Proctor.

Douglas Lowe for the wife.
Colin Duncan for the Queen's Proctor supported the summons.

The case cited in argument is referred to in the judgment.

COLLINGWOOD J. stated the facts substantially as set out above and continued: Mr. Colin Duncan has appeared on behalf of the Queen's Proctor, and I think I am right in saying that not only did he not oppose this application but he gave it wholehearted support.

I have been referred to *Gill* v. *Gill*,[1] which was a similar application, being a summons taken out in the same form. But in that case Karminski J. dismissed the summons. In *Gill* v. *Gill*[1] the Queen's Proctor resisted the summons, but here, as I have said, counsel for the Queen's Proctor has supported it. In the case before Karminski J. the Queen's Proctor had had no opportunity of making any inquiries at all; here the Queen's Proctor has had the opportunity of making the fullest inquiries, and has in fact made those inquiries as a result of the communication of the facts. Not only that, but he has done what there was no opportunity of doing, as was pointed out by my brother in *Gill* v. *Gill*,[1] that is to say, he has consulted the Attorney-General as to what steps he wished to take, and the Attorney-General has intimated that he desires to take no step in the matter himself. Moreover, a portion of the communication from the Attorney-General has been read by Mr. Colin Duncan, and in that document it appears that the Attorney-General himself suggested that the wife should take out the present summons in the form in which it was taken out in *Gill* v. *Gill*.[1]

I need hardly say that I respectfully agree with everything that was said by Karminski J. in *Gill* v. *Gill*[1] as to what is the

[1] [1957] P. 151; [1956] 3 W.L.R. 695; [1956] 1 All E.R. 240.

proper and more usual course to take in circumstances such as these, and that it is only in an exceptional case that there should be any deviation from that procedure. Here the Queen's Proctor agrees that it is an exceptional case, and clearly, from the attitude taken by the Attorney-General, he agrees with that view. The inquiries which have been made by the Queen's Proctor include inquiries with regard to the husband himself and his conduct, and I am quite satisfied that the wife's adultery had no bearing whatever upon the desertion by her husband in September, 1946.

Therefore, I am prepared to accede to the application and grant leave to amend the petition, without the necessity for re-service, by the inclusion therein of a prayer for the exercise of the discretion of the court. I further give leave to the wife to file the discretion statement which she put in today. I also exercise my discretion in her favour in respect of her adultery.

I am asked to grant a decree absolute. I think that the proper course to adopt would be not to grant a decree absolute, but to give leave to the wife to apply in the usual course for the decree to be made absolute.

Leave to amend petition.

Solicitors: *Kingsford, Dorman & Co.; The Queen's Proctor.*

J. B. G.

[HOUSE OF LORDS.]

H. L. (E.)†
1960
July 27.

* UNITY THEATRE SOCIETY LTD. . . PETITIONERS;
AND
SPEIDEL . . . . . RESPONDENT.

PLATO FILMS LTD. . . . . PETITIONERS;
AND
SAME . . . . . RESPONDENT.

Petition for leave to appeal to the House of Lords in *Speidel* v. *Plato Films Ltd.* and *Same* v. *Unity Theatre Society Ltd.*[1]

The Appeal Committee granted the petition.

F. C.

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† *Present*: LORD RADCLIFFE, LORD COHEN and LORD KEITH OF AVONHOLM.

[1] [1960] 3 W.L.R. 391; [1960] 2 All E.R. 521.

[PROBATE, ETC., DIVISION.]

1960
May 16, 30.

Mr. Comr. Edgedale Q.C.

* WOYNO *v.* WOYNO.

Husband and Wife—Marriage—Declaration of validity—Power of court to make—R.S.C., Ord. 25, *r.* 5.

The husband had lived with another woman abroad prior to his marriage in 1948 in England. Doubts having been raised by the Home Office upon his being granted in 1957 a certificate of naturalisation, he applied under R.S.C., Ord. 25, r. 5, for a declaration that the marriage was valid:—

Held, that the court had power to make a declaration of validity, and that upon the evidence such a declaration should be made.

PETITION FOR A DECLARATION.

The husband was born in Poland in 1898 and in 1932 he began to live with a widow in that country; but they never went through a ceremony of marriage. In 1939 both were deported to Russia; and in 1941 the husband was released for service in the Polish Forces. He obtained the woman's release from a forced labour camp in Russia by making a false declaration to the Polish Army authorities that she was his wife; but she never joined him thereafter. In December, 1947, his records in the Polish Record Office of the Polish Resettlement Corps were changed to show him a single and not a married man. He acquired a domicile of choice in this country and went through a ceremony of marriage at the Chelsea Register Office on August 7, 1948.

In August, 1957, he was granted a certificate of naturalisation in England; but the Home Office refused to register the woman with whom he had gone through a ceremony of marriage on the ground that she was not his lawful wife as he had at the time been married to the other woman. He accordingly petitioned for a declaration that the marriage in 1948 was a valid marriage. It appeared that there had been some misunderstanding when a police officer, who was called in these proceedings after an adjournment to allow the Home Office to be represented, spoke to the husband, who had difficulty with the English language, at the time of the application for naturalisation and registration.

G. Dobry for the husband.

A. T. Hoolahan for the Home Office.

Har-Shefi v. *Har-Shefi* [1] was referred to in argument.

MR. COMMISSIONER EDGEDALE Q.C. I thought that the husband was telling the truth, and a consistent story. The detective who gave evidence got the impression that the husband was telling him that he did go through a civil marriage in 1932, but he

[1] [1953] P. 161; [1953] 2 W.L.R. 690; [1953] 1 All E.R. 793, C.A.

has frankly explained to me that it is possible that there was some misunderstanding, because when the husband was speaking in English I found him almost unintelligible.

In those circumstances I am asked to declare that this marriage is valid. I am satisfied that I have got power to make such a declaration and I do make that declaration.

1960

WOYNO v. WOYNO.

Mr. Comr. Edgedale Q.C.

Declaration accordingly.

Solicitors: *S. L. Karpinski; Treasury Solicitor.*

J. B. G.

[PROBATE, ETC., DIVISION.]

* HORTON *v.* HORTON.

1960 *Jan.* 22, 25.

Lord Merriman P. and Collingwood J.

Husband and Wife—Justices—Submission of no case—Submission upheld — Appeal — Rehearing ordered — Right of husband to call evidence at rehearing.

Husband and Wife—Justices—Public interest in proceedings—Election to call no evidence—Whether evidence may be called at rehearing.

A wife's appeal against a decision of the magistrates that there was no case for her husband, who had elected to call no evidence, to answer, was successful, and a rehearing was ordered:—

Held, that, since the overriding consideration in matrimonial cases was the effect of a decision upon status, the husband should be allowed, notwithstanding his election at the first hearing to call no evidence, to give such explanations as might be open to him at the rehearing.

Dicta in *Preston-Jones* v. *Preston-Jones* [1951] A.C. 391, 401, 417; [1951] 1 T.L.R. 8; [1951] 1 All E.R. 124, H.L. applied.

APPEAL from the Bristol magistrates.

The wife had made a complaint under the Summary Jurisdiction (Separation and Maintenance) Acts, 1895–1949, that her husband had been guilty of adultery with a woman unknown at a place unknown. At the hearing a submission had been made on behalf of the husband that there was no case for him to answer, and his representative had elected to stand on his submission and to call no evidence.

The magistrates upheld the submission and dismissed the complaint. The wife appealed.

The case is reported solely upon the question whether the husband should be allowed to call evidence at the rehearing, which was ordered by the Divisional Court, in spite of the earlier submission of no case to answer.

Holroyd Pearce for the wife.

J. A. Cox for the husband.

LORD MERRIMAN P. I have come to the conclusion that the decision was wrong. In circumstances like the present it would

1960

HORTON
v.
HORTON.

Lord Merriman P.

be open to us to find, not only that the submission and the ruling that there was no prima facie case were wrong, but also that the magistrates ought to have made an order on the evidence before them and that we, therefore, ought to make an order on it. Although that would be a possible conclusion, I, for my part, think that it is better that the case should be sent back for a rehearing, and I think that the reason for that will become apparent as I discuss the details.

In particular, I am influenced by the fact that only last week we resisted a submission [1] that where an election and a decision to stand on it had been made, we could not send the case back, but must deal with it ourselves because, if we sent it back, the election to give no evidence would still stand and the husband would be barred from giving any evidence at all. I do not take that view, and, indeed, we expressly declined to take it in that particular case, because the overriding consideration in these matrimonial matters is that we are dealing with status. I do not need to refer to authority about it, but in one of the cases that has been cited to us, *Preston-Jones* v. *Preston-Jones*,[2] concerning the onus of proof, Lord MacDermott [3] with whom Lord Simonds agreed,[4] emphasised the point that these cases deal with questions of status in which the public—the unseen third party, as the public has sometimes been called—has a very great interest. For that reason alone I should be against any attempt to shut out the husband, who made this sumbission and elected to stand on it, from giving any of the explanations which may be open to him to give on the rehearing. I realise that when one orders a rehearing in these cases it does give both sides a chance to improve their case, and there may be (though I am not going to point them out) places in which the wife could dot the i's and cross the t's in the evidence which she produced, and there would be nothing to stop her from doing so. Similarly, it may be open to the husband to give such explanation as he can of the circumstances.

[His Lordship then considered the evidence and held that the wife had established a case which the husband should have been called upon to answer.]

COLLINGWOOD J. concurred.

Rehearing ordered.

Solicitors: *Mowll & Mowll for Lawrence, Williams & Co., Bristol; Edward Heal & Smith, Bristol.*

J. B. G.

[1] *Story* v. *Story* (unreported), January 20, 1960.

[2] [1951] A.C. 391; [1951] 1 T.L.R. 8; [1951] 1 All E.R. 124, H.L.

[3] [1951] A.C. 391, 417.

[4] Ibid. 401.

[COURT OF APPEAL.]

* WINE SHIPPERS (LONDON) LTD. *v.* BATH HOUSE SYNDICATE LTD.

C. A.

1960
July 22, 25.

Hodson, Ormerod and Harman L.JJ.

[1960 W. 233.]

Landlord and Tenant—Business Premises (security of tenure)—Discovery—Landlords' intention to demolish or reconstruct—Landlord and Tenant Act, 1954 (2 & 3 *Eliz.* 2, *c.* 56), *s.* 30 (1) (*f*).

Practice—Discovery—Originating summons—Landlord and tenant—Application for a new lease — Affidavit evidence — Summons adjourned for trial on affidavit and oral evidence—Whether tenants entitled to discovery.

Landlords served a notice under section 30 of the Landlord and Tenant Act, 1954,[1] determining a tenancy of business premises, and stated in the notice that they would oppose any application for a new tenancy on the ground that they intended to demolish or reconstruct the whole of the premises and could not reasonably do so without obtaining possession. The tenants served a counter-notice under the Act stating that they were unwilling to give up possession, and applied to the court by originating summons for the grant of a new tenancy.

The tenants filed an affidavit stating that they did not admit that the landlords had the requisite intention to demolish or reconstruct the premises on the termination of their tenancy, and the master adjourned the originating summons into court to be tried on cross-examination of the deponents on their affidavits and on oral evidence in chief to be cross-examined to.

The tenants applied by summons for further directions asking for discovery of a large number of documents.

Buckley J. ordered discovery of documents bearing upon the question whether the landlords had a firm and settled intention to carry out the project. On appeal from that decision:—

Held, that an order for discovery on an originating summons was only made in very special circumstances, and there were none in the present case which would justify such an order.

In re Borthwick [1948] Ch. 645; 64 T.L.R. 471; [1948] 2 All E.R. 635, C.A. applied.

Decision of Buckley J. [1960] 1 W.L.R. 613; [1960] 2 All E.R. 51 reversed

APPEAL from Buckley J.[2]

On September 28, 1959, landlords, Bath House Syndicate Ltd., gave notice under section 30 of the Landlord and Tenant

[1] Landlord and Tenant Act, 1954, s. 30: "(1) The grounds on which a "landlord may oppose an application "under subsection (1) of section 24 "of this Act are such of the following "grounds as may be stated in the "landlord's notice under section 25 "of this Act or, as the case may "be, under subsection (6) of section 26 "thereof, that is to say:— . . . (*f*) that "on the termination of the current "tenancy the landlord intends to "demolish or reconstruct the premises "comprised in the holding or a "substantial part of those premises "or to carry out substantial work of "construction on the holding or part "thereof and that he could not reason-"ably do so without obtaining posses-"sion of the holding; . . ."

[2] [1960] 1 W.L.R. 613; [1960] 2 All E.R. 51.

C. A.
1960
Wine Shippers (London) Ltd. v. Bath House Syndicate Ltd.

Act, 1954, to tenants, Wine Shippers (London) Ltd., determining their tenancy of premises known as 83, Piccadilly, London, W.1, on March 31, 1960: the notice stated that the landlords would oppose an application to the court under Part II of the Act for a new tenancy on the ground open to them under section 30 (1) (*f*), that, on the termination of the current tenancy, they intended to demolish or reconstruct the whole of the premises, and that they could not reasonably do so without obtaining possession of the premises.

On November 24, 1959, the tenants served a counter-notice under the Act, stating that they were unwilling to give up possession of the premises on March 31, 1960, and on January 27, 1960, they applied by originating summons under the Act for the grant of a new tenancy. In their affidavit in support of the originating summons they set out proposals for the new lease.

The landlords filed an affidavit by one Maurice Wohl, stating that the landlord company was entitled to the reversion immediately expectant on the applicant tenants' lease, and was entitled also to the reversion of the adjoining premises, Nos. 82 and 84, Piccadilly; that the landlord company was formed with the intention and for the purpose of carrying out the redevelopment of the properties facing Piccadilly between Bolton Street and Clarges Street; that they had instructed architects to prepare plans and act on their behalf in obtaining all necessary permissions to enable the proposed redevelopment to be carried out, and that application had been made to the London County Council for town planning permission, and the permission obtained from the council was exhibited to the affidavit. That permission was for the erection of an office, showroom and residential building on the site of 82, 83 and 84, Piccadilly, subject to certain conditions: the first condition was: "The submission to, and approval by, the council "before any building work is commenced, of details of the "external facing materials to be used on the infilling panels "between the windows, and the type of rendering proposed for "the roof structure on the Bolton Street block," and the second condition was: "No works (including works of demolition) being "commenced (*sic*) unless and until the developers have acquired "and are to the satisfaction of the council in possession of the "necessary interests in 83 and 84, Piccadilly to ensure that they "are able to proceed with the entire development and that no "part of Bath House"—Bath House was 82, Piccadilly—"shall "be demolished until the aforementioned properties have been "demolished." The reasons given for imposing these conditions include: "To ensure that the whole of the site, particularly the "frontage to Piccadilly between Clarges Street and Bolton Street, "shall be treated comprehensively and in such a way as may "justify the demolition of Bath House."

The deponent further stated that the architects had proceeded with preparing the necessary agreements for the demolition of No. 83, and there was exhibited a letter from the architects to the

landlord company setting out the steps which were being taken to procure the carrying out of the demolition and eventual reconstruction of No. 83. Owing, however, to the interposition of the proceedings by originating summons the programme originally contemplated was already running a little behind time.

The tenants, in answer, put in evidence an affidavit in which they stated, among other things: "The applicant company does "not admit that the respondent company has the requisite inten-"tion to demolish or reconstruct the said premises on the "termination of the applicant company's current tenancy." The master adjourned the originating summons into court to be tried on cross-examination of the deponents on their affidavits and on oral evidence in chief and cross-examination.

On April 12, 1960, the tenants applied by summons asking that the following further directions be given in the proceedings by originating summons: 1. That the landlords within 14 days file an affidavit of the documents which were or had been in their possession or power relating to the following matters: (a) Planning permissions, building and by-law consents for the proposed demolition and/or the proposed reconstruction of the three properties, Nos. 82, 83 and 84, Piccadilly, and each of them in force or in respect of which application was being made or was required or was required by the appropriate authority to be made together with all correspondence in connection with any such application; (b) agreements or contracts for the proposed demolition and/or tenders, agreements or contracts for the proposed reconstruction of the three properties, and each of them together with all correspondence in connection with any proposed agreement or contract for any such purposes; (c) the financial position of the landlords to meet the expenditure involved in the proposed demolition and the proposed reconstruction, being balance-sheets and profit and loss accounts for the last two accounting years of the landlords for which accounts had been completed, together with any agreements entered into between the landlords and any other party for the provision of finance in connection with the proposed demolition or reconstruction; and (d) (i) the respective interests of the various occupiers of No. 84, Piccadilly and (ii) the steps taken by the landlords to determine each such interest together with all correspondence in connection therewith. 2. That there be inspection of documents by the tenants within 14 days of the filing of that affidavit. 3. That such further or other directions be given as the court might deem to be fit and proper in the circumstances. In support of the application the tenants filed a further affidavit drawing attention to a number of matters as to which they said they had no knowledge, and in relation to which they sought discovery.

Buckley J.[3] ordered discovery of documents bearing on the

[3] [1960] 1 W.L.R. 613, 621.

C. A.
1960
WINE SHIPPERS (LONDON) LTD. v. BATH HOUSE SYNDICATE LTD.

question whether the landlords had a firm and settled intention to carry out the project in question. The landlords appealed.

R. E. Megarry Q.C. and *Jeremiah Harman* for the landlords.
T. J. Sophian for the tenants.

The following cases not referred to in the judgment were cited in argument: *John Miller (Shipping) Ltd.* v. *Port of London Authority*[4]; *In re Press Caps Ltd.*[5]; *In re Camkin's Questions*[6]; *In re Wills' Trade Marks*[7]; *Espresso Coffee Machine Co. Ltd.* v. *Guardian Assurance Co. Ltd.*[8]; *Whittal* v. *Kirby.*[9]

HODSON L.J. stated the facts and continued: The judge made an order for discovery, and it is against that order that the landlords have appealed. If the matter had been res integra, I, for my part, should have approached this case upon the footing that it was obviously a matter in the discretion of the judge, with which this court could not be expected to interfere. There being a question between the parties, inter alia, as to the intention of the landlords and whether theirs was a firm and settled intention to carry out their project, that was a matter for the landlords to establish and one which the tenants were anxious to dispute. But the matter is not res integra, and it is (as the judge recognised) governed by authority.

This procedure by originating summons, unlike proceedings in an action, is designed to deal rapidly and simply with a number of matters—usually matters which arise in the Chancery Division, and this originating summons was issued in the Chancery Division. There are no rules dealing with discovery in matters raised by originating summons; and there is authority which is binding on this court to the effect that, although there is a discretion to make orders for discovery in these cases, that discretion will only be exercised in special circumstances. The authority, which is that of Lord Greene, is taken from *In re Borthwick.*[1] The words of the judgment which are relied upon are these[2]: "The view that Roxburgh J. took, and, I think, rightly took, was "that discovery in proceedings in the Chancery Division by "originating summons ought only to be ordered in very special "cases where the facts are such as to justify such an order being "made." I should explain that the *Borthwick* case[3] was not a matter arising under the Landlord and Tenant Act but under the Inheritance (Family Provision) Act, 1938, which had not very long been in operation, and which had annexed to it, as it

[4] [1959] 1 W.L.R. 910; [1959] 2 All E.R. 713.
[5] [1949] Ch. 434; [1949] 1 All E.R. 1013, C.A.
[6] [1957] 1 W.L.R. 255; [1957] 1 All E.R. 69.
[7] [1892] 3 Ch. 201, C.A.
[8] [1959] 1 W.L.R. 250; [1959] 1 All E.R. 458, C.A.
[9] [1947] K.B. 194; 62 T.L.R. 696; [1946] 2 All E.R. 552, D.C.
[1] [1948] Ch. 645; 64 T.L.R. 471; [1948] 2 All E.R. 635, C.A.
[2] [1948] Ch. 645, 649.
[3] [1948] Ch. 645.

were, special rules in R.S.C., Ord. 54F, one of which, rule 9, provides: "The court or a judge may require evidence in regard "to any matter which the court or a judge considers to be "relevant to the application and may direct any party to the "proceedings or any person on whom notice of the proceedings "has been served to attend on the hearing of the application and "give evidence orally or to be cross-examined on any affidavit "made by him." Roxburgh J., who refused to make an order for discovery in that case, based himself not on the narrow ground that in proceedings under the Inheritance Act and the rules made thereunder discovery could not ordinarily be ordered, but on the broad ground which was accepted by the Court of Appeal, as shown by the judgment of Lord Greene, with whom the other member of the court, Asquith L.J. agreed.

I think that it is to be taken to be the rule, at any rate in the Chancery Division, where proceedings are taken by originating summons, that discovery will not be ordered except in what are described as [4] "very special cases where the facts are such as "to justify such order being made." It may be that matters have changed since the originating summons was first thought of and that in modern light and in the complexity of modern litigation it may well be desirable that discovery should be ordered in all cases where the judge in his discretion thought fit. That is a matter for consideration by the Rules Committee; and we here are aware that there is in existence a report [Report of the Committee on Chancery Chambers and Chancery Registrars' Office (Cmnd. 967)], for which one member of this court is responsible, which indeed made recommendations on this particular subject, but those recommendations have not yet been adopted, and we have to administer the law and practice as it is laid down by authority; otherwise, indeed—apart from the fact that it is our duty to do so—we should create great confusion.

The judge did not purport to do other than to follow the decision of the Court of Appeal in *In re Borthwick*,[5] but he felt able to make the order for discovery in this case upon consideration of what had taken place before the Master when the matter came before him because (as I read from the headnote [6]) the Master thought it would be a convenient course to adjourn the originating summons into court to be tried on oral evidence not merely on cross-examination of deponents upon their affidavits but on evidence to be given orally in chief and cross-examined to in the ordinary way. The judge felt himself able to say that that was a peculiar position and came within the heading of [7] "very special cases where the facts are such "as to justify such an order being made." He said in part of his judgment [8]: "The issues have not been defined in "pleadings, and although they may be capable of being

[4] [1948] Ch. 649.
[5] [1948] Ch. 645.
[6] [1960] 1 W.L.R. 613.
[7] [1948] Ch. 649.
[8] [1960] 1 W.L.R. 620.

C. A.
1960
Wine Shippers (London) Ltd. v. Bath House Syndicate Ltd.
Hodson L.J.

"inferred from the affidavits which have been filed, I do not "think that it would be right to say that they have been "defined by those affidavits. On the other hand, the evidence "so far filed is not anything like the whole evidence which it "will be necessary for the parties to adduce at the trial."

I may say that he accepted the submission made by Mr. Harman on behalf of the landlords that the nature of the proceedings themselves cannot be special circumstances but there must be some circumstances peculiar to the particular case. So far as I can see, there were no special circumstances in this case which in themselves differ from those in other cases; and the mere fact that the evidence before the Master was incomplete and that the matter was directed to be tried by oral evidence does not make it in any sense a special case of very special facts.

But Mr. Sophian does not only depend upon that. He says that this is one of those cases where, within the *Borthwick* [9] principle (as he described it), discovery ought to be ordered because (he says, and he emphasises this) there is real doubt as to the landlords' case. I think that that submission cannot be accepted as a ground in this case for making an order for discovery. The position which the tenants have taken up is that they do not know anything about the landlords' financial position, anything about the arrangements which have been made with regard to disposal of the tenants in other buildings in the same block, and although they have seen the planning permission they say that it is conditional and unsatisfactory. The judge took the view that the evidence before the court when it is given orally ought to be properly tested and that in order to enable it to be properly tested he thought it right that the tenants should have an opportunity of subjecting the deponents to cross-examination.

Lord Greene said in the *Borthwick* case [10]: "The plaintiffs, "however, have not put forward a single shred of fact or a single "suggestion casting doubt on the fairness or accuracy of the "executors' evidence on the subject of value. Indeed, their "complaint is this: 'We cannot do that without some materials "'and the reason why we want discovery is to enable us to test "'what the executors have said and to see whether or not we can "'find something on which to attack their estimate.' In ordinary "litigation, of course, the ordinary rules of discovery enable liti-"gants to conduct such an examination, but this is a very special "jurisdiction under a very special Act. . . ." He went on [11]: "The judge has ample power, if he is not satisfied or if he thinks "there is a reasonable ground for doubting the accuracy of such "an estimate as this, to require further evidence on the point, "to summon the executors before him, to put questions to them

[9] [1948] Ch. 645.
[10] [1948] Ch. 645, 650.
[11] Ibid.

"and to subject them to cross-examination." He is dealing there with the language of rule 9 of Order 54F, which I have read. "If he thought that was the proper course and if the matter "was a matter of doubt or if suspicion was aroused, that no "doubt would be the course that he would take." Then he went on to deal with the facts of the particular case; but in his judgment he lends no support to the view that an application for discovery ought to be acceded to merely in order to arm the applicants with material for cross-examination.

In this case there was no material put before the court to form the foundation for any doubts as to any of the matters referred to. All that the tenants were able to do was to express ignorance. I mention that because reference has been made to a decision of Danckwerts J. in *In re St. Martin's Theatre*,[12] where there were special circumstances. The judge does not in terms refer to the *Borthwick* case[13] in his judgment, although it was cited to him in argument as justifying an order for discovery being made against the tenants because on a report by the official referee it was shown that dilapidations for which the tenants were liable amounted to some £16,000 and in those circumstances he felt justified in making an order (which I regard as an order made in very special circumstances having regard to the facts of the case) for discovery against the tenants.

But the rule itself must necessarily apply just as much in proceedings instituted under the Landlord and Tenant Act as in any other proceedings commenced by originating summons; and, as the judge did, I also reject the argument that the *Borthwick* case[14] has no application to any other subject-matter than an originating summons issued under the Inheritance Act. The ground which the court stood upon was a wider ground than that: it was expressed quite clearly to be a ground applicable to an originating summons. In those circumstances I think that this court has no alternative but to allow this appeal.

The evidence before the judge has been supplemented, by leave today without opposition on the part of the landlords, in the form of an affidavit by a clerk in the employment of the solicitors for the applicants, which has shown that they have inspected at Bush House the file of the landlords; some information is given as to the capital of the company such as would be expected to appear on the register; and there is a description of the mortgages and charges. That information, of course, could have been obtained by the tenants at any time. It has provoked in answer a letter (which is later in date than the judgment of the judge) written to the representative of the landlords from an insurance company showing the arrangement which has been tentatively reached between the insurance company and the land-

[12] [1959] 1 W.L.R. 872; [1959] 3 All E.R. 298.

[13] [1948] Ch. 645.

[14] Ibid.

C. A.
1960

Wine Shippers (London) Ltd. v. Bath House Syndicate Ltd.

Hodson L.J.

lords for providing building finance. That is the only additional evidence which has been put before us.

I do not think it is necessary for me to go through the order which the judge has made. He recognised that a summons for discovery could not be at large, as in cases where issues have been defined by pleadings and discovery has to be given touching all the matters in issue between the parties; and with the assistance of counsel an order for limited discovery was made. It is quite clear that, the proceedings being by originating summons, where issues are not clearly defined by pleadings, unless points of claim and of defence are ordered, it must necessarily be that a special order for discovery is made and not one in the widest form. But since the parties have not had any difficulty in agreeing the form of discovery order which would be appropriate in such a case as this, there seems to be no point in my going through the details of it.

The tenants, in support of their argument, have in addition referred to the practice in the county court as it was under the Landlord and Tenant Act, 1927, and pointed out that in the county court where the premises were within the county court jurisdiction the proceedings there taken out, involving an original application and an answer to that application, opened the way to an application for discovery as a matter of common form. That may be a recommendation in support of the argument that the position should be the same in the High Court. But proceedings in the High Court are not always regulated in the same way as proceedings in the county court, and we have to take proceedings in the High Court as we find them. Even if other counsels may prevail in future, it seems to me that at present this court is bound, following the *Borthwick* case,[15] to come to the conclusion that here there was really no material on which to find that the exception—that is, the very special case "where the facts "are such as to justify an order being made"—has been established.

For those reasons I would allow the appeal.

Ormerod L.J. I agree; and although we are differing from the judge there is nothing I wish to add.

Harman L.J. I agree, but with reluctance. It seems to me that in cases involving questions of fact of this sort discovery should go as a matter of ordinary discretion. It further seems to me that the present case and the last one that we heard in this court, *Metropolitan Storage & Trading Co. Ltd.* v. *Michael Nairn & Co. Ltd.*,[16] both under the Act of 1954, do show that R.S.C., Ord. 53d regulating procedure under that Act is in need of

[15] [1948] Ch. 645.

[16] This case was settled.

attention. But as matters stand I do not feel we are at liberty to do anything but allow the appeal.

C. A.
1960
WINE SHIPPERS (LONDON) LTD. v. BATH HOUSE SYNDICATE LTD.

Appeal allowed with costs.
Leave to appeal to House of Lords refused.

Solicitors: *Samuel Sebba & Co.; Evans, Baker & Co.*

I. G. R. M.

[PRIVY COUNCIL.]

* "TRUTH" (N.Z.) LTD. . . . . APPELLANT;
AND
PHILIP NORTH HOLLOWAY . . . . RESPONDENT.

J. C.†
1960
July 26.

ON APPEAL FROM THE COURT OF APPEAL OF NEW ZEALAND.

Libel and Slander—Newspaper—Republication—Innuendo—Onus of proof—Alleged misdirection.
New Zealand—Libel.

In the course of an article calling for an inquiry into the issue in New Zealand of import licences a newspaper stated that a man had seen one J., to whom an import licence had been issued, with the object of getting information from him about import procedure, and that J. had told him to "see Phil and Phil would fix it . . . "By 'Phil' his caller understood him to mean the Hon. Philip "North Holloway, the Minister of Industries and Commerce." The minister thereupon brought this action for libel against the newspaper, pleading an innuendo—that the words meant that he "was a person who has acted and is prepared to act dishonourably "in connection with the issue of import licences." Damages having been awarded against the defendant newspaper, it appealed on the ground that there had been misdirection by the trial judge:—

Held, (1) that there was nothing wrong in the judge's direction to the jury that "on the question of whether the passage that is "complained of bears the meaning that the plaintiff alleges that "it bears, the fact that the newspaper might have been calling "for a general inquiry has no bearing at all."

(2) Nor was there anything wrong with the direction that "it "is not a defence at all that a statement that might be defamatory "is put forward by way of report only . . . The case is properly "to be dealt with as if the defendant itself said 'See Phil and "'Phil would fix it.'" Every republication of a libel is a new libel, and each publisher is answerable for his act to the same extent as if the calumny originated with him.

The judge was right in directing the jury "that it should be "established by the plaintiff that the words bear the meaning "alleged by him" and that no lesser meaning would suffice. If

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† *Present*: VISCOUNT SIMONDS, LORD REID, LORD TUCKER, LORD DENNING, LORD MORRIS OF BORTH-Y-GEST.

J. C.

1960

"TRUTH" (N.Z.) LTD. v. HOLLOWAY.

the jury had thought that the words conveyed, not an imputation of *guilt*, but only of *suspicion*, the plaintiff would have failed to prove his innuendo.

Mountney v. *Watton* (1831) 2 B. & Ad. 673, 678; *Simmons* v. *Mitchell* (1880) 6 App.Cas. 156, P.C. applied.

There had been no misdirection, but even if there had been, the summing-up as a whole provided the jury with a fair guide. "A summing-up is not to be rigorously criticised; and it would not "be right to set aside the verdict of a jury, because in the course "of a long and elaborate summing-up the judge has used inaccurate "language."

Clark v. *Molyneaux* (1877) 3 Q.B.D. 237, 243 applied.

Judgment of the Court of Appeal of New Zealand affirmed.

APPEAL (No. 15 of 1960) from a judgment of the Court of Appeal of New Zealand (November 16, 1959) dismissing an appeal from a judgment of Hutchison A.C.J. in the Supreme Court (July 23, 1959).

The following facts are taken from the judgment of the Judicial Committee: On March 24, 1959, a weekly newspaper in New Zealand called "N.Z. Truth" published an article which contained a reference to the Hon. Philip North Holloway, the Minister of Industries and Commerce. On April 24, 1959, Mr. Holloway brought an action for libel against the newspaper in respect of a passage in this article. He pleaded that it bore an innuendo which was defamatory of him. The newspaper denied that it bore this innuendo. It also pleaded that the occasion was privileged. The case was tried in the Supreme Court of New Zealand between June 2 and 8, 1959, before Hutchison A.C.J. and a common jury. The jury gave a verdict in favour of Mr. Holloway and assessed the damages at £11,000. Despite this verdict, the newspaper moved Hutchison A.C.J. for judgment in its favour on the ground that the occasion was privileged: or, alternatively, for a new trial on the ground that the judge had misdirected the jury. The judge ruled that the occasion was not privileged. He refused the motion for a new trial and on July 23, 1959, he ordered judgment to be entered for Mr. Holloway for £11,000. The newspaper appealed to the Court of Appeal of New Zealand (Gresson P., North and Cleary JJ.), who heard the appeal between September 21 and 24, 1959. On November 16, 1959, the Court of Appeal dismissed the appeal. The newspaper now appealed to Her Majesty in Council.

The newspaper did not raise before the Board many of the issues which had been debated in the court of New Zealand. It did not challenge the ruling that the occasion was not privileged. It confined itself to the contention that the judge had misdirected the jury and sought a new trial on that ground. In order to explain this contention the material facts and pleadings must be set out.

On March 24, 1959, the newspaper published an article calling for an inquiry into the activities of one Harry Judd, whose real name, it said, was Hyman Yudt. He was said to be a Russian

by birth but had taken British nationality. The article was headed in bold letters: "This Ex-Russian's Import Licences should "be investigated." It started with the opening words: "The "Government should take immediate steps to hold a full, "searching and impartial inquiry into import and other dealings "between an Auckland importer of Czechoslovakian glass, one "Harry Judd, of 160 Upland Road, Remuera, and Mr. Warren "Freer, M.P. . . ." And it finished with the concluding words: "In Truth's view the New Zealand Labour Government should "show itself no less meticulous in preventing any suspicion of "under-the-counter dealings with Parliamentarians than did the "British Labour Government when it dealt with Sidney Stanley."

So the article opened and finished with a call for an inquiry. In the course of the article the newspaper described an interview with Mr. Judd. It was the description given of this interview which was said to be a libel on Mr. Holloway. The words complained of were as follows:

"He [Mr. Judd] told a man who approached him some time "subsequently about import procedure that he was 'sick of "'things here' and that '25,000 smackers had just gone like "'that.'

"He [Mr. Judd] gave the impression that there was nothing "doing (in the import field) for him any longer. He told the "caller that he had come too late, that there was 'no use "'talking' and that the Prime Minister, Mr. Nash, had put "his foot down.

"At a subsequent discussion with the same man, the discon-"solate Judd told his caller to 'see Phil and Phil would fix it.' "He warned him, whatever he did, not to let Mr. Nash hear "about it.

"By 'Phil' his caller understood him to mean the Hon. "Philip North Holloway, the Minister of Industries and "Commerce."

It was not suggested at the trial that those words, when taken in their natural and ordinary meaning, were defamatory of Mr. Holloway: but it was said that there was an innuendo which was defamatory of him. The innuendo was pleaded in the statement of claim in this way:

"By the said words the defendant meant and was understood "to mean that the plaintiff is and was a person who has acted and "is prepared to act dishonourably in connection with the issue of "import licences."

In answer to a request for particulars of the facts and matters relied upon in support of the innuendo, the plaintiff said he relied "on the fact that the words 'see Phil and Phil would fix it,' "in the context in which the said words were used, were capable "of being understood and were understood in a sense defamatory "of the plaintiff, more particularly in that the word 'fix' was "used in the said context in a secondary or colloquial meaning,

J. C.
1960
"TRUTH" (N.Z.) LTD. v. HOLLOWAY.

"connoting irregular and dishonourable conduct on the part of "the plaintiff in connection with the issue of import licences."

The appellant denied that it bore that innuendo.

1960. July 4, 5. *Robin Cooke* (N.Z. Bar) for the appellant. *W. E. Leicester* (N.Z. Bar) and *Helenus Milmo* for the respondent.

The following cases, in addition to those referred to in the judgment, were cited in argument: *Stubbs Ltd.* v. *Russell*[1]; *Braddock* v. *Bevins*[2]; *Dakhyl* v. *Labouchere*[3]; *Turner* v. *Metro-Goldwyn-Mayer Pictures Ltd.*[4]

July 26. The judgment of their Lordships was delivered by LORD DENNING, who stated the facts set out above and continued: It was, of course, entirely a question for the jury whether the words bore the innuendo which the plaintiff alleged they did: but the jury had to be warned that no lesser meaning would suffice. And the judge gave them that warning. He said to them: "When he [the plaintiff] alleges a special defamatory "sense, he is bound by that special sense, or innuendo as we "call it, and nothing short of that will suffice . . . if he does not "succeed in showing that the words to the ordinary reader would "mean that the plaintiff is and was a person who has acted and "is prepared to act dishonourably in connection with the issue "of import licences, then the plaintiff will fail. He sets up that "meaning and it is on that meaning that he takes his stand."

No exception was taken to that direction, which was clearly right and, indeed, favourable to the defence. Once the plaintiff had acknowledged that the words were not defamatory of him when taken in their natural and ordinary meaning, then it was absolutely incumbent on him to prove they bore the meaning alleged in the innuendo. If he only proved a lesser meaning, he would fail. A good illustration was given in the course of the argument. The innuendo in this case imputed that the plaintiff "has acted and is prepared to act dishonourably." That is an imputation of *guilt*. If the jury thought that the words conveyed, not an imputation of *guilt*, but only of *suspicion*, the plaintiff would fail to prove his innuendo, with the result that he would fail in his action, see *Mountney* v. *Watton*,[1] by Lord Tenterden C J.; *Simmons* v. *Mitchell*.[2] The reason is this: If the plaintiff had by his innuendo said the words only imputed *suspicion*, it would be open to the defendant to plead justification if it had sufficient evidence at its disposal to warrant suspicion: but as the plaintiff says that the words impute *guilt*, the defendant

[1] [1913] A.C. 386; 29 T.L.R. 409, H.L.
[2] [1948] 1 K.B. 580; 64 T.L.R. 279; [1948] 1 All E.R. 450, C.A.
[3] [1908] 2 K.B. 325n.; 23 T.L.R. 364, H.L.
[4] (1950) 66 T.L.R. (Pt. 1) 342; [1950] 1 All E.R. 449, H.L.
[1] (1831) 2 B. & Ad. 673, 678.
[2] (1880) 6 App.Cas. 156, P.C.

cannot justify that meaning unless it has sufficient evidence to prove guilt, which is, of course, a higher burden than proving suspicion. So as matter of pleading, in order not to put the defendant to any disadvantage, the plaintiff is pinned to his innuendo.

Their Lordships notice, however, that this distinction between guilt and suspicion which was taken so clearly before them, was not pressed before the jury: and they think they can understand why. The jury would not be likely to view with favour defendants who came into court saying: "We did not say he was actually "*guilty* of dishonourable conduct. Our words only meant that "he was *suspected* of it." It is defamatory to say of a man that he is suspected of dishonourable conduct. The defendants would, by imputing suspicion, be willing to wound, and yet afraid to strike—an attitude which a New Zealand jury would like no better than an English jury.

The case which the defendants put before a jury was rather different. They said that the words bore a lesser meaning than that alleged in the inuendo. In looking to see what that lesser meaning was, their Lordships find it succinctly expressed in the words of Mr. Cooke when he addressed the judge at the end of the summing-up: "If the jury thought that the meaning was, "in view of Judd's remarks, that an inquiry should include the "question whether or not the plaintiff has acted dishonourably "in connection with import licences—if they thought the words "bore that lesser meaning, a different meaning from the one "assigned by the plaintiff, then the defendant would be entitled "to a verdict."

There was some question as to the exact answer given by the judge, but it may for present purposes be accepted to be as follows. The judge said: "I do not wish to add anything to "what I have already said on that matter. I have told the jury "that it should be established by the plaintiff that the words "bear the meaning alleged by him and I want to leave it at that."

Their Lordships find it a little difficult to understand quite what Mr. Cooke was contending the words did mean: but he stressed the importance to his case of the call for an inquiry; and their Lordships can only conclude that, according to the defendants, the words meant this: "We call for an inquiry "because, amongst other things, Mr. Judd has made remarks "about Mr. Holloway. And we say that, in view of his remarks, "the inquiry should include the question whether Mr. Holloway "has acted dishonourably." But their Lordships would observe that this does nothing to elucidate what Judd's remarks did mean: and this is the crux of the case.

Their Lordships have no doubt that Mr. Cooke put before the jury the lesser meaning for which he contended: and it is plain that the jury rejected it. They held that the words did bear the innuendo alleged by the plaintiff and they awarded £11,000 damages. That being so, the defendants have no hope

J. C.
1960
"Truth" (N.Z.) Ltd.
v.
Holloway.

of upsetting this award unless they can show a misdirection by the judge on an important ground. Mr. Cooke originally complained of eleven passages in the summing-up which he said were misdirections, but when the case reached their Lordships, the passages were reduced to three. The first of these was this: "(d) *Directing the jury that on the question whether the passage "complained of bore the meaning alleged by the plaintiff the "fact that the newspaper might have been asking for a general "inquiry had no bearing at all.*" The words actually used by the judge to the jury were these: "For your purposes, on the "question as to whether the passage was defamatory, in my "direction to you, the fact that the paper was calling for a "general inquiry is not an answer on the question whether "the passage was defamatory. That fact that it was so calling "may be a circumstance to be considered on the question of "damages if you come to the question of damages, but I will "mention that later, but my direction to you is that, on the "question of whether the passage that is complained of bears "the meaning that the plaintiff alleges that it bears, the fact "that the newspaper might have been calling for a general "inquiry, has no bearing at all."

Their Lordships see nothing wrong in that direction. If a newspaper says: "We call for an inquiry because a man called "Judd has made such and such remarks about Mr. Holloway," and you want to know what the newspaper is talking about, you have to know what Judd's remarks were. To get at the meaning of the passage, the jury have to see what remarks were attributed to Judd and then ask themselves what those words mean. If Judd had said that the Minister was "bungling" or "imprudent," there might still be a call for inquiry. If he had said that the Minister was "suspected" of dishonourable conduct, a call for inquiry might be made just the same. In any case the call for an inquiry does not help.

The second of the alleged misdirections was this: "(e) *Direct-"ing the jury that the case was properly to be dealt with as if "the defendant itself had said: 'See Phil and Phil would fix it.'*" The words actually used by the judge to the jury were these: "If you accept that those words were spoken by Judd, it is "not a defence at all that a statement that might be defamatory "is put forward by way of report only. It does not help the "defendant that the way that it is put is that Judd said 'See "'Phil and Phil would fix it.' The case is properly to be dealt "with as if the defendant itself said 'See Phil and Phil would "'fix it.'"

Their Lordships see nothing wrong in this direction. It is nothing more nor less than a statement of settled law put cogently to the jury. Gatley opens his chapter on Republication and Repetition with the quotation: "Every republication of a "libel is a new libel, and each publisher is answerable for his "act to the same extent as if the calumny originated with him."

see Gatley on Libel and Slander, 4th ed., p. 106. This case is a good instance of the justice of this rule. If Judd did use the words attributed to him, it might be a slander by Judd of Mr. Holloway in the way of his office as a Minister of the Crown. But if the words had not been repeated by the newspaper, the damage done by Judd would be as nothing compared to the damage done by this newspaper when it repeated it. It broadcast the statement to the people at large: and it made it worse by making it one of the grounds on which it called for an inquiry, for thereby it suggested that some credence was to be given to it.

The third of the misdirections alleged is this: "(f) *Directing "the jury that they should find for the defendant if they thought "that the words sued on did not mean what was alleged by the "plaintiff, but might mean something less than that, that the "Minister was bungling or incompetent or something of that sort, "but refraining from specifically directing the jury upon request "that they should find for the defendant if they thought the "meaning was that, in view of Judd's remarks, an inquiry should "include the question whether or not the plaintiff had acted "dishonourably in connection with import licences.*"

Their Lordships have referred to this request earlier: and they find no fault in the answer the judge gave to it. It is difficult to know what meaning the defendants were seeking to put on the words complained of. The request by counsel did nothing to elucidate the meaning of "Judd's remarks" on which the whole case turned. The judge gave the right answer when he declined to embark on a course so confusing to the jury. He said: "I have told the jury that it should be established by the "plaintiff that the words bear the meaning alleged by him and I "want to leave it at that." That was short, simple and correct.

Their Lordships are therefore of opinion that there was no misdirection: and they think that Hutchison A.C.J. was right in refusing the motion for a new trial.

The Court of Appeal seem to have thought that there may have been a misdirection in directing the jury that the call for an inquiry had no bearing: but they dismissed the appeal on the ground that the summing-up considered as a whole provided the jury with a fair guide when they came to consider their verdict. Their Lordships think there was no misdirection. But if there had been, they would unhesitatingly affirm the view of the Court of Appeal. It has been well said that "a summing-up "is not to be rigorously criticised; and it would not be right to "set aside the verdict of a jury, because in the course of a long "and elaborate summing-up the judge has used inaccurate "language," see *Clark* v. *Molyneaux*,[3] by Bramwell L.J.

The issues in this case were fairly and properly left to the

[3] (1877) 3 Q.B.D. 237, 243.

J. C.
1960
"TRUTH" (N.Z.) LTD. v. HOLLOWAY.

jury. There is no ground for upsetting their verdict. Their Lordships will humbly advise Her Majesty that this appeal should be dismissed. The appellant must pay the costs.

Solicitors: *Wray, Smith & Co.*; *Oswald Hickson, Collier & Co.*

C. C.

[COURT OF APPEAL.]

C. A.
1960
April 11; *July* 20, 21.
Hodson, Willmer and Devlin L.JJ.

* DAVIES *v.* DAVIES.

Husband and Wife—Divorce—Costs—Statement taken by petitioner's solicitor from respondent—Costs incurred excluded by commissioner—Whether wrongly excluded.

Solicitor—Discipline—Jurisdiction of court—Deprivation of costs—Inapt in case of alleged professional misconduct.

The costs incurred by a solicitor acting in a divorce suit for a wife petitioner in taking a statement from the husband which contained a confession of adultery was disallowed by the commissioner on the ground of his disapproval of solicitors taking such statements, which he thought should be taken by inquiry agents:—

Held, that it was not a proper exercise by the commissioner of his discretion to exclude costs because the evidence had been obtained in a particular way; any question of professional misconduct was a question for the Law Society and in the circumstances the costs were wrongly excluded (post, p. 1006).

Per Willmer L.J. It was impossible to say that in all circumstances such a practice was either right or wrong; every case had to be judged on its own particular facts (post, p. 1008).

Per Devlin L.J. The object of the commissioner's order was to penalise the solicitor for having acted in a way which, in the commissioner's view, was improper, and although the commissioner had power under R.S.C., Ord. 65, r. 11, or under the inherent jurisdiction of the court to make such an order, there was here no question of these costs having proved fruitless, and there was, therefore, no power under the rule or under the inherent jurisdiction to make it and it was misconceived. In the absence of a clear practice, a solicitor was entitled to use his own judgment.

APPEAL from Judge O. Temple-Morris (sitting as commissioner).

By this appeal the court was asked to set aside that part of an order of the commissioner, whereby he excluded certain items of costs incurred by a solicitor acting for a wife petitioner in a divorce suit in taking a statement from the husband respondent and all expenses connected therewith.

The order in question was made on October 26, 1959, and by it the commissioner pronounced a decree nisi of divorce on an undefended petition on the ground of the adultery of the husband with a woman, service upon whom had been dispensed with; that part of the order stood. The situation had been that on June 23,

1959, the commissioner, not being satisfied as to the absence of collusion, adjourned the matter for the assistance of the Queen's Proctor, who appeared by counsel on October 26, 1959, and said that the Queen's Proctor had made inquiries and proposed to take no further part in the case. On that occasion the husband gave evidence of his own adultery and the decree was pronounced.

The order, so far as relevant, was in the following terms: "... and condemned the respondent [the husband] in the costs "incurred and to be incurred on behalf of the petitioner [the "wife] up to June 23, 1959, in this cause excluding all solicitor's "costs relating to the statement made by the respondent on "September 11, 1958, his attendances upon the respondent, and "the telephone conversation in relation thereto, and the pre-"paration of the affidavit in support of the application for leave "to dispense with service of the petition on the woman named "therein such costs to be taxed as between party and party."

"And it is ordered that the costs of the petitioner excluding "all solicitor's costs relating to the statement made by the "respondent on September 11, 1958, his attendances upon the "respondent, and telephone conversations in relation thereto, "and the preparation of the affidavit in support of the application "for leave to dispense with service of the petition on the woman "named therein, be taxed as between solicitor and client in "accordance with the provisions of the Third Schedule of the "Legal Aid and Advice Act, 1949."

C. Trevor Reeve for the wife and for the solicitor.

The husband was not represented and did not appear.

The following case, not referred to in the judgment, was cited in argument: *Wagman* v. *Vare Motors Ltd.*[1]

HODSON L.J. stated the facts and said that, so far as the party and party costs involved in this appeal were concerned, leave to appeal was refused and this court could only entertain the appeal, at any rate on that part of the order, on the basis that the judge did not exercise any judicial discretion in dealing with the matter as he did. He continued: The commissioner was concerned, and rightly concerned, to see that justice was done in accordance with the law, which requires him, in an undefended (as in a defended) case, to be satisfied as to the charges which are to be proved, and also to be satisfied as to the absence of collusion. What happened was this. The wife consulted her solicitor and gave instructions. Inferentially it appears from the evidence that the instructions were based upon the supposed fact that the husband had committed adultery. Following upon that, a telephone number which the husband had given to the wife—they were living apart—was given to the solicitor, and the solicitor spoke

[1] [1959] 1 W.L.R. 853; [1959] 3 All E.R. 326, C.A.

C. A.
1960
DAVIES
v.
DAVIES.
Hodson L.J.

to the husband on the telephone and obtained an admission from him to the effect that he had committed adultery. This was followed by an interview which the solicitor had with the husband in which, after being warned that anything he said would be used in evidence against him and that he need not say anything, the husband made a statement which was reduced into writing.

On the first day of the trial the only evidence of adultery which was produced was this statement made by a man who clearly on the face of it was importuning his wife for a divorce and anxious that a divorce should be pronounced against him on the ground of adultery. In circumstances of that kind the court is naturally concerned as to the weight of the evidence, because a statement of that kind, unless strongly supported by surrounding circumstances, must necessarily be of little weight. So far as the weight of the evidence is concerned, nothing in the end turned upon that—I do not know if the commissioner had ever been concerned with that aspect of the case—because the husband eventually swore on oath (the previous statement being unsworn) that he had committed adultery, and upon that evidence being accepted the decree was pronounced.

But the commissioner, in depriving the wife of part of the costs, was actuated by the disapproval which he expressed as to the way in which the evidence had been obtained in the first instance, in that the solicitor had communicated with the husband and obtained the statement in the way which I have described, saying in terms that he did not think that was the right thing to do: he had passed it once but when it was repeated he thought it was time to show his disapproval in no uncertain way by disallowance of costs, so that the matter should never be conducted in that way before him in similar cases in the future. He pointed out that there were plenty of inquiry agents, and if that sort of work was to be done it should be done by the inquiry agents.

With all respect to the commissioner, I do not think that in exercise of his duty in trying a case depending upon evidence it was any part of his function to say whether the solicitor as a professional man was acting properly or improperly in behaving as he did. So far as the evidence is concerned, the weight does not vary because the person who obtains a statement is a solicitor—necessarily at any rate—as against the case where similar evidence is obtained by an inquiry agent; and any matter of professional ethics is a matter surely not for the commissioner but for the disciplinary body, namely, the Law Society, which has to do with the professional conduct of solicitors. I do not see that it is a judicial exercise of discretion to deprive the solicitor of any part of the costs because the evidence has been obtained in that particular way.

I will read what the commissioner said, in order to show the way in which it appears that he—with the best intentions in the world—appears to have approached this case. He said: "I have

"in the past, for this particular firm, seen Mr. Myer Cohen [the "solicitor involved] go into the witness box and give evidence "that he has interviewed the respondents at his office and I have "not said one single word, and I have granted a decree, because "I thought, when he did so, it was an isolated incident. I saw "him repeat it, I have not said anything; but when I saw that "this was looking as though it was going to be a practice—and "as I again say, no other firm appearing before me has ever "indulged in this practice—then I thought it right, and I still "think it right, to say that in my view it should not be indulged "in as a practice, as in the main it is very highly undesirable."

At the end of his judgment he said: "A judge has autonomy "in his own court in matters of policy as to the methods of proof; "provided always he obeys the laws of the land and follows "decisions of higher courts. I am within the law; I am not "violating any superior decision in saying, in matters of general "policy, what finds favour and disfavour with me; and con-"sequently I said what I had to say and I disallowed those "particular few items of costs. A judge is entitled to state his "preference as to the best ways on matters of presentation of "evidence in the cases before him. He accepts and applies the "standards of proof required by law; it is for him to state how "those standards are to be reached in his court, each case being "decided on its own facts, proved in evidence. It has been my "experience in the past that members of the Bar, and solicitors, "members of the Law Society, have welcomed such assistance "and expressed their appreciation therefor. In my view, Mr. "Myer Cohen is endeavouring to exaggerate incidents into a "crisis, and if he were more amenable to the court's wishes, it "would certainly be more helpful to the administration of this "court."

In my judgment the commissioner has there really confused in his mind two matters, namely, on the one hand the question of admissibility of evidence and the weight to be attributed thereto, and on the other hand the method in which evidence is laid before the court; and in dealing with the matter in the way in which he has I am bound to say I think it is outside his function to disallow costs for the reasons which he there stated. Therefore I think that this appeal should be allowed.

WILLMER L.J. I agree with the judgment which my Lord has delivered, both with regard to its conclusions and with regard to the reasons given. I desire to add but a few words of my own.

The commissioner, as I understand his decision, made his special order with regard to the costs of this case by way of marking his disapproval of what he thought was the regular practice followed by the petitioner's solicitor of approaching the respondent in matrimonial proceedings direct for the purpose of obtaining a statement. We were informed by Mr. Reeve, who argued this appeal, that that was a matter with which the Law

C. A.
1960
DAVIES
v.
DAVIES.
Willmer L.J.

Society were very much concerned, and he invited us to give a general ruling on the propriety or otherwise of the so-called practice. I fear that if the Law Society are hoping for a general ruling they will be disappointed; for I think it is quite impossible to say that in all circumstances such a practice is either right or wrong. In my judgment, every case must be judged on its own particular facts; and it is precisely here that, as it seems to me, the commissioner fell into error. He dealt with this case on the basis that the practice followed by the solicitor was in all circumstances open to objection, and failed to apply his mind to the particular circumstances of this case or to exercise his discretion with regard thereto. In such circumstances, it seems to me to follow that there has in this case in fact been no judicial exercise of discretion with regard to the question of costs. It is therefore open for this court to interfere.

Having examined, so far as we have been able to do so, the particular circumstances of this case, it seems to me that there is no ground for complaining in this case of the way in which the solicitor behaved; and in such circumstances it could not be a proper exercise of discretion to make such an order as to costs as the commissioner made. I therefore agree that this appeal should be allowed.

DEVLIN L.J. We have here before us what are in reality two appeals, because there are two orders that have been appealed against by two different appellants. The main order is the one in which the commissioner ordered that the costs of the petitioner [the wife] that were to be taxed as between solicitor and client should exclude all solicitor's costs relating to the statement made by the husband on September 11, 1958. That he has power to make an order of that sort, which in effect makes the solicitor personally liable for the costs incurred, is beyond doubt. He has power both under the rules of court, R.S.C., Ord. 65, r. 11, and also under the inherent jurisdiction of the court. It is a separate proceeding quite independent of the divorce suit, and one in which the solicitor has been called upon to show cause why he should not be treated in this way. He was not formally called upon in this case to show cause, but no complaint can be made or has been made about that because there is no doubt that the commissioner gave him ample opportunity to put his point of view in the witness-box. However, it is, as I say, a separate proceeding; and he, also represented by Mr. Reeve, has appealed against that order.

The other order, the order in the suit itself, is in my judgment merely supplementary. The object of what the commissioner was doing was to penalise the solicitor for having acted in a way which in his, the commissioner's, view was improper; and of course it follows incidentally from that that if he were going to make the solicitor pay the costs personally then they should not

be included in the petitioner's bill against the respondent. That is the other subsidiary order that he has made.

I propose to deal with this matter in relation to the first order, the order against the solicitor. I do not want to discuss the principles that emerge from *Donald Campbell & Co.* v. *Pollak* [1] and *Baylis, Baxter Ltd.* v. *Sabath*,[2] to which the commissioner referred in the course of his judgment. It is quite clear, and it has been so held, that from an order made against a solicitor personally an appeal lies to the court without leave. Therefore, no special rules regarding interference with the commissioner's discretion have there to be considered. If that order is, in the view of this court, wrong, then there is plainly no material at all to support the order in the taxation as between party and party, and its rescission necessarily follows.

As I have said, an order against a solicitor personally can be made under R.S.C., Ord. 65, r. 11, which provides, so far as is material, "If in any case it shall appear to the court or a judge "that . . . by reason of any misconduct or default of the solicitor, "any costs properly incurred have nevertheless proved fruitless "to the person incurring the same, the court or judge may call "on the solicitor of the person by whom such costs have been so "incurred to show cause why such costs should not be disallowed "as between the solicitor and his client."

There can be no question in this case of these costs having proved fruitless. If the commissioner had refused to admit the evidence, then it might well have been said that the costs of taking the statement were fruitless. If he had said that, though admitting the evidence, he attached no weight at all to it, the same might conceivably have been said. But in the course which the commissioner took he accepted the evidence and acted upon it. I think that is a fair inference. It is true, as Hodson L.J. has pointed out, that the evidence was supplemented by the admission of the husband himself; but there is nothing in either of the judgments that the commissioner gave on this point to suggest that he would have rejected the solicitor's evidence. In those circumstances, it is clear that, so far from the costs incurred in the taking of the statement proving fruitless, they have in fact enabled the same result to be reached more economically than it could by any other means.

It is plain, therefore, that there is no case here under the rules. As I have said, the rule leaves untouched the inherent jurisdiction of the court; but I apprehend that where costs are concerned the same principle must operate. If the solicitor is to be deprived of some of the costs which he has earned, it must be because his misconduct has caused costs to be incurred which would not otherwise have been incurred. A solicitor is sometimes deprived of costs, or a party is sometimes deprived of costs, as it is said, to mark the disapproval of the court; and I am not

[1] [1927] A.C. 732; 43 T.L.R. 495, H.L.

[2] [1958] 1 W.L.R. 529; [1958] 2 All E.R. 209, C.A.

C. A.
1960
Davies
v.
Davies.
Devlin L.J.

suggesting for a moment that some round sum may not be imposed in that way where costs which it may not be possible exactly to quantify have been thrown away. But where there is no question of costs being thrown away, an order of the sort made by the commissioner cannot stand. We have not discussed whether the inherent jurisdiction of the court permits it to impose a penalty or a fine upon a solicitor for his misconduct. As my Lord has said, the ordinary course is to report the matter to the Law Society so that his professional brethren may deal with it. I need say no more about that because it is clear that the commissioner here was not imposing a fine or a penalty in terms and was not directing his mind to that at all: the order relates to costs.

In my judgment, therefore, the order is misconceived, there being no power to make it either under Ord. 65, r. 11, or under the inherent jurisdiction of the court. But I ought to add the expression of my own view, since Mr. Myer Cohen's conduct has been called in question, that I can see nothing in what he did that amounts to misconduct at all.

In saying that, I am not seeking either to uphold or to condemn the practice which the commissioner said was improper, namely, the taking of a statement from a respondent by the solicitor to the petitioner and not by an inquiry agent. On that I have nothing at all to add to what has been said by my brethren, who are much more familiar with the right principles to be applied in cases of that sort than I am. But taking it (as they have said) that there is no universal practice one way or the other, it seems to me that it is impossible to say that what Mr. Myer Cohen did amounted in any way to misconduct. Had there been a clear practice which he had infringed, it might be different. Without there being a clear practice, it could not be said that what he did amounted to misconduct. In the absence of a clear practice, he was entitled to use his own judgment. The reasons which he gave for what he did appear to me to be sound and sensible ones, and indeed I should like to say that the impression which his evidence makes on my mind—given in answer to the questions from the commissioner, Mr. Myer Cohen being thus not in a very easy position—is altogether a good one.

I agree that the appeal should be allowed.

Appeal allowed and that part of commissioner's order excluding certain items from the solicitor and client bill and party and party bill set aside.

Solicitors: *Theodore Goddard & Co. for Myer Cohen & Co., Cardiff.*

I. G. R. M.

[CHANCERY DIVISION.]

* *In re* TINKER'S SETTLEMENT.

1960
July 14, 15.

Russell J.

[1959 T. No. 1114.]

Trusts—Variation—Act of 1958—*Rectification of settlement—Fund divided in equal shares between son and daughter—Son absolutely entitled to share on attaining* 30—*Gift over to daughter's share should son die under* 30—*Income from daughter's share payable to daughter for life and after her death capital held on trust for her children—Omission to provide for children of son should son not attain* 30—*Omission not intended by settlor—Application for variation to rectify—Settlement—Whether for benefit of "any "person unborn"—Variation of Trusts Act,* 1958 (6 *&* 7 *Eliz.* 2, *c.* 53), *s.* 1.

By a settlement dated April 4, 1951, it was provided that certain funds should be held by the trustees for the settlor's son and daughter in equal shares. Clause 1 (3) provided that if the son attained the age of 30, he should become absolutely entitled to his share, and clause 1 (5) that if he should die before attaining that age, then his share was to accrue to the daughter's share. The settlement provided that if the daughter should attain the age of 30 the income of her share should be payable to her during her life and after her death the capital was to be held on trust for her children.

The settlor applied to the court under section 1 of the Variation of Trusts Act, 1958, for approval on behalf of unborn persons interested in the settled funds of a variation of the trusts of the son's share whereby, should the son die before attaining the age of 30, leaving a child or children who attained the age of 21 one-half of the son's share should be held on trust for such child or children, and that clause 1 (5) should be made subject to a new clause to that effect. At the date of these proceedings, the son and daughter were both unmarried and under 30 years of age:—

Held, that the court could not sanction the proposed variation, which was, in fact, a claim for rectification of the settlement, unless it was satisfied that it would be for the benefit of the unborn children of the daughter; that this proposal to give away half of that to which those children would be entitled if the son died under 30 years of age could not possibly be said to be for their benefit; and that, therefore, the variation would not be approved.

ADJOURNED SUMMONS.

By a settlement dated April 4, 1951, made between the settlor, Derek Tinker, and Derek Tinker, his wife, Margaret Isobel Tinker, and Arthur Maxwell Ramsden (an independent trustee), it was provided, by clause 1 (1), that the income of the settlor's son Clive's share (which was one half of the settled fund) should be subject to a trust for accumulation until the settlor's death or until Clive attained the age of 30, whichever first happened. Clause 1 (3) provided that if Clive attained that age, then the trustees should hold the capital of his share for him absolutely;

[Reported by Miss PHILIPPA PRICE, Barrister-at-Law.]

1960

Tinker's Settlement, *In re.*

and clause 1 (5) that if he should die before attaining that age, then his share would accrue to the settlor's daughter Sandra's share. The income of Sandra's share (which was the other half of the settled fund) was subject to a similar trust for accumulation, and if Sandra attained the age of 30, then the income was payable to her during her life, and from and after her death the capital was to be held on trust for her children as she might by deed or will appoint and in default of appointment for her children in equal shares.

A prior settlement, dated June 28, 1945, of a smaller fund had provided that the son and daughter should not have the income of their shares of the settled fund until they attained the age of 25, both their shares being settled with remainder to their children. The settlor deposed that when the settlement of 1951 was under consideration he had given instructions that he wanted it to "be along the lines" of the 1945 settlement, except that the son was not to have the capital of his share until he was 30 and that the daughter was not to have the income of her share until she was 30. In fact the settlement of 1951 departed very materially from the terms of the 1945 settlement and the settlor deposed that he had not appreciated that under the 1951 settlement, should the son die under the age of 30 leaving children, his share would go over to the daughter's share, and his children would take no interest. He further deposed that he would not have executed the settlement if he had understood that that was the effect of the trusts.

At the date of these proceedings the son Clive was a bachelor, aged 25 years, and the daughter Sandra a spinster aged 22 years.

The settlor applied to the court under the Variation of Trusts Act, 1958, for (1) an order under section 1 of the Act approving on behalf of all unborn persons interested in the settled funds an arrangement for such variation of the trusts of the settlement as would terminate the trusts for accumulation of the incomes of the respective shares of Clive and Sandra under the settlement, which trusts might terminate on the settlor's death and give rise to liability for estate duty in respect of the settled funds, and (2) such variation of the trusts of Clive's share as would prevent the whole of his share accruing to Sandra's share in the event of his dying before the age of 30 leaving issue surviving him. The summons set out the suggested form of a new subclause (3) in clause 1 of the settlement in the following terms: "(3) If the "son dies before attaining the age of 30 years leaving a child or "children who being male attains the age of 21 years or being "female attains that age or marry, one half of the son's fund "shall be held upon trust for such child or children . . . in equal "shares absolutely." It was also suggested that clause 1 (5) should be prefaced with the words "subject to the trusts "aforesaid."

B. L. Bathurst Q.C. and *Hector Hillaby* for the settlor.
D. S. Chetwood for the son.
B. J. H. Clauson for the daughter.
G. B. H. Dillon for the independent trustee of the settlement.

No cases were cited in argument other than that referred to in the judgment.

RUSSELL J. I am prepared in this matter to approve an arrangement whereby the trusts of this settlement are altered so as to put an end to an accumulation period. The accumulation period must necessarily relate to the death of the settlor, when the trusts might become extinct and give rise to a liability for estate duty. I have no doubt that it will mean that income in the case of the son's half, which would probably have accumulated in the next four and a half years, and, in the case of the daughter's half, for the next nine years, with the additional benefit of capital will not so accumulate. Nevertheless, it seems to me, weighing the risks one against the other, that it must be for the benefit of the next generation, for whom I am now concerned, that the accumulation should be put an end to.

I am also asked to make a provision to cover this defect in the settlement, namely, that the son is given the capital of his half absolutely on attaining 30 years of age, but it is provided that if he should die under 30 his half goes over to the daughter's half which is settled upon her for life with the remainder to her children. It will be observed at once that if he himself has children in the next four and a half years before he is 30, and then dies under 30, no part of his share will go for the benefit of his children: it will all go over to the daughter's half. Evidence in the form of an affidavit by the settlor is before me to suggest that there is a possible claim to be made for rectification of the settlement so as to procure the son's half in that event going to his own children.

It is quite clear that I must be satisfied before I sanction that arrangement, which involves half of the son's half being given, so to speak, in the particular event to his children and not over to the daughter's family, that such an arrangement is beneficial to the unborn children of the daughter. It seems to me that it is about one of the thinnest and weakest claims for rectification that I have seen, perhaps only rivalled by that in *Constantinidi* v. *Ralli*,[1] and I cannot think that I would be benefiting the daughter's children if I gave away half of that which they would come into if the son dies under 30.

Mr. Bathurst has said that one can look at this sort of thing in two ways and ultimately combine the two. First, that this is a sensible and fair thing to do because somebody has blundered —somebody has forgotten about the son's children—and it would

[1] [1935] Ch. 427.

1960

TINKER'S SETTLEMENT, *In re.*

Russell J.

seem very hard that this half of this substantial settlement should go away from his children to his sister and her children, and, secondly, that it would in a broad sense be beneficial to the sister's children as members of this whole family. I cannot apply the jurisdiction under the Variation of Trusts Act in that broad way. Although it may very well be that one can throw that kind of consideration into the scale in order to increase a financial benefit which is already established, yet one cannot regard it as a benefit in its own right. I would be only too pleased if I were able so to hold, but, having regard to the type of claim for rectification which is adumbrated, I do not find myself able to approve a compromise or arrangement or variation under the Act as is sought by paragraph 2 of the summons.

Declaration accordingly.

Solicitors: *Stafford Clark & Co. for Simpson, Curtis & Co., Leeds.*

[CHANCERY DIVISION.]

1960 *July* 25.

Buckley J.

* *In re* PEARCE DUFF & CO. LTD.

[No. 00527 of 1960.]

Company — Capital — Reduction — Defective special resolution — Short notice—Second resolution for payment of premium on paid off preference shares submitted to meeting—Written consent by shareholders to second resolution—Whether effective to cure defect in initial notice—Subsequent consent by all shareholders to both resolutions being treated as valid—Whether sufficient basis for confirmation of reduction of capital—Companies Act, 1948 (11 & 12 *Geo.* 6, *c.* 38), *s.* 141 (2).

By section 141 (2) of the Companies Act, 1948: "A resolution "shall be a special resolution when it has been passed by such a "majority as is required for the passing of an extraordinary "resolution and at a general meeting of which not less than twenty-"one days' notice, specifying the intention to propose the resolution "as a special resolution, has been duly given: Provided that, if "it is so agreed by a majority in number of the members having "the right to attend and vote at any such meeting, being a "majority together holding not less than ninety-five per cent. in "nominal value of the shares giving that right . . . a resolution "may be proposed and passed as a special resolution at a meeting "of which less than twenty-one days' notice has been given."

A company sent to its members short notice of a resolution to be passed at an extraordinary general meeting as a special resolution for the reduction of capital. The directors later wished to propose a second resolution for the payment of a premium to the holders of preference shares paid off on the reduction and, appreciating that they could not give the statutory period of notice for the second resolution, requested the shareholders at the meeting to

sign a consent to the second resolution being proposed, notwithstanding that the statutory notice had not been given. The consent was signed at the meeting by shareholders being a majority together holding more than 95 per cent. in nominal value of the shares. Subsequently, the company obtained the written consent of every shareholder to both resolutions being treated as valid special resolutions.

On a petition for confirmation of reduction of capital presented on the footing that the written consent of every shareholder to treat both resolutions as valid special resolutions had been obtained:—

Held, (1) that the proviso to section 141 (2) of the Companies Act, 1948, required persons agreeing to a resolution being passed on short notice to appreciate that fact, and that since the shareholders did not appreciate that the initial notice of the first special resolution was defective in point of time, the consent given at the meeting could not cure that defect.

(2) But that since every shareholder had in fact subsequently consented to both resolutions being treated as valid special resolutions, and the petition had been presented on that footing, no shareholder could be heard to say that they had not been validly passed, and that, accordingly, the reduction in capital would be confirmed.

PETITION.

By a notice, dated March 7, 1960, the petitioning company, Pearce Duff & Co. Ltd., gave notice to its members of a resolution to be passed as a special resolution at an extraordinary general meeting to be held on March 29, 1960, for the reduction of capital. The company sent the notice to its members on March 8, 1960, and it was conceded that the statutory period of 21 days' notice had not been observed.

The board of directors then formed the opinion that it would be right that the holders of 22,500 £1 fully-paid preference shares, which were being paid off, should receive not only repayment of their capital but also a premium distributed out of the available accumulated profits of the company, and they resolved that a further resolution to that effect be submitted to the meeting to be held on March 29. The directors appreciated that they could not give the proper period of notice in respect of this second resolution, and therefore at the meeting, at which shareholders holding upwards of 95 per cent. of the shares of the company were present, they required the shareholders to sign a document in the following terms: "We, the undersigned, being "a majority in number of the members of the above-named "company entitled to attend and vote at the extraordinary general "meeting of the company convened for this day and the holders "of more than 95 per cent. of the ordinary shares giving that "right, hereby consent to the following additional special "resolution being proposed and considered at that meeting "notwithstanding that the statutory notice of meeting has not "been given in regard to such resolution, viz. . . . (3) That "contingently upon the said reduction taking effect the holders "of the said 22,500 issued preference shares be paid out of the

1960

PEARCE DUFF & CO. LTD., *In re.*

"general reserves of the company available for distribution among "the shareholders a premium of one shilling on each such "preference share payable at the same time as the return of "the capital paid up thereon." That consent was signed by all the shareholders present at the meeting. Later, the company obtained the written consent of all the shareholders to both resolutions being treated as valid special resolutions.

The company presented a petition for confirmation of the reduction of its capital on the footing that the consent of every shareholder to the resolutions being treated as valid had been obtained.

Peter Oliver for the company.

The following case, in addition to those referred to in the judgment, was cited in argument: *In re Hector Whaling Ltd.*[1]

BUCKLEY J. stated the facts substantially as set out above and continued: It is contended in the first place that the fact that shareholders holding more than 95 per cent. of the shares entitled to attend and vote at the meeting signed the consent was sufficient to surmount the difficulty with regard to the inadequate notice given in relation to the resolution set out in the original notice of the meeting. It is pointed out that the resolution which is set out in the form of consent is a resolution which is expressed to be contingent upon the reduction taking effect, the reduction being the subject-matter of the earlier resolutions referred to in the original notice of the meeting. It is contended that by inference, therefore, all the shareholders who signed the consent consented not only to the resolution No. 3 being passed as a special resolution notwithstanding short notice, but consented to all the other resolutions also being passed as special resolutions notwithstanding short notice.

In my judgment, that is not the effect of the consent. Section 141 (2) of the Companies Act, 1948, requires 21 days' notice in the case of a special resolution, with the proviso as to resolutions being passed on short notice which is to be found in that subsection. In my judgment, that proviso requires the persons who agree to a resolution being passed on short notice to appreciate that the resolution is being passed on short notice and to agree to its being so passed with that consideration in their minds. I think that it is clear that in the present case the shareholders who signed the consent did not have it in their mind at all that the initial notice was defective in point of time. So, in my judgment, this consent does not cure the matter in that way.

However, since the date of the meeting, the consent of every shareholder has been obtained to these resolutions being treated

[1] [1936] Ch. 208; 52 T.L.R. 142.

as valid special resolutions, and this petition has been presented upon that footing. I have been referred to *In re Oxted Motor Co. Ltd.*[1] and *Parker and Cooper Ltd.* v. *Reading*,[2] which show that in certain circumstances all the corporators, if they agree, can bind the company. Those cases, I think, relate to a rather different subject-matter from that which I have to consider, because, as I see it, I have to consider not whether these resolutions bound the company as special resolutions but whether any shareholder could now say that the resolutions were not properly passed as valid special resolutions. Having regard to the 100 per cent. consent which has been obtained to the resolutions being treated as valid and to the fact that the petition has been presented upon that footing, I do not think that this court ought to hear any of the shareholders to say that those resolutions were not validly passed.

In those circumstances, I think, the case being a rather exceptional one, that I am entitled to regard this special resolution as sufficient basis for the reduction which the court is asked to confirm; and accordingly, subject to being satisfied on the evidence as to excess of wants, I will confirm the reduction.

Declaration accordingly.

Solicitor: *Kingsford, Dorman & Co.*

M. G. T.

[1] [1921] 3 K.B. 32; 37 T.L.R. 757, D.C.

[2] [1926] Ch. 975.

[PRIVY COUNCIL.]

J. C.†
1960
June 20; *July* 26.

* KENNETH MERRALL FOX . . . APPELLANT;

AND

GENERAL MEDICAL COUNCIL . . . RESPONDENTS.

ON APPEAL FROM THE DISCIPLINARY COMMITTEE OF THE GENERAL MEDICAL COUNCIL.

Medical Practitioner — Medical Disciplinary Committee — Conduct of hearing—Appeal—Rehearing—Powers and duties of Board—"Due "inquiry"—Evidence—Admissibility—Medical Act, 1956 (4 *&* 5 *Eliz.* 2, *c.* 76), *s.* 36—*General Medical Council Disciplinary Committee (Procedure) Rules Order in Council,* 1958 (*S.I.* 1958, *No.* 1805), *r.* 43 (2).

Privy Council—Jurisdiction—Professional discipline—Appeal from General Medical Council—Powers and duties of Board.

Evidence — Cross-examination — Material unproved, on — Discretion of advocate.

Evidence—Denial—Prior denial of charge to friend—Whether admissible—Recent invention alleged.

† *Present*: LORD RADCLIFFE, LORD TUCKER, LORD COHEN.

J. C.

1960

Fox
v.
General
Medical
Council.

The terms of the Medical Act, 1956, which confer a right of appeal from a decision of the General Medical Council acting by its Disciplinary Committee do not limit or qualify in any way the appeal which, in a general sense, is nothing less than a rehearing of the case and a review of the decision. There is no useful analogy between the position of the Board on an appeal under the Medical Act and the position of an appellate court dealing with an appeal from a judge sitting with a jury. A much closer and more useful analogy is between the Board's position and that of a court of appeal hearing an appeal from a judge sitting alone without a jury, though there remains the distinction that in hearings before the Medical Council no reasoned judgment is delivered, but only a finding that the Disciplinary Committee has or has not found the facts alleged in the charge to have been proved to their satisfaction. In such circumstances, the Board's inability to know, except by inference, what considerations of fact or law have proved the determining ones, sometimes requires that the Board shall take a comprehensive view of the evidence as a whole and form its own conclusion whether a "due inquiry" was held and a proper finding made having regard to the rules of evidence under which the Disciplinary Committee's proceedings are regulated.

While there can have been no due inquiry if the rules of natural justice have not been observed (*General Medical Council* v. *Spackman* [1943] A.C. 627; 59 T.L.R. 412; [1943] 2 All E.R. 337, H.L.), it would be an undue limitation of the Board's duty and powers in dealing with the statutory appeal to require no more for the upholding of a determination than observance of the rules of natural justice. The Board is bound to consider complaints made on any appeal against the background of the rules governing the proceedings of the Disciplinary Committee, but it would not necessarily be assumed that merely because something inconsistent with the rules had taken place that there had been no "due inquiry."

At the hearing of a doctor's appeal against a decision of the General Medical Council, acting by its Disciplinary Committee, it was alleged that there had been defects in the conduct of the inquiry in that, inter alia, (1) though letters left by a woman patient (since deceased) with whom the doctor was charged with having committed adultery had been excluded on the advice of the legal assessor, material obtained from them had been used in the cross-examination of the doctor, and (2) that evidence of a friend of the doctor, to whom, it was alleged, the doctor had told the same general story about his relations with the woman patient, had been wrongfully excluded:—

Held, (1) that an advocate was entitled to use his discretion whether to put questions in cross-examination which were based on material which he was not in a position to prove directly (post, p. 1023).

(2) That such confirmatory evidence as the statement alleged to have been made by the doctor to his friend was, generally speaking, immaterial and not admissible. One head of exception from that general rule was that if in cross-examination a witness's account of some incident or set of facts was challenged as being a recent invention, thus presenting a clear issue as to whether at some previous time he had said or thought what he had been saying at the trial, he might support himself by evidence of earlier statements by him to the same effect. The application of that exception must be, within limits, a matter of discretion. The friend's evidence, as tendered, did not come within the exception, and its exclusion was not wrongful in the legal sense, for the challenge to the doctor's

evidence raised by the cross-examination was not of the order that could be affected by proof of statements made by him to the friend.

Rex v. *Roberts* (1942) 58 T.L.R. 138; [1942] 1 All E.R. 187; 28 Cr.App.R. 102, C.C.A.; *Reg.* v. *Cole* (1889) 24 L.R.Ir. 522, C.C.R.; *Rex* v. *Benjamin* (1913) 8 Cr.App.R. 146, C.C.A.; and *Flanagan* v. *Fahy* [1918] I.R. 2 K.B. 361 considered.

Decision of the General Medical Council affirmed.

Appeal (No. 55 of 1959) by Dr. Kenneth Merrall Fox from a determination of the Disciplinary Committee of the General Medical Council made on November 27, 1959, that he had on numerous occasions committed adultery with the late Mrs. Kathleen Margery Thomas, who was his patient, and upon that finding judged him to have been guilty of infamous conduct in a professional respect, and ordered his name to be erased from the Medical Register. Mrs. Thomas committed suicide on April 17, 1959. The appellant had denied the charge.

1960. June 14, 15, 16, 20. *John Hobson Q.C.* and *Desmond Fennell* for the appellant.

Peter Boydell and *John Drinkwater* for the respondents.

The following cases, in addition to those referred to in the judgment, were cited in argument: *Felix* v. *General Dental Council* [1]; *Benmax* v. *Austin Motor Co. Ltd.* [2]; *Allender* v. *Council of the Royal College of Veterinary Surgeons* [3]; *Hughes* v. *Architects' Registration Council of the United Kingdom* [4]; *Stock* v. *Central Midwives Board* [5]; *Ong Bak Hin* v. *General Medical Council* [6]; *O'Gorman* v. *O'Gorman, Phillips, Goldberg and Von Boris* [7]; *Watt or Thomas* v. *Thomas* [8]; *East India Company* v. *Oditchurn Paul* [9]; *Doe* d. *Devine* v. *Wilson* [10]; *Lloyd* v. *Powell Duffryn Steam Packet Co. Ltd.* [11]; *Rex* v. *Haddy* [12]; *Stirland* v. *Director of Public Prosecutions* [13]; *Rex* v. *Ooster-Ritter.* [14]

June 20. Lord Radcliffe. Their Lordships will humbly advise Her Majesty that this appeal ought to be dismissed. They will give their reasons later.

July 26. The reasons of their Lordships for dismissing the appeal were delivered by Lord Radcliffe. This is an appeal

[1] [1960] A.C. 704; [1960] 2 W.L.R. 934; [1960] 2 All E.R. 391, J.C.

[2] [1955] A.C. 370; [1955] 2 W.L.R. 418; [1955] 1 All E.R. 326, H.L.

[3] [1951] W.N. 527; [1951] 2 T.L.R. 872; [1951] 2 All E.R. 859, D.C.

[4] [1957] 2 Q.B. 550; [1957] 3 W.L.R. 119; [1957] 2 All E.R. 436, D.C.

[5] [1915] 3 K.B. 756; 31 T.L.R. 436, D.C.

[6] [1956] 1 W.L.R. 515; [1956] 2 All E.R. 257, P.C.

[7] (1912) 56 S.J. 634.

[8] [1947] A.C. 484; 63 T.L.R. 314; [1947] 1 All E.R. 582, H.L.

[9] (1850) 7 Moo.P.C.C. 502, P.C.

[10] (1855) 10 Moo.P.C.C. 502, P.C.

[11] [1914] A.C. 733; 30 T.L.R. 456, H.L.

[12] [1944] K.B. 442; 60 T.L.R. 253; [1944] 1 All E.R. 319, C.C.A.

[13] [1944] A.C. 315; 60 T.L.R. 461; [1944] 2 All E.R. 13, H.L.

[14] (1948) 32 Cr.App.R. 191, C.C.A.

J. C.
1960
Fox
v.
General
Medical
Council.

against a decision of the General Medical Council, acting by its Disciplinary Committee, that the appellant, Dr. Kenneth Merrall Fox, had been guilty of infamous conduct in a professional respect and that his name should be erased from the Register of Medical Practitioners. The decision of the council was arrived at on November 27, 1959, after a three-day hearing. The charge preferred against the appellant was that for a period of some three years ending in April, 1959, he had improperly associated with a patient of his, the late Mrs. Kathleen Margery Thomas, and committed adultery with her on numerous occasions. The course of proceedings before the committee and on the appeal before this Board made it plain that the charges of improper association and of adultery were to be considered as interdependent, and that the decision to remove the appellant's name from the register must stand or fall according to the view taken of the relevance and cogency of the evidence on the adultery charge.

It is necessary at the outset to say something as to the nature of an appeal to the Board in a matter of this kind, because upon that depends to some extent the Board's approach to questions that relate to the evidence taken at the hearing, and the treatment of it before the committee during the course of the hearing. The appeal in this case lies as of right and by statute—see section 36 of the Medical Act, 1956. The terms of the statute that confers the right do not limit or qualify the appeal in any way, so that an appellant is entitled to claim that it is in a general sense nothing less than a rehearing of his case and a review of the decision.

Nevertheless, an appellate court works under certain limitations which are inherent in any appeal that does not take the form, as this does not, of starting the case all over again and hearing the witnesses afresh. In the High Court, where appeals to the Court of Appeal are by function by way of rehearing, there are well-recognised principles which give some measure of precedence to the decisions of the tribunal that has seen and heard the witnesses over what might otherwise be the view of the facts preferred by the appellate court which has only the record of the evidence to study. Moreover, if the trial at first instance has been by judge and jury, only misdirection by the judge or such special cases as a perverse verdict or a verdict wholly contrary to the weight of the evidence are allowed to justify a reversal of the finding of the jury.

It does not seem to their Lordships that it is possible to find an exact analogy between the position of the Board on an appeal under the Medical Act, and the position of an appellate court dealing with an appeal either from a judge sitting with a jury or from a judge sitting alone to decide both law and fact. With the former there is no useful analogy. The decision arrived at in a hearing before the Medical Council is indeed that of a body of persons, but there is no distinction between their responsibility

for deciding on the law and their responsibility for deciding on the facts. There is no judge to conduct the proceedings, to direct the jury on matters of law or to sum up for them on issues of fact. Although the Disciplinary Committee has the assistance of a legal assessor at its hearing, as required by the Act, it is the President of the court and not he who is in charge of the proceedings, and his duties are confined to advising on questions of law referred to him, and to interventions for the purpose either of informing the committee of any irregularity in the conduct of their proceedings which comes to his knowledge, or of advising them when it appears to him that, but for such advice, there is a possibility of a mistake of law being made.

There is no doubt a much closer and more useful analogy between the Board's position and that of a court of appeal hearing an appeal from a judge sitting alone without a jury, and for many purposes this analogy will suffice. But even here there is a distinction which may be important in some instances. A judge delivers a reasoned judgment; he puts on record his findings where there is material conflict of evidence and the conclusions that he has formed as to the credibility or reliability of the witnesses he has heard; he indicates his views on the law and the bearing of those views on the conclusion that he comes to. It is with this judgment before it that the appellate court proceeds to its hearing of the appeal. But in the case of hearings before the Medical Council no judgment is, of course, delivered. There is only a finding such as we have here that "the committee "have determined that the facts alleged . . . in the charge have "been proved to their satisfaction." It is not possible to tell, except by inference, what has been the weight given by the committee to various items or aspects of the evidence, or what considerations of fact or law have proved the determining ones that have led the members to arrive at the decision finally come to. Such considerations, which are unavoidable in appeals of this kind, do sometimes require that the Board should take a comprehensive view of the evidence as a whole, and endeavour to form its own conclusion as to whether a proper inquiry was held and a proper finding made upon it, having regard to the rules of evidence under which the committee's proceedings are regulated.

The validity of any determination by the committee is, certainly, dependent upon the performance of its statutory duty to hold a "due inquiry" into the matter, and the Board will need to be satisfied as to this if it is challenged on an appeal. But to say that there must be due inquiry does not greatly elucidate the question unless there is some exhaustive definition of the conditions which such an inquiry postulates. It has been said in an earlier case (see *General Medical Council* v. *Spackman* [1]) that there can have been no due inquiry if the rules of natural justice have not been observed, and this is true. At the same

[1] [1943] A.C. 627; 59 T.L.R. 412; [1943] 2 All E.R. 337, H.L.

J. C.
1960
Fox
v.
General
Medical
Council.

time it must be remembered that before there was a statutory right of appeal to the Board under the Medical Act the only way of attacking a decision of the council was by way of certiorari proceedings or, at any rate, one of the other prerogative writs. Such proceedings are not truly by way of appeal. The court in granting or refusing the writ does not investigate the merits of the decision: its only concern is to satisfy itself that certain essential rules of procedure, which are treated by it as constituting the requirements of natural justice, have been duly observed. Their Lordships think, therefore, that it would be an undue limitation of their duty and powers in dealing with the statutory appeal to require no more for the upholding of a determination than observance of what are known as the rules of natural justice.

There are now detailed rules governing many aspects of the proceedings of the Disciplinary Committee—see the General Medical Council Disciplinary Committee (Procedure) Rules Order in Council, 1958. An important provision of these rules is that which deals with the reception of evidence, see rule 43 (2): "The committee may receive as evidence any such oral, documentary or other matter as, after consultation with the legal assessor, they may think fit: Provided that, where any matter is tendered as evidence which would not be admissible as such if the proceedings were criminal proceedings in England, they shall not receive it unless, after consultation with the legal assessor, they are satisfied that their duty of making due inquiry into the case before them makes its reception desirable." There is also a separate set of rules laying down the functions and duties of the legal assessor—see the Medical Disciplinary Committee (Legal Assessor) Rules, 1951. The Board is bound to consider complaints made on any appeal to it against the background of these special regulatory provisions. It may be that in some cases an appellant will be able to show in positive terms that there has been a departure from what the rules required. In any such case the departure will be a matter for comment and, in the absence of any actual indication of the significance or bearing that it had upon the ultimate decision, their Lordships cannot well escape the responsibility of assessing for themselves what that significance or bearing should be taken to be. It is sufficient at this stage to guard themselves from the assumption that merely because something inconsistent with the rules can be shown to have taken place, there can have been no "due inquiry," and the decision appealed from must necessarily be reversed.

With these considerations in mind their Lordships turn to the circumstances of the present appeal. The relevant facts that appeared at the inquiry were few and there is in effect no dispute about them. [His Lordship stated the facts, and continued:] Taking the recited facts by themselves, it is plain that they amount to no evidence of adulterous intercourse. They show an intimate association between the appellant and Mrs. Thomas, an association, it may be said, of a somewhat unusual character.

They show, too, that there were numerous occasions of opportunity for adultery, if adultery took place. But any interpretation of these facts that supported the charge brought against the appellant must have depended entirely upon certain things said or admitted by him in the course of several conversations which he had with a Mrs. Monck-Mason during the months that followed Mrs. Thomas's death. Here again, with the exception of two points, neither of which appears to their Lordships to be of any crucial importance, there is no conflict of evidence between the appellant and Mrs. Monck-Mason as to what was actually said. The conflict arises in the significance to be attached to certain remarks, in the bearing which they are thought to have upon what had gone before, and in the relative plausibility of the explanations offered by the appellant as to his meaning or purpose in saying them. Having no guidance as to the view formed by members of the tribunal on these matters, their Lordships can only proceed by setting out the essential passages of each conversation and assessing their weight as evidence before a tribunal of fact.

[His Lordship referred to the revelant conversations and continued:] Their Lordships feel no doubt as to what all this evidence must have amounted to in the eyes of the tribunal. Much of what passed in these conversations is consistent with either view of the appellant's relations with Mrs. Thomas, but not all of it tallies with his version. The tribunal was fully entitled to make the finding that it did on the evidence before it, and it would be impossible for an appellate court to reverse the finding on any contrary view of the facts. It follows that the appeal must fail unless there was some defect in the conduct of the inquiry, by way of admission or rejection of evidence or otherwise, that may fairly be thought to have been of sufficient significance to the result to invalidate the committee's decision. It is to this that their Lordships now turn.

Points were raised on behalf of the appellant which were said to involve breaches of the Disciplinary Committee rules of procedure, or otherwise to amount to misconduct of the proceedings. The second point made was that, though the letters left by Mrs. Thomas had been excluded on the advice of the legal assessor, material obtained from them was used in the cross-examination of the appellant. Even if it was, there is nothing necessarily improper in that. An advocate is entitled to use his discretion as to whether to put questions in the course of cross-examination which are based on material which he is not in a position to prove directly. The penalty is that, if he gets a denial or some answer that does not suit him, the answer stands against him for what it is worth. The whole episode apparently—their Lordships do not know the contents of the letters—comes down to one question: "Q. Did you seduce her in the surgery very soon after "that (a visit of Mrs. Thomas in 1956)? A. I did not." As the

J. C.
1960
FOX
v.
GENERAL
MEDICAL
COUNCIL.

legal assessor immediately intervened with the words "I don't "think we can have this," the matter was not pursued further. There is nothing in the point.

Next, the objection was made that on the "direction" or advice of the legal assessor inadmissible evidence had been admitted on the issue of adultery. To appreciate what weight there is in this, it is necessary to set out something of the context in which the point arose. What happened was this. In the course of the cross-examination of Mrs. Monck-Mason by the appellant's solicitor she gave an answer to one of his questions which introduced a story about something which Mrs. Thomas had said or implied to her connecting the appellant with the paternity of Anne Thomas while the Thomases and Monck-Masons were on holiday together in Somerset in the year 1958. The answer did not strictly arise out of the question put to her. It might have been objected to on the spot as not being "responsive" and the tribunal invited to ignore it. In any event, a report of some statement made by Mrs. Thomas would not have constituted any evidence against the appellant on the issue of adultery. No objection was taken: the appellant's solicitor, probably exercising a wise discretion, paid no attention to the matter and returned to another point. He did, however, make an allusion to Mrs. Monck-Mason's answer in the course of his closing address to the committee. There was no need for him to do this unless he chose to. The respondents' solicitor had never made any reference to it or at any time suggested that it could be evidence against the appellant, nor had he examined or re-examined Mrs. Monck-Mason on it. The objection taken fails, the truth being that the presence of this inadmissible piece of evidence in the case at all, and any weight that may conceivably have been given to it, must be ascribed to the conduct of the case on behalf of the appellant, and it would be altogether anomalous if he were now to profit by it.

The remaining objection taken relates to what was said to be the wrongful refusal to admit a piece of relevant evidence for the appellant. It was sufficiently apparent that the appellant's solicitor wished to call a Mr. Frampton—an old friend of the appellant—to confirm that on April 15 the appellant had told him the same general story about his relations with Mrs. Thomas, in particular that her outburst of the previous day was not induced by any improper conduct of his, that constituted his defence to the charge before the committee. The purpose of such evidence of a witness's previous statement is and can only be to support his credit, when his veracity has been impugned, by showing a consistency in his account which adds some probative value to his evidence in the box. Generally speaking, as is well known, such confirmatory evidence is not admissible, the reason presumably being that all trials, civil and criminal, must be conducted with an effort to concentrate evidence upon what is capable of

being cogent and, as was remarked by Humphreys J. in *Rex* v. *Roberts*,[2] it does not help to support the evidence of a witness, who is the accused person, to know that he has frequently told other persons before the trial what his defence was. Evidence to that effect is therefore in a proper sense immaterial.

There are, however, certain special exceptions, or at any rate one head of exception, from this general rule. If in cross-examination a witness's account of some incident or set of facts is challenged as being a recent invention, thus presenting a clear issue as to whether at some previous time he said or thought what he has been saying at the trial, he may support himself by evidence of earlier statements by him to the same effect. Plainly the rule that sets up the exception cannot be formulated with any great precision, since its application will depend on the nature of the challenge offered by the course of cross-examination and the relative cogency of the evidence tendered to repel it. Its application must be, within limits, a matter of discretion, and its range can only be measured by the reported instances, not in themselves many, in which it has been successfully invoked.

Thus, in *Reg.* v. *Cole*,[3] a police witness who identified an accused in his trial evidence as being present at and party to the crime charged, being cross-examined on an earlier information sworn by him that did not mention the name of that accused, was allowed to give evidence to the effect that he had mentioned the name in an information of still earlier date. The admission of his evidence seems to be have been treated by the court as coming within the "recent invention" exception. That apart, it seems to have been little more than a permissible exercise of the right of re-examination to ask him in effect whether or not the second of the two informations may not have been due to inadvertence, and thus to displace the inference which the cross-examination had sought to draw from its contents.

Rex v. *Benjamin*[4] is often referred to in this connection. A police witness, whose account of what he saw in certain premises was challenged in cross-examination, was allowed to refer to a contemporary entry in his official note-book showing that he had immediately made a report to the same effect to his superior in the police force.

Perhaps the best example of the way in which the exception can be properly invoked and applied is offered by *Flanagan* v. *Fahy*.[5] There a witness who had testified to the forging of a will was cross-examined to the effect that he had invented his story because of enmity between him and the accused, the beneficiaries under the propounded will. He was allowed to call confirmatory evidence to show that before the cause of this enmity had arisen he had told a third party the story he was now telling. In that situation the issue raised by the cross-examination was

[2] (1942) 58 T.L.R. 138; [1942] 1 All E.R. 187; 28 Cr.App.R. 102, C.C.A.

[3] (1889) 24 L.R.Ir. 522, C.C.R.

[4] (1913) 8 Cr.App.R. 146, C.C.A.

[5] [1918] I.R. 2 K.B. 361.

J. C.
1960
Fox
v.
General
Medical
Council.

clearly defined: a recent invention due to a specified cause, and if the witness could show that his account had been the same before the cause existed he was certainly adding a relevant fact in support of his credibility.

Did Mr. Frampton's evidence, as tendered, come within the exception? In their Lordships' opinion it did not. It is impossible to say that its exclusion was wrongful in the legal sense. The cross-examination of the appellant on behalf of the respondents had not in fact challenged his account of what had passed between him and Mrs. Thomas on April 14. It did not need to, since nearly everything that, according to him, was said could have been said consistently with either view of the case. What was, no doubt, challenged was his whole story that there had been no adulterous relations between them, and that her outburst of April 14 had come as a complete surprise to him. According to him he was "appalled" by the predicament in which this placed him; he had become "more and more worried by the turn of "events." In that state he went to seek advice from an old friend. Could it have made any contribution to the committee's judgment on the veracity of his whole account for them to know that in such a situation he had told the old friend substantially the same story as to his innocence of the matters charged as he was now telling at the hearing? Their Lordships do not think that it could. In their view, the challenge to the appellant's evidence that was raised by the cross-examination was not of the order that could be affected by proof of statements made by him of that kind at that date. No tribunal that was not otherwise prepared to accept the appellant's general story could have been led to do so by hearing what he had told Mr. Frampton on April 15. So regarded, the evidence rejected is no more than the previous assertion of the defence story told at the trial, which Humphreys J. pointed out in *Rex* v. *Roberts*[6] is clearly inadmissible.

As already announced, their Lordships have humbly advised Her Majesty that the appeal ought to be dismissed. The respondents have asked for their costs of the appeal, and their Lordships know of no ground upon which they can refuse the application.

Solicitors: *Hempsons; Waterhouse & Co.*

C. C.

[6] 28 Cr.App.R. 102.

[CHANCERY DIVISION.]

* BURDETT-COUTTS AND ANOTHER *v.* INLAND REVENUE COMMISSIONERS.

1960
June 30;
July 1, 12.

Buckley J.

[1960 B. No. 244.]

Revenue—Estate duty—Business—Partnership assets—Partnership for joint lives—Death of one partner—Partnership a going concern—Whether "interest in a business passes on death"—Whether estate duty chargeable "in respect of" plant and machinery used in partnership business—Finance Act, 1954 (2 *&* 3 *Eliz.* 2, *c.* 44), *s.* 28 (1).

Partnership — Dissolution — Continuance of business afterwards — Proprietary rights of former partners.

By a deed of partnership dated January 17, 1957, a testator and his son entered into a partnership for their joint lives in the business of farming. The deed provided, inter alia, that the capital of the partnership should include the then value of the live and dead stock, agricultural machinery and implements, book debts and other assets of the farming business then carried on by the testator, that the profits should be divided and the losses borne equally and that on the death of either partner the survivor should have the option, exercisable within three months of the death, of purchasing the share of the deceased partner in the capital and assets of the partnership. The deed further provided that if on the death of either partner the other should not exercise the option, then the partnership should be wound up in accordance with the Partnership Act, 1890.

By a codicil to his will dated January 19, 1957, the testator gave all his share of the capital and assets of the partnership with his share of any partnership profits due to him at his death to the son absolutely, subject to any duties payable in respect thereof by reason of his death. Consequently, on the testator's death on February 22, 1957, the son never exercised the option.

On a summons to determine whether the estate duty payable on the testator's death in respect of his share or interest in the farm machinery and plant should be charged in accordance with the reduced rate of duty prescribed by section 28 (1) of the Finance Act, 1954,[1] in which the executors of the testator's estate contended that the testator had an interest in the partnership business which passed on his death within section 28 (1) and the Commissioners of Inland Revenue contended that that section was inapplicable:—

Held, (1), that, when a dissolved partnership was to be or was in the course of being wound up, each partner or his estate retained an interest in every single asset of the former partnership, that interest being proportionate to his share in the total surplus

[1] Finance Act, 1954, s. 28 (1): "Where a business or an interest in "a business passes on a death, any "estate duty chargeable on the death "in respect of industrial heredita-"ments used in and occupied for the "purposes of the business or in "respect of machinery or plant so "used shall (except as hereinafter "provided) be charged in accordance "with a scale of rates of duty repre-"senting the usual scale for the time "being in force with a reduction of "45 per cent. in each of the rates."

[Reported by Miss PHILIPPA PRICE, Barrister-at-Law.]

1960

BURDETT-COUTTS v. INLAND REVENUE COMRS.

assets of the partnership, and it followed that when a partnership business survived the dissolution as a going concern, each partner retained an interest in that business as well as in every asset employed in it. In any case, therefore, where a partnership for joint lives became dissolved and liable to be wound up on the death of a partner and where the partnership business was a going concern, it necessarily followed that an interest in that business passed on the death of the deceased partner (post, p. 1035). Accordingly, an interest in the partnership business did pass on the tetator's death.

Manley v. *Sartori* [1927] 1 Ch. 157; *Perpetual Executor & Trustee Association of Australia Ltd.* v. *Commissioner of Taxes for the Commonwealth of Australia* [1954] A.C. 114; [1954] 2 W.L.R. 171; [1954] 1 All E.R. 339, P.C. applied.

Glen v. *Inland Revenue*, 1926 S.C. 44 considered.

(2) That on the testator's death estate duty became chargeable "in respect of" the plant and machinery used in the partnership business within the meaning of section 28 (1) for there was a sufficient nexus between the value of the testator's share in the business and the assets employed in it to describe the duty as payable in respect of those assets. Accordingly, the estate duty payable on the testator's death in so far as it was chargeable in respect of the share or interest of the testator which passed on his death in the machinery and plant used in the partnership business should be charged in accordance with the reduced rate of duty referred to in section 28 of the Finance Act, 1954.

ADJOURNED SUMMONS.

The following facts are taken from the judgment of Buckley J.: By a deed of partnership dated January 17, 1957, the testator, H. S. H. Burdett-Coutts, entered into partnership with his son, M. S. Burdett-Coutts, as from October 12, 1956, during their joint lives in the business of farmers. The deed provided that the capital of the partnership should consist of the net value as at October 11, 1956, of the live and dead stock, agricultural machinery and implements, book debts and other assets of the business of a farmer then carried on by the testator, less the outstanding liabilities of that business, and should be credited to the testator as his capital, and that any further sums which either partner should contribute should be credited to such partner as capital of his. In fact, the son did not contribute any capital during the continuance of the partnership. The deed provided that the profits should be divided and the losses borne equally. The deed also provided that on the death of either partner the survivor should have the option, to be exercised within three months of the death, of purchasing the share of the deceased partner in the capital and assets of the partnership: it also contained corresponding provisions applicable upon the expulsion or retirement of a partner. The deed further provided that, if on the expulsion, retirement or death of either partner the other should not exercise his option, then the partnership should be wound up in accordance with the Partnership Act, 1890, but so that on a sale of the partnership assets by auction each partner or his personal representatives should be entitled to bid.

On February 22, 1957, the testator died. At that date there were undistributed profits amounting to £687 3s. 11d., one half of which fell to be added to the capital account of each partner as at the date of the testator's death. Consequently, the partners' capital accounts then stood at £27,077 1s. 10d. for the testator and £343 11s. 11d. for the son. The assets of the partnership included plant and machinery used in the farming business worth about £6,600.

By a first codicil to his will, dated January 19, 1957, the testator gave all his share of the capital and assets of the partnership, together with his share of any partnership profits due to him at his death, to the son absolutely, subject to any duties payable in respect thereof by reason of his death. Consequently the son, having become entitled to the testator's share in the partnership under the codicil, never exercised the option under the deed of partnership. The residuary estate of the testator was amply sufficient to meet all the debts and liabilities of his estate (other than estate duty on his share of the partnership) without recourse to his said share or to any other property specifically disposed of.

By an originating summons the plaintiffs, the executors of the testator's will, Whimbrel Esther Burdett-Coutts and John Burne Turner, asked the court to determine whether a proportionate part of the estate duty chargeable on the death of the testator in respect of his share or interest under the deed of partnership ought to be treated as "chargeable in respect of" such of the assets of the partnership as consisted of plant and machinery used for the purposes of the partnership business within the meaning of section 28 of the Finance Act, 1954,[1] and ought, accordingly, to be charged in accordance with the reduced scale of rates of duty referred to in that section.

The plaintiffs contended that the testator had an interest in the partnership business which passed on his death within the terms of section 28 (1). The defendants, the Commissioners of Inland Revenue, contended that the section was applicable only to a share in a partnership business which passed on a death in specie, that is, where the death had no effect on the continuance of the partnership even as regards that share, which passed intact to someone else.

R. O. Wilberforce Q.C. and *K. J. T. Elphinstone* for the plaintiffs.

R. E. Borneman Q.C. and *E. Blanshard Stamp* for the Commissioners of Inland Revenue.

The following cases, in addition to those referred to in the judgment, were cited in argument: *Commissioner of Stamps* v. *Salting*[2]; *In re Ritson*[3]; *In re Beard, Simpson* v. *Beard*[4]; *Assam*

[1] See ante, p. 1027.
[2] [1907] A.C. 449.
[3] [1899] 1 Ch. 128; 15 T.L.R. 76, C.A.
[4] (1888) 58 L.T. 629.

1960

Burdett-Coutts v. Inland Revenue Comrs.

Railways and Trading Co. Ltd. v. *Inland Revenue Commissioners.*[5]

Cur. adv. vult.

July 12. Buckley J. read the following judgment, in which he stated the facts as set out above, and continued: What I have to decide in this case is whether the estate duty payable on the testator's death in respect of his share or interest in the plant and machinery which I have mentioned ought to be charged in accordance with the reduced rate of duty prescribed by section 28 of the Finance Act, 1954, as the plaintiffs, who are the testator's executors, contend, or at the normal rate applicable to the testator's estate. Section 28 (1) is in the following terms: "Where a "business or an interest in a business passes on a death, any "estate duty chargeable on the death in respect of industrial "hereditaments used in and occupied for the purposes of the "business or in respect of machinery or plant so used shall "(except as hereinafter provided) be charged in accordance with "a scale of rates of duty representing the usual scale for the time "being in force with a reduction of forty-five per cent. in each "of the rates." Subsection (2) deals with any case in which duty is chargeable in respect of shares or debentures of a company which fall to be valued by reference to the value of the company's assets in accordance with section 55 of the Finance Act, 1940. Subsection (3), inter alia, extends the operation of the section to any case in which the relevant business is carried on not by such last-mentioned company but by a subsidiary thereof. Subsection (4) deals with any case where the hereditaments, machinery or plant in question were leased by the deceased to a company to which subsection (2) applies. Subsection (5) deals with any case in which a company's business is treated as passing on a death by virtue of section 46 of the Finance Act, 1940. The section is thus designed to grant relief from duty in respect of plant and machinery in cases in which the deceased's interest in the business for the purposes of which the plant or machinery is used is direct or arises indirectly through the medium of a company or companies. The plaintiffs claim that the testator in the present case had an interest in the partnership business which passed on his death within the terms of subsection (1). The defendants, on the other hand, contend that the section is only applicable to a share in a partnership business where that share passes on the death in specie, that is to say, where the death has no effect on the continuance of the partnership even as regards that share, which passes intact to someone else.

Defendants' counsel have referred me to the observations of Lord President Clyde in *Glen* v. *Inland Revenue.*[1] The question in that case arose under the Finance Act, 1914, section 15 of

[5] [1935] A.C. 445; 50 T.L.R. 540; 18 T.C. 509.

[1] 1926 S.C. 44, 51, 54.

which, so far as relevant, provides as follows: "Where the Commissioners of Inland Revenue are satisfied that estate duty has become payable on any property consisting of . . . any interest in . . . a business passing upon the death of any person, and that subsequently within five years estate duty has again become payable on the same property or any part thereof passing on the death of the person to whom the property passed on the first death, the amount of estate duty payable on the second death . . . in respect of the property so passing shall be reduced" to the extent specified in the section. The facts in *Glen* v. *Inland Revenue* [2] were somewhat unusual. "A father and two of his sons carried on business in partnership. By a re-arrangement of the partnership relations the father accepted a sum of £124,646 in full satisfaction of his whole rights in the old firm and its assets, and agreed to allow this sum to remain as a loan to the new firm at 4 per cent. interest, on condition that, if called up by him, or in any event on his death, it was to be repaid by ten yearly instalments. The father contributed no capital to the new firm apart from the loan, but had an interest in the profits to the extent of a one-tenth share. He died in 1922, leaving a will by which he bequeathed the residue of his estate (including the loan) to his family, in certain shares, and estate duty was duly paid thereon. The two sons, who continued to carry on the business, thereafter came to an arrangement with their father's executors, under which the sons agreed to repay the loan at once in return for a certain discount; and, in settling with the executors, they retained in the business the respective shares of the loan falling to them, by crediting themselves with the amounts in the books of the firm. Within two years of the father's death one of the sons died, and estate duty became payable on his estate. His executrix having claimed a reduction, under section 15 of the Finance Act, 1914, of the estate duty payable on the sum credited to the son in the firm's books in respect of his share of his father's loan, the Commissioners of Inland Revenue refused the claim."

The Lord President opened his judgment with the following general observations on the relevant section [3]: "The section applies to estate duty which falls twice in rapid succession upon certain kinds of property passing on death. The property which it is the object of the statute to protect is described as consisting of two kinds: it may be (*a*) 'property consisting of 'land' or of 'any interest in land,' or it may be (*b*) property consisting of 'a business' or 'any interest in a business.' The crippling effect of the repeated incidence of estate duty on the management of landed estate and on the conduct of industrial or commercial business is the mischief for which the section offers a palliative. If two successive owners of an estate, or

[2] 1926 S.C. 44.

[3] Ibid. 53.

1960

Burdett-Coutts v. Inland Revenue Comrs.

Buckley J.

"of a business, die within a short interval, the last successor "must denude the estate, or bleed the business, to whatever "extent may be necessary to enable him to pay the double estate "duty, with disastrous results to the estate or the business.

"Whatever may be the precise content of the expression 'any "'interest in land' and 'any interest in a business,' it seems "safe (having regard to the intention of the enactment) to say "that the interest referred to must be such that the exhaustion "of it in paying repeated estate duties will be detrimental to the "landed estate, or to the business, as the case may be. In other "words, the interest must be such that its fate and fortune is "one with the fate and fortune of the land or business. A share "in a partnership may, by the terms of the articles of copartnery, "be descendible to heirs or legatees; or its value may, on the "death of the partner, become a debt to his representatives. In "the latter case, what reason could there be for protecting the "jus crediti of the representatives (qua creditors of the firm) "from the effects of repeated incidence of estate duty any more "than in the case of any other asset—whether in the form of "jus crediti or of property—which formed part of the deceased's "estate? The diminution of the estate passing to the representatives, as the result of the exaction of estate duty, is no doubt "grievous for the persons entitled to it, but it infers no prejudice "to the business, which in terms of the partnership articles is in "any case liable for the value of the deceased partner's share, "neither more nor less. The same reasoning applies to a charge "on a landed estate. It is true that, in popular language, both "a charge on land and the loan capital of a business might be "called an 'interest' in the land or in the business; but the fact "that the jus crediti in the secured charge or in the loan of "capital passes several times on successive deaths, and so suffers "exhaustion (more or less) in the hands of those who succeed to "it by the payment of estate duty, has no prejudicial effect on "either the landed estate or the business. On the other hand, "the repeated incidence of estate duty on a business or on shares "therein to which successive partners became entitled in terms "of the partnership is a drain on the life-blood of the business."

Later he said this[4]: "A good deal of argument was presented "to us as to the precise nature of the father's loan capital and "the executors' right to repayment of it. There is no ground "for regarding it as anything else than a loan. Whether the "case would be different if the interest of the father had consisted of an ordinary contribution of partnership capital it is "unnecessary to consider. Confining attention to the actual "case before us, the question is whether the right which emerged "to the father's executors to be repaid the loan of £124,646 was "an 'interest in the business' which the partnership had carried "on down to the father's death. In view of the considerations

[4] 1926 S.C. 44, 55.

"explained in the earlier part of this opinion, it seems plain that "the answer to that question must be in the negative. The "father's loan was no more an 'interest in the business' than "any other loan obtained for the purpose of use in the business "would have been."

He also gave as an additional reason for holding the section to be inapplicable that the property or interest which passed on the son's death was not the same property or interest which passed on the father's death. None of the other three judges said anything about the Lord President's general observations. Lord Skerrington held that the interests which passed on the two deaths were not identical. Lord Cullen held that quoad the loan the father had no interest in the business. Lord Sands, while concurring in the result, safeguarded himself in the following terms [5]: "I am not satisfied that where there are two partners "all the working capital they provide may not in certain circum-"stances be held to represent respective interests in the business, "although in order to hold a balance as between the parties in "respect of inequality of interests it may not all be treated in "the same way in the partnership accounts."

I have referred to this case at some length because counsel for the defendants say that Lord Clyde's general observations are authority or justification for the view of the Estate Duty Office which I am told has been and is the basis of departmental practice in cases such as the present one under section 28 (1) of the Finance Act, 1954. That view is stated in the Law Society Gazette for July, 1956, p. 320, as follows: "1. The reduced rate "is applicable where—(a) the right of the deceased partner's "representatives is to a share of the partnership assets as such "(an uncommon case); or (b) the deceased's share of the part-"nership assets passes to a beneficiary under the partnership "agreement, either directly or by virtue of the exercise by the "deceased of a power conferred by the partnership agreement. "2. In the case of a partnership at will without an agreement, "a share in the assets of the business does not pass on the death "of a partner and estate duty is accordingly payable at the full "rate. The partner's death dissolves the partnership (Partner-"ship Act, 1890, section 33 (1)) and his interest in the business "—to be ascertained according to the rules set out in section 44 "of the Act—is a sum of money constituting a debt due from "the surviving partners (see section 43)." This practice is recognised in leading textbooks on Death Duties: Dymond, 13th ed., p. 535; Green, 4th ed., p. 323; Hanson, 10th ed., p. 1050.

The first thing that should be said of Lord Clyde's general observations is that in their general application they were, in my respectful opinion, clearly obiter dicta. His rationes decidendi were (a) that the father's loan was no more an "interest in the "business" than any other loan would have been, and (b) lack

[5] 1926 S.C. 44, 57.

1960

BURDETT-COUTTS v. INLAND REVENUE COMRS.

Buckley J.

of identity in the property passing on the two deaths. Secondly, Lord Clyde expressly reserved his opinion whether the case would have been different had the father contributed to the partnership capital. Thirdly, none of the other judges based his decision in any way on Lord Clyde's general observations. Lastly, the general observations related to an enactment differing in important respects from the section which I have to consider, affording, in my judgment, a much stronger context for justifying the judge's view of the nature of the property to be protected from the adverse effects of taxation than section 28 of the 1954 Act affords. I do not feel, therefore, that I derive much assistance in the present case from Lord Clyde's remarks, or from the decision in *Glen* v. *Inland Revenue*.[6]

I turn, therefore, to consider the terms of section 28 (1) of the Act of 1954. To secure the benefit of that subsection it must in the present case be established (1) that an interest in the partnership business passed on the death of the father, and (2) that estate duty became chargeable on the father's death in respect of machinery or plant used in the partnership business. For the purpose of considering whether an interest in the business passed on the death, I am content to assume that on the true construction of the deed of partnership the partnership was dissolved immediately upon the father's death. I am inclined to think that this is probably the correct view, although I think it is arguable that the partnership continued until the end of the option period with the consequence that the father's share did pass in specie at his death.

Upon the footing that the partnership became dissolved immediately upon the testator's death, the rights which vested in his personal representatives were not identical with those which were vested in the testator immediately before his death, but was the change such that his personal representatives became entitled to no interest in the business? This question must, I think, be answered in the negative. The defendants say that, the partnership having become dissolved, all that the testator's estate was entitled to immediately after his death was a sum of money to be ascertained on taking an account in the winding up of the partnership, had the option been exercised, a sum of money representing the purchase price payable upon an exercise of the option and ascertained in accordance with the provisions of the deed in that behalf; and they contend that what passed was the right to such a sum of money only, and that this did not comprise any interest in the partnership business.

I feel unable to accept this argument. No doubt it is true to say that, when a partnership is dissolved and to be wound up, the ultimate rights of the former partners (including legal personal representatives of deceased former partners) inter se are to receive the amounts which turn out to be due to them

[6] 1926 S.C. 44.

respectively on the final account. No doubt it is also true that (apart from some exceptional agreement) none of them has any exclusive interest in any asset of the partnership or, at any rate until all the liabilities of the partnership have been paid, any definite share or interest in any one partnership asset capable of being realised and got in otherwise than in the liquidation of the partnership: *Rodriguez* v. *Speyer Bros.*[7] But this is not to say that they have no interest in the assets of the partnership pending the final liquidation.

In *Manley* v. *Sartori*[8] Lord Romer as a judge of first instance had to decide how profits earned after dissolution of a partnership by a continued employment of partnership assets in a continuance of the partnership business should be distributed. Following Wigram V.-C. in *Willett* v. *Blanford*,[9] he held that such profits belonged to the former partners in the proportions in which they were interested in the assets employed in earning those profits. Lord Romer, after reading section 42 (1) of the Partnership Act, 1890, which in terms refers to a deceased partner's share of the partnership assets, said[10]: "Now the rights of the deceased "partner or his legal personal representatives are rights over all "the assets of the partnership. He has an unascertained interest "in every single asset of the partnership, and it is not right to "regard him as being merely entitled to a particular sum of cash "ascertained from the balance-sheet of the partnership as drawn "up at the date of his death. So that if, after the death of "Charles James Calder, any profits were in fact earned by using "any single partnership asset, the profits so far as attributable "to the use of that partnership asset are profits in which the "executors of Charles James Calder have a share to the extent "of their share in that particular asset; that is to say, in propor-"tion to their share in the total assets of the partnership." This case is authority for the view that, when a dissolved partnership is to be, or is in course of being, wound up, each partner or his estate retains an interest in every single asset of the former partnership which remains unrealised or unappropriated, and that that interest is proportionate to his share in the totality of the surplus assets of the partnership. It follows that, where the partnership business survives the dissolution as a going concern, each partner retains an interest in that business as well as in every asset employed in it.

The advice of the Judicial Committee of the Privy Council in *Perpetual Executors and Trustees Association of Australia Ltd.* v. *Commissioners of Taxes of the Commonwealth of Australia*[11] is to the like effect. In any case, therefore, where a partnership at will or for joint lives becomes dissolved and liable to be wound up on the death of one of the partners, and at the date of the

[7] [1919] A.C. 59, 68, H.L.
[8] [1927] 1 Ch. 157.
[9] (1841) 1 Hare 253.
[10] [1927] 1 Ch. 157, 163.
[11] [1954] A.C. 114; [1954] 2 W.L.R. 171; [1954] 1 All E.R. 339, P.C.

1960

Burdett-Coutts v. Inland Revenue Comrs.

Buckley J.

death the partnership business is a going concern, it necessarily follows, in my judgment, that an interest in that business passes on the death of the deceased partner. The testamentary dispositions of the deceased partner may, as in the present case, do away with the necessity for a winding up of the partnership by constituting the surviving partner the sole owner of the partnership assets, but this cannot affect the character of the property which passes on the death of the deceased partner to his legal personal representatives; nor can the fact that the surviving partner after the death buys up the interest of the deceased partner either under an option (as in the case last cited) or by negotiation with the deceased partner's legal personal representatives do so. For these reasons I reach the conclusion in the present case that on the death of the father an interest in the partnership business did pass.

The defendants contended that, although this view might be correct if there were no context in other estate duty legislation showing in what sense the legislature used the term "interest "in a business" in such legislation, the use of the same expression in section 15 of the Finance Act, 1914, and the observations of the Lord President in *Glen* v. *Inland Revenue*,[12] show that in enactments on this subject the term is used with a restricted meaning. I have already stated my reasons for thinking that that case does not assist me, nor do I consider that there is a sufficiently close relationship or similarity between section 15 of the Act of 1914 and section 28 of the Act of 1954 to justify an inference that the legislature meant to use the expression in precisely the same sense in the later enactment as in the earlier, if in the earlier enactment it ought to bear a restricted meaning.

I turn now to the question whether on the death of the testator any estate duty became chargeable "in respect of" the plant and machinery used in the partnership business within the meaning of section 28 (1). Mr. Borneman, for the defendants, has contended that no duty became payable in respect of any specific asset of the partnership: the duty became payable, he says, on the value of the testator's share, there being no sufficient nexus between the value of that share and the assets employed in the partnership to make it appropriate to describe the duty as payable in respect of any of those assets. This is an argument which, if valid, must be equally applicable to any share in a partnership, whatever the effect of the death may have been upon the partnership, upon the share, or upon the partners' respective rights. It would exclude every case of partnership from the operation of the section. It would, so far as I can see and so far as Mr. Borneman has suggested, confine the operation of section 28 (1) in its application to the passing of an interest in a business to cases where a business is held in joint ownership by persons who are not partners, which would be, one would

[12] 1926 S.C. 44, 53, 54.

think, most exceptional, and possibly cases where a business is held by trustees in trust for persons beneficially interested in undivided shares. But the commonest and most obvious way in which a man may have an interest in a business, otherwise than through a company, is a partnership, and one must, I think, at least start with a disposition to suppose that the legislature had partnership in mind in framing this subsection. The value of the assets of a partnership underlie and are directly related to the value of each partner's share, just as the value of a company's assets underlie and are directly related to the value to be attributed to shares which have to be valued in accordance with section 55 of the Finance Act, 1940. There is, in my judgment, as close a nexus between partnership assets and the value of a partner's share as there is between the value of a company's assets and the value to be placed on a shareholder's holding which falls to be valued under the last-mentioned section. It is clear from section 28 (2) of the Act of 1954 that relief under the section is available in the latter case and, in my judgment, relief is also available under section 28 (1) in any case in which the value of machinery or plant used in the relevant business underlies and contributes to the value of the deceased's interest in that business. Mr. Borneman submitted that "in respect of" in section 28 (1) meant the same as "on" and that no duty could properly be said to be payable on any of the partnership assets by reason of the testator's death. Even in the case of the death of a sole proprietor of a business no duty could, in my judgment, be said with strict accuracy to be payable "on" any plant or machinery used in his business, for duty is not payable on specific assets comprised in a dead man's personal estate but on the value of his net personal estate after making such allowances for liabilities as are prescribed by section 7 of the Finance Act, 1894. The value of the assets employed in the dead man's business, however, are an element of the value of his net personal estate and must be ascertained before the value of the net personal estate can be ascertained. Just so, in the case of a partner whose death dissolves and may necessitate the winding up of his partnership, the value of his interest in the partnership is an element of the value of his net personal estate, and the value of that interest and consequently the value of the net personal estate can only be ascertained after ascertaining the value of the partnership assets. In each case it is, in my judgment, equally appropriate to describe some part of the duty chargeable on the death as being chargeable "in respect of" the assets employed in the business.

For the purposes of arriving at the net value of any assets in respect of which duty is to be charged at a reduced rate under section 28 (but for that purpose only) section 31 (6) requires the assets of the business to be marshalled in the manner there laid down, but this can have no bearing on the question whether a given case does or does not fall within section 28 (1) and cannot,

1960

Burdett-Coutts v. Inland Revenue Comrs.

Buckley J.

I think, affect the reasons which I have endeavoured to express for holding that in the present case estate duty became chargeable on the testator's death in respect of machinery or plant used in the partnership business.

Subject to any observations counsel may wish to make about the precise form of the order, I will consequently declare that the estate duty payable on the death of the testator so far as it is chargeable in respect of the share or interest of the testator which passed on his death in the machinery and plant used at the time of his death in the business of the partnership constituted by the deed of partnership should be charged in accordance with the reduced scale of rates of duty referred to in section 28 of the Finance Act, 1954.

Declaration accordingly.

Solicitors: *Lawrence, Graham & Co.; Solicitor, Inland Revenue.*

[MANCHESTER ASSIZES.]

1960 *March* 9, 10, 11.

Diplock J.

* SHINDLER *v.* NORTHERN RAINCOAT CO. LTD.

Company—Director—Managing director—Service agreement for ten years—Resolution of company removing from directorship and terminating appointment as managing director—Whether breach of contract—Companies Act, 1929 (19 *&* 20 *Geo.* 5, *c.* 23), *Sch. I, Table A, art.* 68.

Damages—Mitigation—Service agreement—When duty to mitigate arises—Reasonableness of offer.

The plaintiff sold the share capital of the defendant company to L. Co. for £25,000 and it was agreed that the defendant company would enter into a ten-year service agreement to employ the plaintiff as managing director at £3,000 a year plus commission and expenses, which agreement was executed on April 8, 1958. In August, 1958, L. Co., having offered the plaintiff alternative employment to which he appeared agreeable, sold the share capital in the defendant company to M. Co., who did not wish to retain the plaintiff's services. No concluded agreement as to the plaintiff's employment by L. Co. was ever reached and the plaintiff refused all subsequent offers of employment by them. At an extraordinary general meeting of the defendant company on November 21, 1958, the plaintiff was removed from office as a director. L. Co. made further offers to employ the plaintiff in February and March, 1959, which he refused. The plaintiff claimed damages against the defendant company for wrongful dismissal:—

Held, (1) that although article 68 of Table A of Sch. I[1] was

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[Reported by Donald Hart, Esq., Barrister-at-Law.]

[1] Article 68 of Table A of Sch. I to the Companies Act, 1929 (19 & 20 Geo. 5, c. 23): "The directors may "from time to time appoint one or "more of their body to the office of "managing director or manager for "such term and at such remuneration ". . . as they may think fit, and

incorporated into the articles of the defendant company, nevertheless there was an implied term in the plaintiff's agreement that the defendant company would do nothing of its own motion to put an end to the state of circumstances which enabled the plaintiff to continue as managing director and, accordingly, the defendant company was in breach of its contract with the plaintiff.

Stirling v. *Maitland* (1865) 34 L.J.Q.B. 1; 5 B. & S. 840; *Southern Foundries (1926) Ltd.* v. *Shirlaw* [1940] A.C. 701; 56 T.L.R. 637; [1940] 2 All E.R. 445, H.L. applied.

Bluett v. *Stuchbury's* (1908) 24 T.L.R. 469, C.A.; *Nelson* v. *Nelson (James) & Sons Ltd.* [1914] 2 K.B. 770; 30 T.L.R. 368, C.A.; *Read* v. *Astoria Garage (Streatham) Ltd.* [1952] 1 T.L.R. 1059; [1952] 1 All E.R. 922; [1952] Ch. 637; [1952] 2 T.L.R. 130; [1952] 2 All E.R. 292, C.A. considered.

(2) That, on the question of damages, there was no duty on the plaintiff to accept the offer of L. Co. and thus mitigate his damages prior to the breach of contract on November 21, 1958; that the subsequent offers of employment by the L. Co. were genuine but having regard to all the facts, including the pending litigation, the plaintiff was not unreasonable in refusing those offers and was entitled to damages of £7,500.

ACTION.

The plaintiff, Israel Shindler, claimed £33,126 damages for wrongful dismissal from his employment as managing director of the defendant company, the Northern Raincoat Co. Ltd. On a date early in 1958 the plaintiff and his wife sold the £2,000 share capital of the defendant company, which the plaintiff had built up over the previous ten years, to Loyds Retailers Ltd. for the sum of £25,000. It was a further term of this agreement that the defendant company should enter into a service agreement with the plaintiff for a period of ten years at a salary of £3,000 a year plus 10 per cent. commission on the audited annual profits over £15,000, and such an agreement was entered into under the seal of the company on April 8, 1958. From April until August, 1958, the business of the defendant company was carried on by the plaintiff as managing director under the directions and control of Loyds, whose aim at this time, as at the time of the acquisition, was to integrate the business of the defendant company with their own similar business.

In August, 1958, J. Mandleberg & Co. (Holdings) Ltd. offered to pay Loyds £65,000 for the shares of the defendant company.

"a director so appointed shall not, "while holding that office, be sub-"ject to retirement by rotation, or "taken into account in determining "the rotation or retirement of direc-"tors; but his appointment shall be "subject to determination ipso facto "if he ceases from any cause to be "a director, or if the company in "general meeting resolve that his "tenure of the office of managing "director or manager be determined." These matters are dealt with in similar terms in Article 107 of Table A of Sch. I to the Companies Act, 1948, save that that Article ends with the words: ". . . if he cease from any "cause to be a director," and does not provide for termination by resolution of the company. The removal of a director by resolution of the company is there dealt with in Article 96, which concludes: "Such removal "shall be without prejudice to any "claim such director may have for "damages for breach of any contract "of service between him and the "company."

1960

Shindler v. Northern Raincoat Co. Ltd.

They did not wish to retain the plaintiff's services, and it was a term of their offer that the agreement between the defendant company and the plaintiff should be rescinded. On August 18, 1958, Symons, a director of Loyds and of the defendant company, told the plaintiff of Mandlebergs' offer, and added that if the offer was accepted the plaintiff's contract with the defendant company would come to an end, but Loyds would be prepared to employ him on a ten-year agreement at the same salary and with the same expenses, as controller of their shops, or in the mail order or credit trade sides of their business. The plaintiff was at this stage willing to fit in with these proposals.

On the afternoon of the same day the plaintiff saw the managing director of Mandlebergs, and told him that he would be seeing Loyds when Mandlebergs were willing to release him from his agreement with the defendant company. On this date Loyds accepted Mandlebergs' offer for the shares of the defendant company. The next day the plaintiff had a further interview with Symons at his own request, from which they parted on bad terms. Thereafter there was an exchange of correspondence in which the defendant company repeated the offers of employment by Loyds, and the plaintiff refused to accept these offers, mainly on the ground that they involved a drop in status from managing director to employee.

On November 21, 1958, after certain Chancery proceedings directed to that end, an extraordinary general meeting of the defendant company was called by the plaintiff. At this meeting resolutions were passed removing the plaintiff from his directorship of the defendant company, and terminating the service agreement. Thereafter the plaintiff commenced this action.

The defence raised three matters: (1) That the agreement of April 8, 1958, was not enforceable, in that Symons, who purported to act as a director of the defendant company in affixing the company's seal to the agreement, was not in fact a director since he did not hold the qualification share required by the articles. The defendants abandoned this point by certain admissions in their rejoinder to matters pleaded in the reply.

(2) That the agreement of April 8, 1958, was subsequently rescinded, or the plaintiff was estopped from asserting any rights under it after November 30, 1958. This situation was alleged to arise in one of three ways:

(i) At the interview of August 18, 1958, the plaintiff accepted the offer made by Symons on behalf of Loyds to employ him for ten years from a date not later than November 30, 1958, as controller of their shops at a salary of £3,000 per annum plus expenses; further, the plaintiff, or the plaintiff together with Symons, accepted this on behalf of the defendant company as a novation of the plaintiff's agreement with the defendant company.

(ii) At the interview later the same day with Symons and Strauss, the plaintiff agreed with the defendant company, through Symons, to rescind his agreement with them by stating that he

had agreed to enter the employment of Loyds from a date not later than November 30, 1958, and would co-operate in the running of the defendant company for so long only as Mandlebergs wished.

(iii) In reliance upon the plaintiff's above statement as to his agreement with Loyds, the defendant company changed its position by conducting its business in accordance with the directions of Mandlebergs, and the plaintiff was therefore estopped from asserting any right to be employed by the defendant company for any period after November 30, 1958.

The plaintiff by his reply denied that there was any binding agreement between himself and Loyds.

(3) That it was a condition of the plaintiff's right to remuneration under the agreement of April 8, 1958, that he should continue to be managing director of the defendant company. The articles provided that an appointment to the office of managing director should be determined ipso facto if the holder ceased to be a director. On November 21, 1958, by a resolution passed in accordance with the articles, the defendant company removed the plaintiff from his directorship, and accordingly his dismissal from the position of managing director was lawful and not actionable.

The plaintiff by his reply admitted that he had been duly removed from his directorship, but asserted that the defendants were nevertheless liable in damages for his dismissal.

The defendant company by their rejoinder relied upon certain further offers of employment made by Loyds to limit any damages to which the plaintiff might be entitled.

D. Brabin Q.C. and *C. N. Glidewell* for the plaintiff.

Fenton Atkinson Q.C. and *Lionel Cohen* for the defendant company.

The following cases were cited in argument, in addition to those referred to in the judgment: *Ross* v. *Pender*[2] and *Payzu Ltd.* v. *Saunders*.[3]

DIPLOCK J. stated the facts and found that there was no concluded agreement between Loyds Retailers Ltd. and the plaintiff on August 18, 1958, and that the plaintiff's service agreement with the defendant company was accordingly not rescinded. His Lordship then passed to consider the third head of defence and the question of damages, on which matters alone this case is reported: The articles of association of the Northern Raincoat Co. incorporated by article (1) the articles set out in Table A of the Companies Act, 1929, and among the articles so incorporated was article 68 about managing directors which is in the following terms:

[2] (1894) 1 R. (Ct. of Sess.) 352; 11 Sc.L.R. 175.

[3] [1919] 2 K.B. 581; 35 T.L.R. 657, C.A.

1960

Shindler v. Northern Raincoat Co. Ltd.

Diplock J.

"The directors may from time to time appoint one or more of "their body to the office of managing director or manager for "such term and at such remuneration (whether by way of salary, "or commission, or participation in profits, or partly in one way "and partly in another) as they may think fit, and a director so "appointed shall not, while holding that office, be subject to "retirement by rotation, or taken into account in determining "the rotation or retirement of directors; but his appointment "shall be subject to determination ipso facto if he ceases from "any cause to be a director, or if the company in general meeting "resolve that his tenure of the office of managing director or "manager be determined." Since on November 21, 1958, the plaintiff was removed from office as a director and thus ipso facto ceased to be managing director, and his tenure of office was determined by the company in general meeting, the defendants contend that as a matter of law he was not wrongfully dismissed and he had no claim in this connection. In support of that contention, Mr. Atkinson, for the defendants, relied upon a number of cases, of which the most important are *Bluett* v. *Stuchbury's* [1] and the decision of Harman J. in *Read* v. *Astoria Garage (Streatham) Ltd.*[2]

The argument for the defendants on this matter, which gains some support from the cases I have referred to and from *Nelson* v. *Nelson (James) & Son Ltd.*,[3] must, I think, be put thus: where a company's articles of association include article 68, the directors have no power to appoint a managing director on terms which purport to exclude the company's right to terminate his office and his appointment as managing director ipso facto upon his ceasing to be a director, or by resolution in general meeting to resolve that his tenure of office as managing director be determined. That argument can be put in alternative ways, either that an agreement for a fixed term which does not incorporate the right of the company set out in article 68 is ultra vires, or else that an agreement for a fixed term must be subject to the implied term, that it is terminable in either of the circumstances set out at the end of article 68.

It seems to me that this point is concluded against the defendants by the decision of the House of Lords in *Southern Foundries* v. *Shirlaw*.[4] That case was somewhat complicated, and gave rise to a division of opinion in the House of Lords. Two of their Lordships who were most familiar with the chancery side came to one conclusion, and three of their Lordships who were perhaps more familiar with the common law side came to another. There are some references in subsequent cases in the Chancery Division which suggest that it is difficult to ascertain what *Southern*

[1] (1908) 24 T.L.R. 469, C.A.

[2] [1952] 1 T.L.R. 1059; [1952] 1 All E.R. 922.

[3] [1914] 2 K.B. 770; 30 T.L.R. 368; 83 L.J.K.B. 823; 110 L.T. 888, C.A.

[4] [1940] A.C. 701; 56 T.L.R. 637; 109 L.J.K.B. 461; 164 L.T. 251; [1940] 2 All E.R. 445, H.L.

Foundries v. *Shirlaw*[4] determined. It does, however, seem to me that all five of their Lordships in the *Southern Foundries* case[4] were agreed upon one principle of law which is vital to the defendants' contention in this case. That principle of law is that laid down in the case of *Stirling* v. *Maitland*,[5] where Cockburn L.J. said[6]: "if a party enters into an arrangement which can "only take effect by the continuance of a certain existing set of "circumstances, there is an implied engagement on his part that "he shall do nothing of his own motion to put an end to "that state of circumstances under which alone the arrangement "can be operative." Applying that respectable principle to this case, there is an implied engagement on the part of the company that it will do nothing of its own motion to put an end to the state of circumstances which enables the plaintiff to continue as managing director: that is to say, an undertaking that it will not revoke his appointment as a director and will not resolve that his tenure of office be determined.

It is necessary to say a word about the circumstances of the *Southern Foundries* case.[7] In that case the plaintiff had a ten-year contract as managing director of Southern Foundries Ltd. At the time when he was appointed the articles of the company were not in the form of article 68. The relevant articles were these:—

Article 90: "The directors may from time to time appoint "any one or more of their body to be managing director, or "managing directors, for such period and upon such terms as "they think fit . . ."

Article 91: "A managing director shall not while he continues "to hold that office be subject to retirement by rotation and he "shall not be taken into account in determining the rotation of "retirement of directors; but he shall, subject to the provisions "of any contract between him and the company, be subject to "the same provisions as to resignation and removal as the other "directors of the company, and if he cease to hold the office of "director he shall ipso facto and immediately cease to be a "managing director."

Article 105 is important: "The company may by extraordinary "resolution remove any ordinary director before the expiration of "his period of office, and may, if thought fit, by ordinary resolu-"tion appoint another director in his stead . . ."

Thus there was in the articles in force at the time that the managing director's agreement was entered into an article which enabled the company by extraordinary resolution to determine his appointment by removing him as a director. Subsequently, the articles were changed and an article was inserted which gave another company, the Federated Foundries Ltd., a stranger to the contract of employment, power at any time, by an instrument

[4] [1940] A.C. 701.
[5] (1865) 5 B. & S. 840; 34 L.J. Q.B. 1; 11 L.T. 337; 29 J.P. 115.
[6] 5 B. & S. 840, 852.
[7] [1940] A.C. 701.

1960

SHINDLER v. NORTHERN RAINCOAT CO. LTD.

Diplock J.

in writing, to remove from office any director of Southern Foundries Ltd. The matter which gave rise to a dissension of opinion in the House of Lords was whether when Federated Foundries Ltd. exercised that power as they did by removing the plaintiff that constituted wrongful dismissal of the plaintiff. The majority of the House held that the fact that it was done by a third party who was given power to do so by the new article did not prevent this being wrongful dismissal although it was done by a stranger to the contract and did not, on the face of it, come within the principle in *Stirling* v. *Maitland*.[8] The minority took the view that it did not come within the *Stirling* v. *Maitland*[8] principle because the articles were altered in good faith and the act was the act of a third party. All of their Lordships made it quite plain that in their view if the company did exercise the power under the original articles by removing the plaintiff as director by extraordinary resolution, that would have been a breach of the implied term laid down in *Stirling* v. *Maitland*[8] and would have given rise to the right to damages.

Lord Maugham said[9]: "In my opinion it would have been a "breach of the negative term properly understood for Southern "to have removed the respondent under article 105 from his "position as director during the ten years; but I am also of "opinion that it was not a breach of any implied term in the "agreement for Southern to alter its articles as was done and "to include in the altered articles the new article 8." Lord Atkin said,[10] after referring to *Stirling* v. *Maitland*[11]: "I think "it follows that if either the company of its own motion removed "the respondent from the office of director under article 105, or "if the respondent caused his office of director to be vacated by "giving one month's notice of resignation under article 89, either "of them would have committed a breach of the agreement . . ." Lord Wright, who is with the majority, came to the same conclusion.[12] Lord Romer, who was the other member of the minority, deals with this matter thus[13]: "But the agreement "by Southern to employ the respondent, or his agreement to "serve them, could only take effect for the full ten years, if the "respondent continued to be a director during that period. In "these circumstances there was in my opinion an implied "engagement on the part of Southern that they would not during "that period exercise their power of removing him from his "directorship under Article 105, and an implied obligation on "his part that he would not during that period serve notice of "resignation under Article 89 (*f*)." He then referred to *Stirling* v. *Maitland*.[11]

It seems to me, therefore, that the decision of their Lordships in *Southern Foundries* v. *Shirlaw*,[14] which is, of course, binding

[8] 5 B. & S. 841.
[9] [1940] A.C. 701, 713.
[10] Ibid. 717.
[11] 5 B. & S. 841.
[12] [1940] A.C. 701, 719.
[13] Ibid. 730.
[14] [1940] A.C. 701.

on me, is conclusive in the plaintiff's favour and that this defence fails. I should, however, be doing an injustice to Mr. Atkinson's argument if I did not refer to the cases on which he relies and in particular to *Reid* v. *Astoria Garage (Streatham) Ltd.*, before Harman J.[15]

That was a case where a company whose articles included article 68 of Table A, and whose directors had by resolution appointed the plaintiff to be managing director of the company at a salary of £7 a week from Monday, February 1, 1932. On September 28, 1949, an extraordinary general meeting of the company passed a resolution dismissing him and resolving that his tenure of office be terminated. In these circumstances, he brought an action for breach of contract, alleging that he was entitled, as servants normally are, to reasonable notice. Harman J. held that the action failed, and I think it is plain that the ratio decidendi, if it could be reconciled with the House of Lords' decision in *Southern Foundries (1926) Ltd.* v. *Shirlaw*,[14] would be in favour of the defendants.

Harman J. said[16]: "It is difficult to find any direct authority "for this matter. The nearest case, I think, is *Nelson* v. *Nelson* "*(James) & Sons Ltd.*,[17] where the facts were quite different "because, for one thing, there was a special article expressly "empowering the board to revoke a managing director's appoint-"ment and not a Table A article, and for another thing (to quote "the headnote): 'The board appointed the plaintiff to be "'managing director upon the terms of an agreement which "'provided that he should hold office so long as he should remain "'a director of the company and retain his due qualification "'and efficiently perform the duties of the office.' The board "subsequently revoked that appointment, relying on their express "power to revoke. Lord Reading C.J.[18] said that one must "read that power to revoke as subject to the contract which "had been made, and that contract, he said, was for a term "of years, and the power to revoke only gave the directors "'power to take away that which they had given provided that "'they had not bound themselves to give it for any period of "'time.' He said that that was an appointment for a period "of time and could not by the exercise of a power of revocation "be altered. Swinfen Eady L.J., however, does deal with "Table A. He says[19]: 'The articles may give a power to the "'directors to appoint one of their number to be managing "'director, but no power to revoke or cancel the appointment. "'The company may keep that power in its own hands to be "'exercised in general meeting.' That is the position under "Table A in the Companies Act, 1908, which is the same for "this purpose as the Act of 1929. He goes on: 'With an article "'in that form it is manifest that the directors can only appoint

[14] [1940] A.C. 701.
[15] [1952] 2 All E.R. 292, C.A.
[16] Ibid. 294.
[17] [1914] 2 K.B. 770.
[18] Ibid. 774.
[19] Ibid. 779.

1960

SHINDLER v. NORTHERN RAINCOAT CO. LTD.

Diplock J.

" ' a managing director subject to the right of the company in " ' general meeting to resolve at any time that his tenure of the " ' office of the managing director is to be determined.' These " observations are obiter, but, nevertheless, they are germane " to the matter in question.

" In *Southern Foundries (1926) Ltd.* v. *Shirlaw*,[20] there was " a division both in the House of Lords and in the Court of " Appeal. The majority held that there was a breach of contract " if a company which had appointed a managing director for " ten years allowed its articles to be so altered that a power to " remove was imported. I do not think, in view of the unfor- " tunate differences of opinion which made themselves plain, " that the case helps very much.

" It seems to me that I ought to apply the observations of " Swinfen Eady L.J. in the *Nelson* case.[19] The article does, " after all, say quite clearly that the appointment is ' subject " ' to determination ipso facto if the company resolve ' that that " be so. So, everybody who becomes a managing director of " this company which has adopted Table A knows that he has " certain rights, and that the board cannot alter them. It may " be that the company cannot, by altering its articles, give them " power to do that. That would seem to be so from the majority " decision in the House of Lords in *Southern Foundries (1926)* " *Ltd.* v. *Shirlaw*.[21] But that does not, it seems to me, forbid, " as being a breach of contract, the company itself (having power " to dismiss) to exercise that power, because every contract which " is entered into with the company must on the face of it be " subject to that chance."

There is no doubt that in that judgment the ratio decidendi is in the defendants' favour, although it seems to me, with the greatest respect, that it cannot be reconciled with the opinions of their Lordships in *Southern Foundries*.[21] *Reid* v. *Astoria Garage (Streatham) Ltd.* went, however, to the Court of Appeal, where the decision was upheld.[22] The Court of Appeal did not, however, as I read it, adopt the ratio decidendi of Harman J.

After referring to the passage I have already read in the judgment of Harman J., in which he refers to the judgment of Swinfen Eady L.J. in *Nelson* v. *Nelson (James) & Sons Ltd.*, Jenkins L.J. continues[23]: " It will be seen that the learned Lord " Justice was there recognising that where a company in general " meeting reserves the right to determine the appointment of a " managing director, the directors cannot by the appointment of a " managing director for some fixed term, override that power in " the company. At all events, I think it is plain that where " there is an article in that form, a managing director, whose " appointment is determined by the company in general meeting " in exercise of that power, cannot claim to have been wrongfully

[19] [1914] 2 K.B. 779.
[20] [1940] A.C. 701.
[21] [1940] A.C. 701.
[22] [1952] Ch. 637.
[23] Ibid. 640.

"dismissed unless he can show that an agreement has been "entered into between himself and the company, the terms of "which are inconsistent with the exercise by the company of "the power conferred on it by the article to determine a managing "director's appointment in general meeting. In the present case, "as I have said before, there is no evidence of the existence of "any such contract." It seems to me that Jenkins L.J. did not accept the full ratio decidendi of Harman J. and left open the question of whether, where an agreement has been entered into between the managing director and the company, the terms of which are inconsistent with the exercise of the company's power conferred upon it by the articles, and the company exercise that power, there is an action for wrongful dismissal. Having regard to the articles I have indicated and to the authorities in particular, and to *Southern Foundries* v. *Shirlaw*,[24] I answer this question in the affirmative and hold that the defence fails on this point.

That leads me to the last question which I have to determine, the matter of damages. It is a matter which has given me very great difficulty and I must deal with two contentions on behalf of the defendants. The relevant facts are these: The plaintiff was dismissed on November 21, 1958. He advertised in December for employment, but without success, and he answered a large number of advertisements in the Press. He has provided me with a schedule of advertisements, offering his services for high executive posts. He was unsuccessful, he says, in obtaining any employment of that nature, and it was not until February 5, 1960, well over 12 months after his employment was terminated, that he got a job as a salesman at a salary of £9 a week, plus £5 expenses and commission on the amount of business which he obtains. That job he holds now. After the termination of his employment and while he was seeking work, Loyds Retailers Ltd. wrote him a letter, dated February 11, 1959, in the following terms:

"Dear Mr. Shindler,

"I am writing to you as I understand that you have recently "advertised for a position. As you know, this company was very "interested in acquiring your services and, despite the events of "the past months, we would still be interested in your joining "us on the shops side, at a salary of £3,000 per annum, plus "full time use of a car and expenses incurred. The position "would, of course, be on a full time basis. I look forward to "hearing from you.

"Yours faithfully,

"(signed) L. Symons."

The plaintiff took no notice of that letter and on March 2 a further letter was written by Mr. Symons as follows:

[24] [1940] A.C. 701.

1960

Shindler v. Northern Raincoat Co. Ltd.

Diplock J.

"Dear Mr. Shindler,

"Would you please let me know whether or not you are "interested in the offer made to you in my letter of the 11th "ultimo. We desire to fill this position with all speed and as "we feel that you suit our requirements I have left several "other interviews pending waiting for your reply. Will you, "therefore, please be good enough to get into touch with me as "quickly as possible and if I do not hear from you within the "course of the next week then I shall have to reluctantly assume "that you are not interested. This would leave me with no "alternative but to carry on with other interviews to fill the "position as the matter to us is most urgent."

That drew a reply on March 5 from the plaintiff, at great length, which I need not read. It was an abusive and bitter letter, turning down the offer.

I must first deal with the contentions made by the defendants. It is said on their behalf that it is the duty of the plaintiff to mitigate his damages—or perhaps a better way of putting it is that he is under a duty to take reasonable steps to mitigate his damages: alternatively, it is said that the true measure of damages is the loss which can reasonably be expected to result from the breach and that includes loss arising during a reasonable time spent in obtaining other employment. The first contention of the defendants is, that being so, that the plaintiff ought to have accepted the original offer of £3,000 a year, which was made in August and September, 1958. There seems to me to be two objections to that: one of fact and one of law. I will deal with the objection in law first.

The position was that, on the correspondence, the defendants had, by the letter dated September 2, 1958, told the plaintiff that his service with them would terminate not later than November 30, 1958. That was a wrongful repudiation of contract which the plaintiff had an opportunity either to accept by rescinding the contract and thus entitle himself to sue for damages, or to continue to treat the contract as subsisting and to continue to serve as managing director. He elected to do the latter and there was accordingly no breach of the contract on which he could sue until his office as director was terminated on November 21, and between September 2 and November 21 the defendants had a locus paenitentiae in which they could have changed their minds and decided to go on employing him. It seems to me that on a matter of law it cannot be said that there is any duty on the part of the plaintiff to mitigate his damages before there had been any breach, which he has accepted as a breach.

The objection in fact seems to be this. In his solicitor's letter dated September 27, 1958, the plaintiff expressed willingness to accept, or, as it was put, was "not unwilling to accept," the alternative post offered by Loyds Retailers Ltd., provided his functions were clearly defined and the letter continued: "the "acceptance is on the strict understanding that in so doing he

"does not in any way prejudice his claims arising out of the "breach of his contract. . . ." The letter in reply, dated October 1, stated that the proviso "is of course not acceptable to "our clients. . . ." Therefore, the only offer which was before him at that moment was an offer of employment on the terms that he should not act on such legal rights as he had for damages for breach of contract against the defendants. It seems to me that it was not reasonable to ask him, or to require him, to accept such an offer. That matter is self evident.

The second contention of the defendants is that whatever may be said about the earlier offers, namely, those made in February and March, 1959, after he had been dismissed, there were further offers which ought to have been accepted by the plaintiff if he were acting reasonably. The plaintiff invites me to say that these offers were not sincerely made. They were merely offers designed to reduce the possible damages in this litigation. Since that charge has been made, I think it right to say that I am satisfied that these offers were genuine offers and that Loyds considered that the plaintiff was a man with a flair who could be useful to them in their business and they were prepared, despite what had gone before, to make use of his services. But the fact that I have found that the offers were genuine offers, of course, does not conclude the matter, because I have to consider whether it was reasonable for the plaintiff to refuse them. I may have indicated that I have no great moral admiration for the attitude which the plaintiff has taken in this case, but I have still got to consider, using common sense, whether it was reasonable in all the circumstances to expect the plaintiff to accept the offer of employment from Loyds made in February and March, 1959. The plaintiff said that he thought that the offers were not genuine, and I have no doubt that he did so think.

It seems to me that in all the circumstances, having regard to the row which had taken place between the plaintiff and Mr. Symons of Loyds at their last significant meeting, to the fact that there had already been litigation about the calling of the meeting on the question of the dismissal of the plaintiff, to the fact that the litigation in this action had already reached the stage at which the pleadings were being delivered thick and fast, and to the fact that the letter offering the employment was not sent, as it might well have been at that stage, through the solicitors; and having regard especially to the fact that the employment was one of personal services where the plaintiff would have to act under the direction of Mr. Amelan, the managing director of Loyds, and Mr. Symons, I think as a matter of common sense it would not be right to say that the plaintiff was unreasonable, at that time in those circumstances, in refusing the offer. These are the two contentions of the defendants which go to the root of the question on the amount of damages.

I am in great difficulty in assessing the damages in this case.

1960

SHINDLER v. NORTHERN RAINCOAT CO. LTD.

Diplock J.

I am surprised—and I express my surprise—that the plaintiff has failed to get any substantial employment, or indeed any employment at all for some 12 months afterwards, and I feel a little dubious as to whether he has tried as hard as he has sought to give the appearance of trying. It would not, however, be right for me to say that I am satisfied that he could have got other employment at a comparable salary, at £3,000 a year, during the period which has elapsed until now; but having seen him, I feel pretty confident that once this action is over he will overcome some of the difficulties which have presented themselves until now and obtain employment, and I do not doubt that during the course of the next eight years, and pretty soon, he will find some employment in which his undoubted flair can be used at a level more commensurate with it than that which exists at the moment in his present employment.

This is a case in which I have got to take into consideration the principles laid down in *British Transport Commission* v. *Gourley*[25] as to the incidence of taxation, and in which I have got to make the best forecast I can as to his future employment and to take into consideration what would be the worth of the 10 per cent. commission on profits over £15,000 a year, in the management of the defendants by Mandlebergs.

Taking the best view I can and making the best estimate I can, and taking a more optimistic view than the plaintiff does as to the prospects of his future employment, I think that a proper figure for damages in this case is £7,500.

Judgment for the plaintiff with costs.

Solicitors: *Linder, Myers & Pariser, Manchester; Amelan & Roth, Manchester.*

[25] [1956] A.C. 185; [1956] 2 W.L.R. 41; [1955] 3 All E.R. 796, H.L.

[CHANCERY DIVISION.]

1960
June 21, 22.

Russell J.

* *In re* ROBERTSON'S WILL TRUSTS.

[1960 R. No. 294.]

Trusts—Variation—Act of 1958*—Protective trust—Exercise of power of appointment—Appointment to enable arrangement for division of trust fund—Intention to benefit appointees—Consequential benefit to appointor—Whether fraud on power—Whether court should approve arrangement—Variation of Trusts Act,* 1958 (6 *&* 7 *Eliz.* 2, *c.* 53), *s.* 1.

Power of Appointment—Fraud on power—Benefit to non-object—Purpose to benefit objects—Subsequent discovery of possible benefit to appointor—Whether purpose changed—Whether fraud on power.

A testator devised and bequeathed part of his estate on trust for his son, the applicant, for life on protective trusts and after his

death upon trust for such of the applicant's issue, born within 21 years of the applicant's death, as he should by deed, revocable or irrevocable, or by will or codicil appoint, and in default of appointment on trust for his children equally.

The applicant, who had three children, desired to make some immediate capital provision for them consistently with his being in no worse position financially. He was advised that, having regard to the protected life interest it was not possible for him to deal with the capital of the trust fund without the approval of the court under the Variation of Trusts Act, 1958. It was, therefore, proposed that he should exercise his power of appointment irrevocably in favour of his three children equally and that the court should be asked to approve an arrangement whereby the capital of the applicant's share in the trust fund was to be divided between the applicant and his children in accordance with the actuarial values of their respective interests therein. Subsequently he was advised that the capital sum which he would receive on such a division would purchase an annuity of an amount larger than the amount of the income he was then receiving. On February 8, 1960, the applicant made the proposed appointment.

On an application under section 1 of the Variation of Trusts Act, 1958,[1] for the court's approval of the proposed arrangement on behalf of the persons who would be entitled to a discretionary interest under the protective trusts if the applicant forfeited his life interest:—

Held, that the fact that the applicant was at an intermediate stage advised that his financial position would be improved if the appointment were made and the arrangement approved by the court did not justify the supposition that his original purpose and intention to benefit his children and not himself were changed or added to. The appointment was not, therefore, a fraud on the power of appointment and the arrangement was one which the court could approve.

ADJOURNED SUMMONS.

By his will, dated November 18, 1933, the testator, William Bruce Robertson, devised and bequeathed his residuary estate to his executor and trustee, the Royal Bank of Scotland, upon trust to set aside such sum as should be sufficient to produce a sum of £1,100 per annum to be paid to his wife during her life, and after her death to be divided between his children on certain trusts. Subject thereto the trust fund was to be held on trust to divide it into five equal parts and to hold two such fifth parts on trust for the applicant, one of the testator's children, the remaining shares in the trust fund to be divided amongst the testator's other children on similar trusts. Clause 13 of the will provided that the children's shares in (inter alia) the trust fund were not

[1] Variation of Trusts Act, 1958, s. 1 (1): "Where property, whether "real or personal, is held on trusts "arising, . . . under any will . . . "the court may if it thinks fit by "order approve on behalf of— . . . "(*d*) any person in respect of any "discretionary interest of his under "protective trusts where the interest "of the principal beneficiary has not "failed or determined, any arrange-"ment . . . varying or revoking all "or any of the trusts. . . . Provided "that except by virtue of paragraph "(*d*) of this subsection the court shall "not approve an arrangement on be-"half of any person unless the carry-"ing out thereof would be for the "benefit of that person."

1960

ROBERTSON'S WILL TRUSTS, *In re.*

to vest absolutely in them but were to be held upon trust for such child during his or her life until he or she did or attempted to do or suffered any act or thing (other than an advance under any statutory or express power) whereby, if the income were payable absolutely to such child, he or she would be deprived of the right to receive the same or any part thereof, in which case that trust of the income was to fail or determine. If the trust did fail or determine during the life of such child then, during the residue of that period, the income was to be held upon trust for the maintenance or support, or otherwise for the benefit of all or any of the following: (a) such child and his or her wife or husband (if any), and his or her children or remoter issue (if any); (b) if there were no wife or husband or issue of such child, he or she and the persons who would, if he or she were dead, be entitled to the trust property as the trustee or trustees for the time being in its or their absolute discretion thought fit. After the death of such child, his or her share was to be held upon trust for such one or more of his or her issue born before the expiration of 21 years after his or her decease as he or she might by deed, with or without power of revocation, and new appointment or by will or codicil appoint. In default of, and subject to such appointment, the share was to be held upon trust for all the children or any the child of the child of the testator who attained the age of 21 years, if more than one equally. The will further provided that the bank might exercise the statutory power of advancement contained in section 32 of the Trustee Act, 1925, in favour of any of the testator's grandchildren, but so that not more than £2,000 should be advanced to any one grandchild.

The testator died on July 19, 1934, and his widow on September 28, 1955.

The applicant had three children, Ian Bruce Robertson, born on April 16, 1932, Gillian Mary Robertson (now Gillian Mary Foster), born on August 9, 1936, and William David Robertson, born on June 21, 1939. In January, 1953, the bank advanced £2,000 to the applicant's elder son; and in November, 1955, advanced £2,000 to each of his other two children.

The applicant wished to make some immediate capital provision for his sons and to provide for his daughter on her marriage, which took place on March 30, 1960. His elder son, a captain in Her Majesty's Army, was married with three infant children. His younger son wished, when he had completed his National Service in the Army in January, 1961, to become an underwriter at Lloyd's, for which a substantial deposit of capital would be required. The applicant also wished to reduce the estate duty which would become payable on his death in respect of the trust fund.

According to additional information supplied to the court, the applicant was advised by counsel on October 5, 1959, that because of the protective trusts affecting his interest in the trust fund he

could not release it without the assistance of the court; but that he could exercise his power of appointment in favour of his three children and apply to the court to approve an arrangement whereby he would release his life interest. At a conference with counsel on October 29, 1959, the applicant stated that he was not in a position to give up completely his interest in the trust fund; the possibility of dividing his share in the trust fund between himself and his children in accordance with the actuarial values of their respective interests in it was suggested by counsel and agreed to by the applicant, provided that an actuarial valuation showed that the amount he would receive would be sufficient to purchase an annuity to replace the income he would be giving up. On November 11, 1959, a fellow of the Institute of Actuaries valued the applicant's interest in his two-fifths share in the trust fund at 33/75 of the share, and the children's interest at 42/75 of the share, and advised that the applicant's 33/75 share would purchase an annuity of an amount in fact larger than the amount of the income he was at present enjoying from the trust fund.

By a deed of appointment dated February 8, 1960, the applicant, in exercise of the power of appointment given to him by the will, irrevocably appointed that from and after his death, and in the meantime subject and without prejudice to the prior interests therein during his life, the trustee or trustees for the time being of the will should hold his two-fifths share in the trust fund as to one equal third part thereof in trust for each of his three children absolutely, the interest of his younger son being contingent on his attaining the age of 21 years (which he did on June 21, 1960).

By an originating summons dated February 15, 1960, to which the bank and the applicant's three children were respondents, the applicant asked the court to approve an arrangement whereby the bank should, as from the operative date, divide his two-fifths share in the trust fund into 75 equal parts, and should hold 33 parts for the applicant absolutely, and 14 parts for each of his three children absolutely. The arrangement also provided that the three children should effect a single premium policy or single premium policies with such insurance company as they might select for the aggregate sum of £9,200 payable to them in equal shares in the event of the death of the applicant within five years from the operative date, which premium or premiums should not exceed (unless such respondents otherwise agreed) in the aggregate £1,200. The operative date was defined as the date on which the insurance or, if more than one, the last of the insurances should be effected.

D. S. Chetwood for the applicant.
Peter Oliver for the bank.
D. J. Nicholls for the applicant's two elder children.
G. B. H. Dillon for the applicant's younger son.

1960

ROBERTSON'S WILL TRUSTS, *In re.*

The following cases were cited in argument: *In re Huish's Charity*[2]; *In re Greaves' Will Trusts*[3]; *In re Merton*[4]; *In re Dick.*[5]

RUSSELL J. I myself raised the question whether possibly the appointment was a fraud on the power because, if so, the proposed scheme of arrangement, involving the disbursement of the fund, would be one which the court ought not to approve. I have considered the evidence and the additional information supplied to the court as to the working out of the scheme, and I am satisfied that there is no reason to continue to suppose that there was a fraud on the power. It is quite plain that, from the inception, the purpose and intention of the applicant was to benefit the three children and not himself by making the appointment in question: his only requirement was that he should be in no worse position with regard to the trust fund whether the scheme went through or not. It is the fact that he was at an intermediate stage advised that his financial position would actually be improved if the appointment was made and the court approved the scheme. I do not think that justifies the supposition that his purpose or intention was changed or added to. I do not think it appropriate that I should deliver a judgment discussing and adding to the reported authorities on the subject of fraud on a power. I have had a number of such authorities cited to me; but I do not think it necessary for me to deal with them, though I am very much indebted to counsel for drawing my attention to them.

Order made approving the scheme. Costs and expenses incidental to the application and costs of the other parties on the common fund basis (including costs of the negotiation and preparation of the scheme preceding the issue of the summons) to be paid out of the applicant's two-fifths share in the trust fund. A memorandum of the order to be endorsed on the probate of the will.

Solicitors: *Boyce, Evans & Shepphard; Lithgow, Pepper & Eldridge.*

V. A. M.

[2] (1870) L.R. 10 Eq. 5.

[3] [1954] Ch. 434; [1953] 3 W.L.R. 987; [1954] 1 All E.R. 771, C.A.

[4] [1953] 1 W.L.R. 1096; [1953] 2 All E.R. 707.

[5] [1953] Ch. 343; [1953 2 W.L.R. 477; [1953] 1 All E.R. 559, C.A.

[QUEEN'S BENCH DIVISION.]

* ORMAN v. SAVILLE SPORTSWEAR LTD.

1960
March 1, 2.

Pilcher J.

[1957 O. No. 657.]

Master and Servant—Remuneration—Absence from work through sickness—Production manager employed at basic salary plus bonus—Whether implied term negativing employee's right to payment during period of sickness—Whether employee entitled to be paid bonus.

Master and Servant—Contract of service—Implied term—Absence from work through sickness—Whether remuneration payable—Notice ending service—Whether one week sufficient—Weekly salary.

The defendants advertised for a production manager for their skirt factory and the plaintiff, who was experienced in the manufacture and design of skirts, answered the advertisement. An interview took place during which the defendants offered to engage the plaintiff at a salary of £30 a week, but no concluded agreement was reached. The plaintiff did not consider £30 a week a satisfactory salary and he wrote to the defendants asking to see their managing director again. A further interview took place and, as a result, on December 1, 1954, the defendants wrote to the plaintiff confirming that "we are agreeable to engage you as "production manager . . . at a salary of £30 a week with an "addition of 2d. per skirt bonus on all skirts manufactured at the "factory . . ." On the following day the plaintiff accepted the position. In accepting the defendants' offer the plaintiff did not have in mind the matter of payment of salary during periods of absence from work through sickness; had the matter been broached, the defendants would have proposed that in the event of absence through sickness he should be entitled to receive his salary and bonus for one week only, and the plaintiff would not have agreed.

The plaintiff worked for the defendants until November 12, 1956, when he became ill and was unable to work until January 19, 1957. On that day he was ready to return to work, when he found that he had been replaced as production manager and would be required to work on different terms. He thereupon wrote to the defendants giving three months' notice of his resignation and the defendants, treating his letter as one week's notice, terminated his engagement on January 29, 1957. The defendants in fact paid the plaintiff his basic salary of £30 a week during the time he was away ill and up to January 29, 1957, although not admitting any obligation to do so for more than one week. On a claim by the plaintiff that he was also entitled to payment of the bonus of 2d. a skirt on all skirts produced at the factory during that period:—

Held, (1) that where a written contract of service was silent as to payment during periods of absence through sickness, the employer was liable to pay the employee until the contract was determined unless he could establish an implied term in the contract negativing the employee's right to receive payment and that, since the plaintiff and the defendants would have at once been in disagreement had the matter been mooted when the contract was entered into, no such term could be implied, so that the defendants were liable to pay the plaintiff during the time he was ill (post, pp. 1064, 1067).

1960

ORMAN
v.
SAVILLE
SPORTSWEAR
LTD.

Test laid down by Scrutton L.J. in *Reigate* v. *Union Manufacturing (Ramsbottom) Co. Ltd.* [1918] 1 K.B. 592, 605, C.A. applied.

Marrison v. *Bell* [1939] 2 K.B. 187; 55 T.L.R. 475; [1939] 1 All E.R. 745, C.A. and *Petrie* v. *MacFisheries Ltd.* [1940] 1 K.B. 258; 56 T.L.R. 119; [1939] 4 All E.R. 281, C.A. considered.

(2) That, on the facts, it having been first suggested that the plaintiff should work for a basic salary of £30 and then that he should receive the basic salary plus the bonus, the plaintiff's remuneration under the contract was his basic salary plus bonus, and it was that full remuneration which he was entitled to receive while absent through sickness. Accordingly, the plaintiff was entitled to recover the amount of the bonus claimed.

Semble. Seven days was insufficient notice to terminate the contract of service (post, p. 1066).

ACTION.

In December, 1954, the plaintiff, Lewis Orman, was engaged by the defendants, Saville Sportswear Ltd., as production manager at their skirt factory. The plaintiff, who had had great experience in the production and design of skirts, answered an advertisement of the defendants and, as a result, on November 20, 1954, had an interview with the defendants' managing director. No concluded agreement was reached at that interview, but the managing director offered to engage the plaintiff at a salary of £30 a week. The plaintiff did not consider that a satisfactory salary in view of the work he would be required to do, and he asked to see the managing director again. The managing director wrote to him: "I am in receipt of your letter and note your mis-"giving that in your estimation the factory is not large enough for "your capabilities. I am prepared in the circumstances to wait "until you are in a position to make a definite decision regarding "the change, but I would ask you to let me know within the next "week or so. Finance is of secondary interest to me as it is my "intention to build up a nucleus of a larger project to this factory. "Please bear this in mind if you think there will be any loss to "you financially, as I feel that this side could be overcome "amicably between ourselves."

A further interview took place, as a result of which the two letters forming the contract of service were written. The first, dated December 1, 1954, from the managing director to the plaintiff was as follows: "Further to our interview on Monday, "we confirm that we are agreeable to engage you as production "manager of our factory . . . at a salary of £30 per week with "an addition of 2d. per skirt bonus on all skirts manufactured at "the factory, commencing Monday, January 10, 1955. We shall "be glad to have your confirmation to this letter and we feel sure "that a pleasant relationship will develop to our mutual advan-"tage." On the following day the plaintiff replied: "I thank "you for your letter dated the 1st inst., in which you give me "the position stated, and confirm that I am pleased to accept "this, to commence on January 10, 1955." In accepting the

defendants' offer the plaintiff did not have in mind the matter of payments of salary during periods of absence from work through sickness. The managing director did have that matter in mind but did not broach it to the plaintiff; had he done so, he would have proposed that in the event of absence due to illness the plaintiff should be entitled to his salary and bonus for one week only, and, had the matter been mooted, the plaintiff and the managing director would have been in disagreement.

The plaintiff worked for the defendants as their production manager until November 12, 1956, when he became ill and unable to work, suffering from coronary thrombosis, from which he did not recover until January 19, 1957. On that date, being ready to return to work, he visited the defendants' factory and found that he had been replaced as production manager and would be required to work on different terms. On the same day he wrote to the defendants giving three months' notice of his resignation, and on January 23 the managing director wrote to him, treating his letter as one week's notice, and terminating his engagement on January 29, 1957.

The defendants in fact paid the plaintiff his salary of £30 a week from November 12, 1956, during the period he was unfit to work and up to January 29, 1957, as, so they maintained, an act of grace, and not because they were under any legal obligation to do so. The plaintiff now issued a writ against the defendants claiming, inter alia, an account of the number of skirts manufactured from November 6, 1956, to January 29, 1957, and of the sum due to him in respect thereof at the rate of 2d. a skirt, payment of the amount found to be due to him on the taking of such an account, and damages for wrongful dismissal. The defendants alleged, inter alia, that it was an implied term of the contract of employment that the plaintiff was not entitled to remuneration if, by reason of ill-health or sickness, he was unable to perform his duties. They also alleged that one week was reasonable notice for the determination of the contract.

A sum of money was paid into court by the defendants in respect of the claim for damages for wrongful dismissal and certain other items, which sum the plaintiff agreed to accept, and, accordingly, the only issue before the court was the plaintiff's claim that he was entitled to be paid the bonus of 2d. a skirt on all skirts manufactured at the factory between November 6, 1956, and January 29, 1957; by agreement the amount of such bonus was quantified at £250 6s. 2d.

Nigel Bridge for the plaintiff.
C. Lewis Hewser Q.C. and *M. Levene* for the defendants.

The following case, in addition to the cases referred to in the judgment, was cited in argument: *Hancock* v. *B.S.A. Tools Ltd.*[1]

[1] [1939] 4 All E.R. 538.

1960

ORMAN
v.
SAVILLE
SPORTSWEAR
LTD.

PILCHER J. In this case the plaintiff, who was the production manager to the defendants, Saville Sportswear Ltd., brings this action against the defendants claiming a number of matters. Whilst the point which I have had to determine is a short one, I think it is impossible to appreciate the case fully without seeing a little of the background.

Having entered into a contract of service with the defendants, the plaintiff was absent owing to sickness for a period of about 10 weeks, and disputes arose between the parties as to his right to receive remuneration during his period of sickness.

The broad outline of the facts in the case is this. Having been engaged as production manager of the defendants early in December, 1954, the plaintiff worked for the defendants as their production manager until November 12, 1956, when he became unfitted for work and had to go sick, suffering from what turned out to be a coronary thrombosis. By January 19, 1957—that is, some nine weeks later—the plaintiff said he had recovered and was ready to return to work. But for reasons which I will indicate, he did not return to work, and on January 29, 1957, the defendants terminated his employment.

On May 31, 1957, the plaintiff issued a writ against the defendants calling for an account and payment of the amount due to him on the account, and also damages for wrongful dismissal, and certain other matters in dispute between the parties.

The statement of claim was delivered on June 4, 1957, and the defence on July 4, 1957. At a later date the defendants, having considered their position, paid into court the sum of £183 to cover the plaintiff's claim for wrongful dismissal and certain other small items in account between the parties. After further correspondence between the respective solicitors, the plaintiff agreed to accept the sum paid into court in respect of all the matters in dispute between the parties except one matter, to which I now refer, and that is the only matter which I have to determine in this case.

The plaintiff contends that under the terms of his contract of service he was entitled to receive, during the period of his absence from work due to illness until the date of his dismissal, not only what I may call his basic salary of £30 a week, which was in the contract of service, but also an appropriate sum by way of bonus to which he was also entitled under his contract of service, at any rate so long as he worked. Greatly to the advantage of everyone, the parties agreed that, if the plaintiff was entitled to recover this sum by way of bonus, it should be quantified at a sum of £250 6s. 2d.

[His Lordship read the two letters forming the contract of service, stated the facts set out above, and continued:] The contract of service is silent in regard to the matter now in issue, namely, the plaintiff's legal right to be paid either salary or salary and bonus during his absence from work due to sickness. The

defendants contended that they were not liable in law to pay the plaintiff anything at all—that was their original intention—whilst he was away sick. They have now paid his basic salary, but they have not paid him the bonus which is now represented by this agreed sum of £250 odd. The only point I have to determine is whether, having regard to the terms of the plaintiff's contract of service, in all the circumstances of the case it is possible or proper to imply a further term into the written contract—namely, that the plaintiff is entitled in law to recover the bonus which he would have earned if he had continued to work for the 10 weeks that he was away sick and until his contract was terminated.

On behalf of the plaintiff it was contended as a matter of law by Mr. Bridge that the facts of this case and the evidence in the case did not permit of the implication or the introduction of any implied term. He referred me to the well-known case of *Reigate* v. *Union Manufacturing Co. (Ramsbottom) Ltd.*[1] That case concerned a contract made by a company for a fixed period to pay an agent certain commission. The company went into liquidation, and the question was whether or no, although the company had gone into liquidation, the agent was entitled to claim damages by way of commission after the company ceased to exist.

I need not go into the facts any more than that, because I cite the case only for the well-known passage in the judgment of Scrutton L.J. which deals with the implication of terms into written contracts. He said[2]: "The first thing is to see what the "parties have expressed in the contract; and then an implied "term is not to be added because the court thinks it would have "been reasonable to have inserted it in the contract. A term "can only be implied if it is necessary in the business sense to "give efficacy to the contract; that is, if it is such a term "that it can confidently be said that if at the time the contract "was being negotiated someone had said to the parties, 'What "'will happen in such a case,' they would both have replied, 'Of "'course, so and so will happen; we did not trouble to say that; "'it is too clear.' Unless the court comes to some such con-"clusion as that, it ought not to imply a term which the parties "themselves have not expressed."

Then he went on to say[3]: "As I understand, it is suggested "that the contract is only to remain in force so long as the "company carry on their business. Is that a necessary implica-"tion? If this matter had been mooted at the time when the "contract was being negotiated, I expect that the parties would "at once have disagreed as to what the position was. Unless we "are satisfied that it is an implication which must necessarily "have been in the minds of both parties, we cannot imply a term "which they have not expressed." Accordingly, the Court of

[1] [1918] 1 K.B. 592, C.A.
[2] Ibid. 605.
[3] Ibid. 605, 606.

1960

ORMAN
v.
SAVILLE
SPORTSWEAR
LTD.

Pilcher J.

Appeal refused to imply a term in that case, because there was no certainty that, if the attention of the parties had been drawn to it when the contract had been made, they would have been in agreement as to what the term was to be.

Mr. Bridge, on behalf of the plaintiff, set out the following proposition which he submitted was accurate in law: Where the contract contains no express term, and no unexpressed terms can properly be implied as to the remuneration during periods of illness, the presumption is that the contractual remuneration remains payable until the contract of service is determined. He further submitted that, on the facts and the evidence in this case, it did not permit of the implication of any term in regard to payment during absence due to sickness, and the plaintiff was accordingly entitled as a matter of law to recover during the period of his absence the whole of this remuneration consisting of basic salary and bonus.

In support of that proposition, Mr. Bridge referred me to a line of cases on this topic dealing with wages during periods of illness, starting with *Marrison* v. *Bell*.[4] I will not read the headnote in that case because it has been subject to a certain amount of criticism. It was a case in which a fruit salesman, who had been employed at £3 10s. a week for a long period by the defendant, and before that by the defendant's father, was stricken with rheumatism. He was away for several months. When he returned, he was given a week's wages in lieu of notice, so that his contract of service continued throughout the period of his absence due to sickness. The real point in that case was that the plaintiff had received National Insurance benefits during his period of sickness. The county court judge held that, having regard to that fact and other matters, he was not entitled to recover wages whilst he was absent from work due to sickness.

But the county court judge's finding was reversed by the Court of Appeal, and I only refer to *Marrison* v. *Bell*[4] because of certain passages in the judgment of Scott L.J. which are, of course, binding upon me, and which I think, if they do not completely state the law on the subject, at any rate afford a basis for it. In allowing the appeal Scott L.J. said[5]: "A long series "of decisions has been given in our courts making it quite clear "that the common law of this country does not recognise any "such rule in contracts of service as is suggested by the learned "county court judge. On the contrary, those cases say, in my "opinion quite clearly, that under a contract of service, irrespec-"tive of the question of the length of notice provided by that "contract, wages continue through sickness and incapacity from "sickness to do the work contracted for until the contract is "terminated by a notice by the employer in accordance with the "terms of the contract."

[4] [1939] 2 K.B. 187; 55 T.L.R. 475; [1939] 1 All E.R. 745, C.A.

[5] [1939] 2 K.B. 187, 198.

Scott L.J.[6] went on to refer to a number of cases, starting with *Cuckson* v. *Stones*[7] and *Warren* v. *Whittingham*,[8] both of which were cases in which the employee had been engaged for a period of years and was nonetheless held entitled to receive his contractual salary during the period of illness so long as the contract was subsisting.

Scott L.J. then referred to *Niblett* v. *Midland Railway Co.*[9] and said[10]: "The plaintiff was a railway employee who, upon "entering the company's service, signed an undertaking to abide "by the rules of the company. One of these rules required him "to join the railway company's friendly society, which was "independent of the company, but to the funds of which the "company contributed. By the rules of the society a member "was entitled to sick pay during illness, but not if he was "receiving wages from the company. The plaintiff became ill "in February, 1905, and received sick pay until September, when "he received notice terminating his employment. It was held "that he was not entitled to his wages during the period of his "illness on the ground that, having regard to the rules which "had to be signed by an employee as a term of his contract of "service, the rules must be read into the contract of service, and, "when so read in, necessarily involved the implication of a term "of the contract of service to the correlative effect of the rules "of the society." It was there said that if it is impossible to say that the rules were part of the contract, they were read into the contract and, consequently, governed the position of the parties. So there was no necessity there to imply a term except that, having agreed to be bound by the rules, the plaintiff was so bound and must accept whatever the rules provide.

Scott L.J.[11] then referred to *Warburton* v. *Co-operative Wholesale Society Ltd.*[12] and cited the headnote of that case: "The fact that a workman stays away from work and receives "compensation from his employers during temporary incapacity "for work resulting from injury received by him during the course "of his employment does not of itself terminate the employment, "even though the contract of his employment is merely at will." Scott L.J. went on[13]: "This is one of the cases mentioned by "the learned judge in his judgment"—that is the county court judge in *Marrison* v. *Bell*[14]—"and no doubt he had that decision "in mind when he held that the contract of employment was not "terminated by the plaintiff's illness. In that case, where the "workman was suing for wages, Lord Cozens-Hardy M.R. "said[15]: 'It has been long settled that a contract of service "'is not terminated by incapacity to work by reason of temporary

[6] [1939] 2 K.B. 187, 198.
[7] (1858) 1 El. & El. 248.
[8] (1902) 18 T.L.R. 508.
[9] (1907) 23 T.L.R. 240; 96 L.T. 462.
[10] [1939] 2 K.B. 187, 199.
[11] [1939] 2 K.B. 187, 201.
[12] [1917] 1 K.B. 663; 37 T.L.R. 124, C.A.
[13] [1939] 2 K.B. 187, 201.
[14] [1939] 2 K.B. 187.
[15] [1917] 1 K.B. 663, 665.

1960

ORMAN
v.
SAVILLE
SPORTSWEAR
LTD.

Pilcher J.

" ' illness, and that on return to work the man can recover his " ' wages during the period of his absence.' "

Those are the only passages from which I wish to cite in *Marrison* v. *Bell*.[16] The next case to which I was referred was *Petrie* v. *Mac Fisheries Ltd.*[17] That was a case of a smoker packer in the defendants' fish smoking department who was absent from his work owing to illness. I need not trouble a great deal with the facts of the case, but it was proved that the defendants had put up a notice in the plaintiff's work place. The plaintiff said that he had never seen it, but he had knowledge of the arrangement referred to in the notice, and he had on two previous occasions in 1933 and 1936 been absent from work by reason of illness and had accepted half-pay in accordance with the terms of the notice. When he was taken ill again in July, 1938, he took his half-pay for five weeks and did not return to work until January, and then he later commenced an action asking for full wages during the period of illness. I refer to that case only because of the passage from the judgment of du Parcq L.J. which I think is helpful. He said[18]: " I quite see, looking again at " *Marrison* v. *Bell*,[19] and at the case which was there cited of " *Warburton* v. *Co-operative Wholesale Society Ltd.*,[20] that if " a reader of the report of *Marrison* v. *Bell*[21] confines his atten- " tion to one sentence and reads it divorced from its context, and " without relation to the subject-matter, he may come to a " wrong conclusion as to what the case decided. It is true that " *Marrison* v. *Bell*[21] adopted and approved the observations of " Lord Cozens-Hardy in the *Warburton* case,[22] which, when they " were spoken by Lord Cozens-Hardy, were, I think, merely dicta " and not binding on the court. It is true, if you look at the " single sentence which was cited by Scott L.J.[23] : ' It has been " ' long settled that a contract of service is not terminated by " ' incapacity to work by reason of temporary illness, and that " ' on return to work the man can recover his wages during the " ' period of his absence,' that in citing it he pointed out, as " was perfectly correct, that the words were unlimited and " unqualified. It was right to point out in *Marrison* v. *Bell*[24] " that no qualification was introduced by Lord Cozens-Hardy, " because so far as *Marrison* v. *Bell*[24] was concerned it was " material to notice that no such qualification was introduced or " suggested as would have prevented those words from applying " to the particular facts of that case, and I venture to say with " great respect that Lord Cozens-Hardy said nothing inaccurate " in that statement if it is read by somebody who does not expect " to find in a short sentence a complete statement of the whole " law. Lord Cozens-Hardy was stating a general proposition,

[16] [1939] 2 K.B. 187.
[17] [1940] 1 K.B. 258; 56 T.L.R. 119; [1939] 4 All E.R. 281, C.A.
[18] [1940] 1 K.B. 258, 264.
[19] [1939] 2 K.B. 187.
[20] [1917] 1 K.B. 663.
[21] [1939] 2 K.B. 187.
[22] [1917] 1 K.B. 663.
[23] [1939] 2 K.B. 187, 201.
[24] [1939] 2 K.B. 187.

"which I believe to be accurate, and I think it is clearly this: "If you have a weekly hiring of a servant without more, and with "nothing in the terms of it, whether they are expressed or "implied, to suggest that during temporary absence through "illness he is not to be paid, then you may assume that he is to "be paid, and that it was the intention of the parties that he "should be paid." Those words seem to me to be important. It is true that du Parcq L.J. went on in the following sentence [25]: "I only hope that, in saying that, I have not said something "which, again taken from its context, may lend colour to argu-"ment which I certainly do not intend my words to support."

On the following page du Parcq L.J. went on to say [26]: "The "first thing to remember is that one must find out what the "contract is. It is plain that Lord Cozens-Hardy did not mean "that every contract of service, whatever terms were contained "in it, must result in a liability to pay a workman during the "time that he is ill. The terms in the contract may be express, "or they may be implied. You may have a custom" and so on.

Then, in the same case, Atkinson J. said at the conclusion of his judgment [27]: "In my opinion, Scott L.J. said nothing in "*Marrison* v. *Bell* [28] which was inconsistent with that submis-"sion." That is a submission which is referred to in the preceding paragraph. "It must be remembered that the "passage to which I have referred followed a reference to what "the county court judge had said, namely: 'When off sick, in "'the absence of any express contract, no wages due.' I think "the Court of Appeal meant that the truer view was the other "way round, and that where there is nothing in the contract, "express or implied, to the contrary, the consideration for wages "is not the actual doing of the work contracted for, but the readi-"ness and willingness, if of ability, to do the work. If that view is "right, the judge below should have asked himself the compara-"tively simple question: 'Did the terms on which the plaintiff "'was employed in 1938 exclude the right to wages if through "'illness he did no work?'" That is what, it seems, to me, I have to apply my mind to.

There is one other case to which I ought to refer, and that is *O'Grady* v. *M. Saper Ltd.* [29] I do not think that it is a very helpful case because, if I may say so, the decision was one which could hardly have been other than what it was, and it was no doubt because of the unfortunate wording of the headnote in *Marrison* v. *Bell* [30] that the county court judge decided the case in the way he did. It was the case of a commissionaire who was receiving £2 15s. or £3 a week and had been absent sick on a number of occasions. He had never been paid during the period of his sickness, and the defendants contended that the

[25] [1940] 1 K.B. 258, 265.
[26] Ibid. 266.
[27] Ibid. 270.
[28] [1939] 2 K.B. 187.
[29] [1940] 2 K.B. 469; 56 T.L.R. 913; [1940] 3 All E.R. 527, C.A.
[30] [1939] 2 K.B. 187.

1960

ORMAN
v.
SAVILLE
SPORTSWEAR
LTD.

Pilcher J.

plaintiff was employed on the basis of pay when he was working, and when he ceased to work, through ill-health or for any other reason, he received no pay. The plaintiff, in substance, admitted that he never expected to be paid when he was not working, but he had seen what appears to be a garbled report of *Marrison* v. *Bell*[30] in a popular paper which led him to go to his solicitors and start proceedings. No doubt he was delighted when he succeeded before the county court judge, and equally disgusted when the defendants' appeal was allowed by the Court of Appeal. But there was no question there but that both parties knew, by the time the plaintiff started his action, that the defendants never intended to pay during the period of sickness, and that the plaintiff knew that they did not intend to pay. That was clearly a case in which it was proper to imply a term which was well known to both parties, to which they would have both assented if it had been raised when the contract was made.

MacKinnon L.J., having criticised the headnote in *Marrison* v. *Bell*,[30] said[31]: "Now the sort of contract which is involved "is usually concluded orally by people who rarely think out, and "still more rarely express any terms. The whole difficulty in "such a case is to ascertain what in truth were the terms of the "contract. Where the thing is not expressed it may be that you "have to ascertain the terms as a matter of implication, but, "in any case, it is a question upon the evidence in the case: "What were the terms of the employment? Were they an agree-"ment that the man should be paid when ready and willing to "work, or only that he should only be paid when he was actually "working? It depends upon the evidence what the terms were. In "this case, as it seems to me, there was abundant evidence that "the terms, not expressed but no doubt implied, upon which this "man was employed were that he should not be paid wages "whilst he was sick." Then the Lord Justice gave some further reasons for arriving at that conclusion, and went on[32]: "If "somebody had raised the question when they were originally "making the bargain what would they both have said about it? "What in this case they would both have said about it is best "proved, and I think is conclusively proved, by what the parties "did when the event arose. When the event arose, and he "was away ill, and he was not paid, he acquiesced in it, and, "as he said, he did not think he ought to have it; he did not "expect to get it. I come without hesitation to the conclusion "that the terms of the contract between these parties were that "he should be paid not during the period when he was ready and "willing to work but only during such period as he did work."

Having considered all these cases and the careful argument addressed to me by counsel, it seems to me that they establish the following proposition. Where the written terms of the contract of service are silent as to what is to happen in regard to

[30] [1939] 2 K.B. 187.
[31] [1940] 2 K.B. 469, 473, 474.
[32] [1940] 2 K.B. 469, 474.

the employee's rights to be paid whilst he is absent from work due to sickness, the employer remains liable to continue paying so long as the contract is not determined by proper notice, except where a condition to the contrary can properly be inferred from all the facts and the evidence in the case. If the employer—and, of course, it will always be the employer—seeks to establish an implied condition that no wages are payable, it is for him to make it out, and the court, in construing the written contract, will not accept any implied term which will not pass the test laid down by Scrutton L.J. in *Reigate* v. *Union Manufacturing (Ramsbottom) Co. Ltd.*,[33] to which I have referred earlier in this judgment.

In my view, it is clear from the evidence in this case that if the matter had been mooted when the contract of service was made between the plaintiff and the defendants' managing director, the situation envisaged by Scrutton L.J. in the *Reigate* case,[33] namely, that the plaintiff and the managing director would at once have disagreed, would have obtained. I am accordingly of the opinion that in this contract no implied term in regard to payment during the period of illness can properly be introduced at all. It follows, therefore, that on the authorities the defendants remain liable to pay the plaintiff from the time when he ceased work until the contract of service was determined.

As I have said earlier in this judgment, the defendants paid the plaintiff for the material period what I call his basic salary of £30 a week. All I have to determine is whether he is entitled to the £250 6s. 2d. which represents the appropriate amount of bonus during the period which he was away. The defendants' managing director, who was for my purposes the defendant company, was at first insistent that the defendants had only paid the plaintiff his basic salary as an act of grace. But eventually he conceded that he recognised that the defendants were liable to pay the plaintiff both basic salary and bonus, but he limited his understanding of the matter to there being a legal liability to pay that for seven days. He agreed that he was anxious to retain the plaintiff's services, and might have been prepared to pay him his basic salary for a longer period as an act of grace. This was clearly not the view which the plaintiff formed in regard to his rights, although he admitted that, when he entered into the contract of service, he had not the matter of payment during periods of sickness in his mind at all.

I propose to read one or two short passages from the plaintiff's and the managing director's evidence. The plaintiff said: "I "never thought about the question of illness at all when I took "the job on. I always had good health, so I cannot tell you "now what I might have had in mind as I never considered the "matter at all." That seems to me to be exactly what one would expect, and I accept that entirely from the plaintiff.

The managing director said this: "Although I had the point

[33] [1918] 1 K.B. 592, 605.

1960

ORMAN
v.
SAVILLE
SPORTSWEAR
LTD.

Pilcher J.

"about payment during illness in mind at my interview with the "plaintiff, I never broached it to him. I should consider the "plaintiff legally entitled to his salary and his bonus if he were "away for two or three days owing to illness. I would also have "paid him his salary and bonus if he had been away a week. "I agree that when we were making the contract neither the "plaintiff nor I would have thought for a moment that the plain-"tiff was not entitled to salary and bonus if absent from work "through illness for a week. If I broached the matter at our "interview, I should have proposed that in the event of absence "due to illness the plaintiff should be entitled to salary and bonus "for one week only. I might quite easily have gone on paying "him longer as an act of grace. Although I had the question of "pay during illness in mind, I did not mention it to the plaintiff, "as I thought I could dismiss the plaintiff on a week's notice. "When the plaintiff fell ill, I thought I was entitled to give "him a week's notice. He was, however, a very good man, and "I wanted to keep him on the hook." I think that was my expression, and not the managing director's.

I hope I can say without offence that I rather doubt whether he had the matter so cut and dried in his mind when he was interviewing the plaintiff as he now feels he did. I am satisfied of one thing, that if he thought, nothing having been said about it, that this was the type of contract which could be determined by seven days' notice, he was wrong. The plaintiff was earning, in total, something in the neighbourhood of £2,500 a year and had a very important and responsible job. I think that the managing director was wrong in what he thought, but that does not matter, except in so far as it may have influenced him in the length of time during which he was prepared to pay the plaintiff while he was sick.

There are two letters in the correspondence to which I think I ought now to refer. On January 19 the plaintiff was recovered from his illness—so he thought, and so he said. I am sure he said it honestly. He was invited round to the managing director's office, and when he got there he was very upset, and why he was upset is set out in this letter: "Having now recovered from "my illness, and upon calling at your request at your office this "morning to discuss my return to the factory as factory manager "(as hitherto) I am amazed to find that during my enforced "absence through illness I have been replaced in my position "by another, and that the conditions under which I would be "permitted to return to the factory would be such as to be most "degrading in respect of the position I held at the time I became "ill. In the circumstances I must advise you that it is impos-"sible for me to return to the factory under such conditions as "this would place me junior to a newcomer, and consequently "I must advise that if this is your final word, then this letter "be taken as my formal three months' notice of resignation,

"terminating my association with the company on April 19 this "year. Should you so desire, I shall be pleased to work out "these three months at the factory in my original capacity or "failing this I am prepared to terminate all association with the "company forthwith and upon receipt of salary in lieu of such "notice up to above mentioned date. In closing I would remind "you that holiday pay up to April 19 this year will become due," and I will not trouble about that.

On January 23 the managing director replied: "I am in "receipt of your letter of the 19th instant. I do not propose to "enter into a correspondence with you regarding either your past "employment or your return to employment, except to say that "none of your complaints have any foundation whatsoever, and "you well know that to be so. The terms of your employment "with us were such that only one week's notice of termination "on either side was required. You have no right to give notice "of termination to take effect on April 19 next, and I do not "accept your letter as any notice of that kind. I accept your "letter as one week's notice, and enclose herewith cheque value "£60 2s." That is made up of a number of items, the first of which is one week's pay to January 22, 1957, "as an act of "grace." That, so far as I know—because I accept what the plaintiff says—is the first intimation the plaintiff ever had that this weekly payment was being made as an act of grace to him.

I think it right that I should also mention this. The plaintiff, who had, at any rate during the earlier part of his illness, been a very sick man, had accepted the £30 thinking, no doubt, that he was entitled to it, but had not suggested that he ought to have anything more by way of bonus. The plaintiff explained that in this fashion. He said: "I was ill. In the past I have very "often only collected my bonus every couple of months. I had "the material from which to calculate it, and the fact that I did "not mention it does not mean that I did not think I was entitled "to it." If that be material, I accept what he says.

The plaintiff then put the matter in the hands of solicitors, and on January 25 they wrote a long letter setting out the plaintiff's case. In that letter they said: "The calculation you have "made in your letter of the 23rd instant is only upon the basic "salary and does not take into account the bonus." If I may say so, the plaintiff's solicitors were quickly on to the point, whether or not it had been in the plaintiff's mind before that.

I am satisfied in this case upon the authorities that, when the written contract is silent as to payment during absence through sickness, the employer must continue to pay his employee unless he, the employer, can satisfy the court that it is a case in which a term negativing the employee's right to remuneration can properly be implied, such an implied term being one which would satisfy the test laid down by Scrutton L.J. in *Reigate* v. *Union*

1960

ORMAN
v.
SAVILLE
SPORTSWEAR
LTD.

Pilcher J.

Manufacturing (Ramsbottom) Co. Ltd.[34] Upon the admitted facts and the evidence in this case it is reasonably clear that, if the matter had been mooted when the contract was made, the plaintiff and the managing director would at once have been in disagreement. It follows that no term can be implied and the defendants remain liable to the plaintiff until the contract of service is terminated. They paid his basic salary and, as I have already said, I am doubtful whether the managing director really applied his mind to whether those payments were made as an act of grace or not. I am satisfied that the plaintiff, being a very sick man, did not apply his mind to the question whether he was entitled to bonus, at any rate until he went to see his solicitor. No doubt he hoped he would get it, but he had not made any formal claim. These matters are not of any great importance once the legal rights of the parties are ascertained.

It was argued by Mr. Levene, rather attractively, that a very clear distinction should be drawn between the plaintiff's legal right to his basic salary and his legal right to the bonus. Mr. Levene put it in this way. He said that the consideration for payment of the basic wage may be willingness or readiness to work, but the consideration of payment of bonus must be the work itself. He continued by saying that it might be that the managing director realised that he was legally bound to pay the plaintiff his basic salary, but never dreamed that he might be legally bound to pay the bonus. Then he added: "The plaintiff "did not apparently think that he was entitled to any bonus." Mr. Levene argued that a bonus was an incentive to production and, consequently, if you are unable to work it was wrong that bonus should be included in the wage you are entitled to recover whilst you are sick.

On the other hand, it was argued by Mr. Bridge for the plaintiff that you could not differentiate between basic salary and bonus, and that what the plaintiff was entitled to recover was the remuneration which he had been receiving. Without going into the matter in any detail, the plaintiff's remuneration here was his basic salary and his bonus which, at the material time, was worth about £20 a week to him. That bonus depended upon the number of garments sold, and that in turn depended upon work which, in broad measure, was the work which had been done by the plaintiff over the preceding months in organising the equipment and the production from the new factory.

I think this is a very difficult point to determine, and it is the only point I have to determine in the case. But it is impossible to understand it without having had the background. I put myself this question. It was at first mooted that the plaintiff should work for the defendants for a basic salary simpliciter, and it was then arranged that his remuneration should consist of salary plus bonus. I suppose it might well have been that the

[34] [1918] 1 K.B. 592, 605.

plaintiff and the managing director might have said: "I know "you are a good man. If you work well you will do extremely "well out of this. I will give you a nominal salary and add "larger bonuses," so that the plaintiff's remuneration really consisted of his bonus, and his salary would have been a matter of less importance.

Having given the matter the best attention I can, and bearing in mind the argument of Mr. Levene, I have come to the conclusion that what I have to consider here is what was his remuneration. His remuneration was somewhere in the neighbourhood of £50 a week. That was salary plus bonus, and the bonus ingredient is represented by the agreed sum of £250 6s. 2d. The realities of the situation, in my view, demand that the plaintiff should be paid during the absence due to sickness the full remuneration which he would have received so long as his contract of service subsisted. The result, therefore, is that in my view the plaintiff is entitled to recover the agreed sum of £250 6s. 2d.

Judgment for the plaintiff with costs.

Solicitors: *Arnold & Co.; Osmond, Bard & Westbrook.*

J. F. L.

[BIRMINGHAM CONSISTORY COURT.]

* *In re* ST. GEORGE'S, BIRMINGHAM.

1960
July 21.
Henry Salt Q.C., Ch.

Ecclesiastical Law—Faculty—Demolition of church—Jurisdiction.

A faculty was sought to enable a church to be demolished:—*Held*, the court had jurisdiction to grant such a faculty, the procedure by petition being preferable to the statutory alternatives.

PETITION for a faculty.

The rector and churchwardens of the parish of St. George, Birmingham, petitioned for a faculty to demolish the parish church. The petition was unopposed.

No counsel appeared on the hearing of the petition.

July 21. HENRY SALT Q.C., Ch. In this case I have allowed the evidence of the petitioners to be given in an affidavit sworn by the incumbent, the Rev. J. A. Carr, and that of the Archdeacon of Birmingham, the Ven. S. Harvie Clark, in whose archdeaconry St. George's Church is situated, to be given in an

[Reported by D. R. ELLISON, Esq., Barrister-at-Law.]

1960

St. George's, Birmingham, *In re.*

Henry Salt Q.C., Ch.

affidavit sworn by him. Both deponents are present and are represented by their respective solicitors. They have been given the opportunity of supplementing their affidavits by oral evidence, but there has been no need to do so, thanks to the full and clear affidavits. Nor has there been any cross-examination, since the petition, following general citation in due form and time, is unopposed. I wish to express to the parties and their solicitors my obligation to them for the way the case has been prepared and presented to me.

Having listened to the evidence and exhibits read to me, I feel bound, while sharing the reluctance of the petitioners and the archdeacon, to accede to the prayer of the petition and grant the requisite faculty for the demolition of St. George's Church. The order, however, will contain two reservations: first, that the tomb of Thomas Rickman, the architect of the church, shall be left undisturbed in the adjoining graveyard; and secondly, that all memorial tablets within the church itself shall be carefully taken down and stored, with a view to their use hereafter in any new, and perhaps smaller, church which may be erected on the present site, or part thereof, or in some neighbouring church, if that can be arranged under the supervision, in the first instance, of the archdeacon.

It is always a serious matter to authorise the demolition of a parish church. Where it must needs be done, in the interests of the cure or care of souls, which is, of course, a paramount consideration, because, for example, of reorganisation in a diocese to enable the church to meet the needs of growing population in suburbs and new residential areas, while redeploying the ministry where central areas have become substantially less populous, or because a consecrated building has become ruinous past hope of repair, it may be possible, and even desirable, to have recourse to the machinery provided by one or more of the measures in this behalf. This enables the matter to proceed under what is, in effect, statutory sanction.

Parallel with this, and in my judgment quite unaffected by it, there remains the ancient jurisdiction of this court to entertain, and in a proper case to accede to, a petition by persons having a proper locus standi, for a faculty to enable the demolition to be carried out.

In the present case, procedure by petition for a faculty is not only suitable but (subject to certain procedural safeguards) preferable to the statutory alternatives.

In the first place it is in the very nature of it swifter; and there can be no doubt that the urgency of the matter is fully made out. I took a view of St. George's on my way to this court, and even the untrained eye can see that the masonry is in a very dangerous condition. The evidence is that pieces of masonry have fallen from the pinnacles and endangered the children and staff of the church school in the adjoining playground, which has

been fenced off. Passing members of the public are also at risk, and there is evidence that in at least one instance there has been what the armed forces of the Crown would term a near miss. Plainly this state of affairs cannot continue, and the provisional arrangements made with a contractor for taking down the structure ought to be authorised so as to take effect under the sanction of this court while the school holidays are current, as they will be within a few days from now.

Secondly, I am satisfied that it would be quite unrealistic to expect this church to be preserved or reconstructed. Redevelopment is going on all round it, and the population of the parish has diminished, and will further diminish below the present estimate of 10,000 souls. It is not a wealthy parish, nor in a wealthy area. The bishop's fund for building churches has gone a substantive way towards its target, but has by no means yet reached it. I am told that this fund is de facto earmarked, from the point of view of subscribers, towards building new churches where the need is greatest in newly populated districts, and cannot very well be resorted to for repairing such a church as St. George's where the need is less. Moreover, before the present incumbency began in 1954, some £14,000 had already been raised and spent in patching the fabric. A conservative estimate by experts is that to put the church into repair would cost a further sum of no less than £35,000. Manifestly this is beyond the scope of the parishioners, even if outside aid were forthcoming.

The church was built about 1820, and is one of the "Water-"loo" churches, for which the State provided or contributed funds. It occupies a dominant position in the city of Birmingham and presents a beautiful silhouette as designed by Thomas Rickman.

In all the circumstances I directed the Archdeacon of Birmingham to be specially cited, over and above the general citation. I also requested the learned registrar to inquire of the Central Council for the Care of Churches whether that body, although having no locus standi to oppose or support the petition as a party, wished to tender any evidence today which would or might assist the court. This I was entitled to do under rule 6 of the Faculty Jurisdiction Rules, 1939. Their secretary writes in reply that they cannot in the circumstances usefully tender any evidence. I adjourned the petition for hearing in open court, in order that, in a matter of this moment, justice should not merely be done but manifestly be seen to be done, and to enable objections, if any, to be heard. There is no objector, but the safeguard of a public hearing in such a case as this is, in my judgment, desirable.

The requirements of notification of the Ministry of Works and the local authority are satisfied

I, therefore, accede to the petition and grant the faculty prayed, subject to the two reservations I have mentioned.

1960

St. George's Birmingham, *In re.*

The petitioners must bear their own costs and, since the archdeacon's appearance has been helpful to them, must pay those of the archdeacon, which costs cannot be heavy and can, perhaps, be agreed.

Faculty granted.

Solicitors: *Johnson & Co., Birmingham.*

[COURT OF APPEAL.]

C. A.

May 27, 30. 1960

Sellers, Willmer and Harman L.JJ.

* WILLIAMS *v.* SETTLE.

[1958 W. No. 1961.]

County Court—High Court—Action transferred—Jurisdiction of county court—Action for unliquidated damages begun in High Court—Agreement contained in letters between parties to transfer action to county court—No express abandonment by plaintiff of excess of claim over £400—Consent order by master to transfer—No statement in order of provision under which master acted—Whether jurisdiction of county court unlimited—Agreement not in existence when summons to transfer issued—Agreement not filed until after judgment—Whether county court deprived of jurisdiction—County Courts Act, 1934 (24 *&* 25 *Geo.* 5, *c.* 53), *ss.* 42, 43, 45, 65; *County Court Rules,* 1936, *Ord.* 16, *r.* 10 (2) (*b*)—*County Courts Act,* 1959 (7 *&* 8 *Eliz.* 2, *c.* 22), *ss.* 41, 42, 45, 67.

Damages—Exemplary—Copyright, breach of—Sale of photographs of murdered father of plaintiff's pregnant wife—Conduct rendering possible vulgar and offensive behaviour by national newspapers—Scandalous conduct and flagrant breach by defendant—Whether jurisdiction to award exemplary damages—Copyright Act, 1956 (4 *&* 5 *Eliz.* 2, *c.* 74), *s.* 17 (3).

The defendant, a professional photographer, was commissioned to take photographs of the plaintiff's wedding; the copyright in the photographs vested in the plaintiff. Two years later, when the plaintiff's wife was expecting a child, her father was murdered in circumstances which attracted publicity. The defendant, without authority, sold certain of the photographs to representatives of the press and one of them, showing a wedding group, was subsequently published prominently in two national newspapers. The plaintiff brought an action in the High Court claiming, inter alia, damages for breach of copyright in the photographs. The plaintiff's solicitors in due course took out a summons for directions and sent it to the defendant's solicitors under cover of a letter in which they asked whether the defendant agreed to the action being transferred to the county court; the defendant's solicitors replied that they had no objection to this course being followed. The master made an order on the summons that the action be transferred by consent to the county court. He made no indication of the provision under which he purported to act, nor did he record any inquiry as to any abandonment by the plaintiff of the excess of his claim over £400; no such abandonment was ever made expressly in the statement of

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[Reported by Grove Hull, Esq., Barrister-at-Law.]

claim or elsewhere. At the trial the judge found that the defendant's explanation of his conduct was very dishonest, and that he was an accessory before the fact to vulgar and offensive behaviour by the newspapers, the principal villains; he regarded it as a shocking case and awarded vindictive damages of £1,000. No formal memorandum of agreement had ever been prepared by the parties, nor were the letters containing the agreement to transfer the action filed by the plaintiff until after the hearing. The defendant appealed, contending that the judge had no jurisdiction to award damages exceeding £400 and that, in any case, the award was excessive:—

Held, (1) that having regard to the provisions of the County Courts Act, 1934,[1] and the County Court Rules, 1936,[2] the facts showed that the action was transferred under section 65 and pursuant to section 43 of the Act of 1934 (now replaced respectively by sections 67 and 42 of the County Courts Act, 1959) and not under section 45 and pursuant to section 42 (respectively sections 45 and 41 of the Act of 1959); and that, therefore, the jurisdiction of the county court judge in regard to damages was unlimited.

(2) That although the agreement between the parties was contained in two documents it was a memorandum within the meaning of section 43; and that the facts that it was not in existence at the

[1] County Courts Act, 1934 (as amended), s. 42: "(1) Where a plaintiff has a cause of action for more than £400 in which, if it were not for more than £400, a county court would have jurisdiction, the plaintiff may abandon the excess, and thereupon a county court shall have jurisdiction to hear and determine the action, so, however, that the plaintiff shall not recover in the action an amount exceeding £400. . . ."

S. 43: "If, with respect to any action other than an action which, if commenced in the High Court, would, under the Acts and rules applying to that court, have been assigned to the Chancery Division or to the Probate, Divorce and Admiralty Division, the parties to the action agree, by a memorandum signed by them or by their respective solicitors, that a county court specified in the memorandum shall have jurisdiction in the action, that court shall have jurisdiction to hear and determine the action accordingly."

S. 45: "(1) In any action commenced in the High Court to which this section applies, any party may at any time apply to the High Court or a judge thereof for an order that the claim . . . shall be transferred— (*a*) to any county court in which the action might have been commenced if the subject matter and the amount thereof had been within the jurisdiction of the court; or . . . (*c*) to any county court which the High Court or judge may deem the most convenient to the parties; and the High Court or judge may thereupon, if the court or judge thinks fit, order that the claim . . . be so transferred accordingly. (2) This section applies to any action where— (*a*) the plaintiff's claim is founded either on contract or on tort and the amount claimed or remaining in dispute in respect thereof does not exceed £100. . . ."

S. 65: "If, where proceedings have been commenced in the High Court, an agreement is made under the provisions of section 43 . . . of this Act, that a county court shall have jurisdiction in those proceedings, the High Court or a judge thereof shall, on the application of any party to the proceedings, order that the proceedings be transferred to that county court."

[2] County Court Rules, 1936, Ord. 7: "r. 1 . . . (2) Where a plaintiff desires to abandon under subsection (1) of section 42 of the Act, the excess of his claim over £400, the abandonment of the excess shall be entered at the end of the particulars."

Ord. 16: "r. 10 (2) The party [lodging with the registrar the documents prescribed by s. 74 (1) (*a*) or s. 138 (2) of the Act] shall at the same time file in the court office . . . (*b*) where the transfer is ordered under section 65 of the Act, the agreement that the county court shall have jurisdiction in the proceedings. . . ."

C. A.

1960

WILLIAMS v. SETTLE.

date of the issue of the summons and that it was not filed until after judgment (in breach of Order 16, r. 10 (2) (*b*) of the County Court Rules, 1936), were procedural blemishes which did not deprive the county court of jurisdiction.

Reg. v. *Judge Willes, Ex parte Abbey National Building Society* [1954] 1 W.L.R. 136 applied.

(3) That the judge was entitled, not only at common law but by the provisions of section 17 (3) of the Copyright Act, 1956,[3] to award vindictive damages; and that having regard to the scandalous conduct of the defendant and the flagrant infringement of the plaintiff's copyright the damages were not too high (post, p. 1082).

Dicta of McCardie J. in *Butterworth* v. *Butterworth and Englefield* [1920] P. 126, 135; 36 T.L.R. 265 and of Singleton L.J. in *Loudon* v. *Ryder* [1953] 2 Q.B. 202, 209; [1953] 2 W.L.R. 537; [1953] 1 All E.R. 741, C.A. applied.

Per Sellers L.J. An action transferred by agreement under section 65 and pursuant to section 43 is a High Court action, unlimited and unrestricted, which falls for trial in the county court.

Per Harman L.J. It would be a salutary practice that orders for transfer should state ex facie the section under which the transfer is being made.

APPEAL from Judge Blagden sitting at Westminster County Court.

The defendant, Frank Settle, who carried on business as a professional photographer, took certain photographs of the wedding of the plaintiff, Donald Brian Williams, in 1956. These photographs were taken at the request of the plaintiff and were paid for by his wife's father (one Baker), and it was eventually admitted that the copyright in them was in the plaintiff.

In June, 1958, when the plaintiff's wife was expecting a child, Baker disappeared from his home and, shortly before the birth of the child, it was discovered that he had been murdered. These matters attracted publicity. The defendant was pressed by representatives of newspapers for copies of the photographs, and he sold several, including one showing a wedding group, to a newspaper representative for £15. Five days after the birth of the child the "Daily Express" and the "Daily Mail," both national newspapers with large circulations, published fairly large reproductions of the photograph with captions describing the persons shown in it by name; the "Daily Mail" gave a particular description of the plaintiff's wife.

The plaintiff obtained an apology from the Press Council, a body set up, inter alia, to protect the public from journalistic misbehaviour, £52 10s. damages and costs from the "Daily

[3] Copyright Act, 1956, s. 17: "... (3) Where in an action under "this section an infringement of "copyright is proved or admitted, and "the court, having regard (in addi-"tion to all other material con-"siderations) to—(*a*) the flagrancy of "the infringement, and (*b*) any bene-"fit shown to have accrued to the "defendant by reason of the infringe-"ment, is satisfied that effective relief "would not otherwise be available to "the plaintiff, the court, in assessing "damages for the infringement, shall "have power to award such additional "damages by virtue of this subsection "as the court may consider appro-"priate in the circumstances."

"Express," and an apology and undertakings from the "Daily "Mail," and brought the present proceedings against the defendant, claiming, inter alia, damages in a High Court action for infringement of his copyright in the photographs. The defendant by his defence denied that he had been commissioned by the plaintiff to take the photographs and that the plaintiff was the owner of the copyright in them, and contended that he had an implied licence to hand the negative of the photograph published to the "Daily Express" for the purposes of its reproduction in that newspaper.

Five months after the issue of the writ the plaintiff's solicitors wrote to the defendant's solicitors a letter which contained the following passage: "We are enclosing copy summons "for directions . . . We shall be pleased to hear that you . . . "agree to the action being transferred to the Westminster "County Court, as otherwise it will be necessary for us to put "the summons in counsel's list." The summons was in common form and requested that the place of trial should be the Westminster County Court. The defendant's solicitors replied in a letter containing the following passage: " . . . we have today "heard from our professional clients that they have no objection "to this action being transferred to the Westminster County "Court."

On the hearing of the summons the master made his order ". . . that the action be by consent transferred to Westminster "County Court . . ." The master made no reference to any statutory or other provision under which he acted, nor did he record any inquiry as to any abandonment by the plaintiff of the excess of his claim over £400; no such abandonment was ever made expressly in the statement of claim or elsewhere. The plaintiff made no attempt to prepare or file a formal memorandum of agreement to transfer, nor were the letters containing the agreement filed until after the hearing of the action.

The action proceeded in the county court and, on December 17, 1959, Judge Blagden gave judgment for the plaintiff for, inter alia, £1,000 damages and costs to be taxed on the High Court scale to the date of the transfer and on county court scale 4 thereafter. The judge, in the course of his judgment, referred to the fact that the parties had been together at school, set out the history of the case, describing the conduct of the two newspapers as vulgar and offensive, and continued: "It is difficult to find "language strong enough to describe this grossly offensive "behaviour on the part of the two newspapers. Even when it "takes its most merciful possible form, the very sudden death "of those nearest and dearest to us is a most appalling shock, "as I can testify from recent personal experience. What it "must be to be informed suddenly that your father or husband "or father-in-law has been murdered I tremble to think. It was "on top of this that these newspaper chose to blazon this picture

C. A.
1960
WILLIAMS v. SETTLE.

"of a happy occasion of a few years ago. Anything more calculated to wound and hurt bitterly the feelings of all members of the family I can hardly conceive. Mr. and Mrs. Williams' wedding anniversary must always be marred by the thought of what these disgusting newspapers did. No doubt these papers are in fact managed by people who in their private lives are decent, honest and reputable citizens. But it does seem that somehow or other there is a tendency on the part of these people to lose, when they get to their offices, all sense of respect for other people's feelings, and just to publish anything regardless of whether it will hurt other people's feelings, providing it will sell the paper . . . the defendant says that he was approached in the first place by a representative of the 'Daily Express' who said that if he supplied photographs of the wedding group this would assist the discovery of the murderer. That, indeed, might be some matter of mitigation, but I do not accept the defendant's story. Very dishonest. He says—again I disbelieve him—that the 'Daily Express' representative told him that he was authorised by the widow to obtain photographs and that they would only publish a photograph of Mr. Baker. His evidence here was most unsatisfactory . . . I disbelieve him. The most serious point is as to who gave the instructions. At first the defendant said he was entitled by custom to the copyright, and this was persisted in during the correspondence . . . The story adopted since April this year was that Mr. Baker ordered the photographs . . . I have not the slightest doubt whatever that Mrs. Williams did give the instructions on behalf of her then fiancé. That leaves only the question of amount. The relevant section of the Copyright Act, 1956, is section 17. I have considered the question of jurisdiction in another case and am of opinion that I have unlimited jurisdiction. The fact is that the defendant was only paid £15 which (having regard to the decreased value of money since the time of Judas Iscariot) makes the thirty pieces of silver for which the latter betrayed his Master a sum comparable to that for which the defendant sold intimate pictures of his former school fellow's wedding. There is no force in his argument based on public spiritedness. The excuse that the papers undertook not to publish the whole of the wedding group is nonsense; it was like selling a jemmy to a known burglar on his undertaking not to use it for breaking and entering houses. Principal villains are the two newspapers but an accessory before the fact can be morally just as guilty. The newspapers could not have done what they did if he had not supplied them with the materials. I regard this as a shocking case. I regard it as my duty to award damages that are really vindictive. . . ."

The defendant appealed. The grounds of the appeal as stated in his notice of appeal were, inter alia, that the judge had no jurisdiction to award damages in excess of £400, that the amount

of damages was excessive, and that the judge was wrong in awarding vindictive damages.

Neil Lawson Q.C. and *T. Ian Payne* for the defendant.
D. Tolstoy Q.C. and *L. J. Belcourt* for the plaintiff.

The following cases, in addition to those referred to in the judgments, were cited in argument: *Simpson* v. *Crowle* [4]; *Lea* v. *Moore* [5]; *Roberts* v. *G. W. King & Co.* [6]

SELLERS L.J. On December 17, 1959, Judge Blagden, sitting in the Westminster County Court, awarded the plaintiff £1,000 damages against the defendant. The defendant appeals, alleging first of all that the judge, sitting in the county court, had no jurisdiction to award damages in excess of £400 and, secondly, if he had, that they were excessive, because they were too much in themselves for the wrong done, and because they had also an element in them of what is described in the notice of appeal as vindictive damages; and it was said, too, in the course of argument, that in what I will describe as some minor matters the judge misdirected himself on the evidence.

[His Lordship stated the facts, observed that the judge's comments on the conduct of the newspapers were by no means too strong, that the defendant's conduct was aggravated, inter alia, by letters written on his behalf attempting to justify his conduct, and that the defendant must have known the use which would be made of the photographs which he supplied, and continued:] The first point taken by the defendant was that, this being an action tried in the county court and the county court jurisdiction admittedly being limited to £400, that was the limit of damages which could have been awarded in any event. It was further said that even £400 would have been excessive.

This action, however, was not commenced in the county court and therefore, on the face of it, was not limited by the county court's limits on jurisdiction. It was commenced in the High Court on August 13, 1958, by a writ, and the pleadings (the statement of claim and defence, further and better particulars and various interrogatories) all followed under the procedure of the High Court. Then there came a time when it was desired by the plaintiff to transfer this action from the High Court to the county court. The summons to that effect was dated January 15, 1959, and was in the common form of a summons for directions; by the material paragraph it requested that the place of the trial should be the Westminster County Court. On the next day, January 16, that summons was sent to the solicitors for the defendant with a letter which contained this sentence: "We "shall be pleased to hear that you are willing to give the

[4] [1921] 3 K.B. 243; 37 T.L.R. 658, D.C.

[5] [1955] 1 W.L.R. 38; [1955] 1 All E.R. 65, C.A.

[6] (1920) 37 T.L.R. 170, C.A.

C. A.
1960
WILLIAMS v. SETTLE.
Sellers L.J.

"particulars and agree to the action being transferred to the West-"minster County Court, as otherwise it will be necessary for us to "put the summons in counsel's list." On January 23, 1959, the defendant's solicitors replied: " . . . we have today heard from "our professional clients that they have no objection to this action "being transferred to the Westminster County Court." In due course the summons came up for hearing and an order was made by the master at the request of the parties to this effect (it being dated April 2, 1959): "It is ordered that the action be by "consent transferred to Westminster County Court, and that "the costs of this application be in the discretion of the county "court judge."

It has been argued by the defendant that the transfer to the county court must be held to have taken place under section 45 of the Act of 1934, which was in force at the material time. It is submitted on behalf of the plaintiff in reply to that argument that the proceeding took place under section 43 of the Act of 1934 and thereby it was a transfer of a High Court action for trial in the county court, a claim for an unliquidated amount with unlimited jurisdiction. Various matters have been discussed to ascertain what was in the minds of the parties when they agreed to transfer this action to the county court.

It does not seem to me very profitable to try to resolve what they respectively had in mind and whether either of them applied their minds to which section was the appropriate section for the transfer. Having looked at the two sections I am ready without hesitation to accept the submission made by Mr. Tolstoy on behalf of the plaintiff that section 45, on the facts of this case, does not seem to be appropriate and that the terms of section 43 have, by what took place, been fulfilled, and that is the section which it is appropriate to hold was the section under which this action in the High Court was transferred to the county court.

Section 45, which I need not read, related to transfers where the amount in the High Court action remaining in dispute was within the county court jurisdiction or had fallen within its jurisdiction by reason of what had taken place, so that it would come under the total sum of £400. Section 43 was of a different character and it read as follows: "If, with respect to any action "[assigned for the time being to the King's Bench Division of "the High Court] the parties to the action agree, by a memoran-"dum signed by them or by their respective solicitors, that a "county court specified in the memorandum shall have jurisdic-"tion in the action, that court shall have jurisdiction to hear "and determine the action accordingly." That, excluding as it did proceedings in the Chancery Division and proceedings in the Probate, Divorce and Admiralty Division, applied clearly to those actions which fell within the jurisdiction of the Queen's Bench Division, as an action for copyright in fact does.

Has there, then, been an agreement? Have the parties

agreed by a memorandum signed by them or by their respective solicitors? The point taken by Mr. Lawson for the defendant, which has been advanced still further by Mr. Payne, is that that section required a memorandum of the agreement to be in one document only and, recognising that that has not been a requirement for a note or memorandum in writing under the Statute of Frauds, 1677, or the Sale of Goods Act, 1893, which have kindred requirements for writing, it has been argued that this should be construed strictly and that there has not been a fulfilment of that section in the circumstances of this case, where an agreement is contained in writing by the solicitors but in two documents.

I can see no justification for so holding. It would seem to be wholly unreasonable and I can see no reason whatsoever for arriving at that conclusion. The essential thing is that the parties should agree. There was, once the action was transferred, a certain procedure to be followed, and, in respect of a transfer under section 43, Order 16, r. 10 (2) (*b*), of the County Court Rules, 1936, required that where a transfer was ordered under section 65 of the Act the agreement that the county court should have jurisdiction in the proceedings should be filed. It seems to me that, if the argument stressed by Mr. Payne that the agreement must be in one document is right, it would at least be more appropriate in that rule if it had said that one memorandum should be filed rather than that the agreement should be filed; but I can see no substance in that interpretation at all.

Therefore one has within the four corners of section 43 an action in the High Court in the Queen's Bench Division and one has the agreement of the letters and the memorandum. The agreement is as to an agreed county court, the Westminster County Court. That gives the county court jurisdiction. Jurisdiction for what? "... that court shall have jurisdiction to "hear and determine the action accordingly." In my view those final words mean that it is not a curtailed action reduced by the amount of damages but it is a High Court action, unlimited and unrestricted, which falls for hearing in the county court. Indeed, it is not the only circumstance in which an action of the High Court can be tried with unlimited jurisdiction, because that also arises under at least one other section of this Act, to which I need not refer.

Once the order had been made, then section 74 (section 77 as it now is) came into play: it provided that where an action, counterclaim or matter was ordered to be transferred from the High Court, any party might lodge with the registrar of the county court various documents; and the officer in the Supreme Court was to do what was necessary to transfer the action to the county court. That took place. What did not take place (and this is relied upon) was that the requirement of Order 16, r. 10 (2) (*b*), for the filing of the agreement, the two letters, was not

C. A.
1960
WILLIAMS v. SETTLE.
Sellers L.J.

complied with. This is taken as an answer to the plaintiff's contention that the jurisdiction of the county court was unlimited. Another point was also taken of a somewhat similar kind. That was that the agreement had not come into existence when the summons was taken out on January 15, and that it only came into existence afterwards.

To my mind neither point goes to the jurisdiction. The point with regard to the summons has been answered by authority, because it is sufficient if the consent is in existence at the time the order is made; and that clearly was the case here. The question arose in *Reg.* v. *Judge Willes, Ex parte Abbey National Building Society*,[1] a case in the Divisional Court. Lord Goddard C.J., having read section 43, said[2]: "That section deals with "common law matters, and section 53 also gives jurisdiction by "agreement in equity proceedings; so that the parties, being "quite willing for the judge to proceed with the case and give "judgment, had only to put their agreement into writing to "confer ample jurisdiction on the judge. But the judge did not "give the parties a chance of putting their agreement into writing "but proceeded to give a judgment saying that he had no juris-"diction to hear the case." Lord Goddard's judgment was the judgment of the court, the other two members, of whom I was one, agreeing with what he said. I would agree again, as I did there, that it is sufficient if the consent is in existence at the time when the judge took the case, and I think that has been followed in practice within my own experience, that the consent has been signed and put into writing even on the threshold of the court itself.

With regard to the failure to file the agreement with the court, that, I understand, was rectified after the trial. It was not a matter which was objected to by the defendant at the trial or in the course of the trial, although this point of jurisdiction was taken and, whilst it was a procedural blemish, it was not one, to my mind, which undermined the jurisdiction. It was waived, as it could be in the circumstances, by the defendant.

On this point of jurisdiction the court has not had the matter dealt with in any detail in the decision of the judge. Apparently the point was taken before him. How far it was argued I do not know, but he seems to have dealt with it quite shortly by saying that he had considered the matter, he had had it in some previous case and he was satisfied that he had jurisdiction. Under what section he was proceeding is not made clear, but the section which does apply, to my mind, as I have indicated, is section 43 and no other. It is perhaps unfortunate that the judge did not look to see what the agreement in writing was, because then, no doubt, it would have been forthcoming and put before the court and the rule would have been complied with. So much

[1] [1954] 1 W.L.R. 136. [2] Ibid. 138.

then for the contention that the county court judge had no jurisdiction to award damages in excess of £400. I think that in the circumstances of this case he had.

Then it is said that the damages are in any case excessive on two grounds, excessive because they are too much in any case for the wrong done to the plaintiff and excessive because they include something over and above ordinary compensatory damages. We were referred to some observations on vindictive or punitive damages made in a judgment of McCardie J. in *Butterworth* v. *Butterworth and Englefield*.[3] That judge reviewed the law at considerable length. In the course of his judgment, given with his "customary thoroughness, he cited from Sedgwick on Damages, and he said[4]: "The meaning of the phrase 'exemplary damages' "is aptly put in Sedgwick on Damages, 9th ed. (1913), s. 347, "where that distinguished author says: 'In actions of tort where "'gross fraud, wantonness, malice or oppression appears, the jury "'are not bound to adhere to the strict line of compensation, but "'may, by a severe verdict, at once impose a punishment on "'the defendant and hold him up as an example to the com-"'munity . . . damages assessed on this principle are called "'exemplary, punitive or vindictive damages.' The origin of "the doctrine of exemplary damages is ably dealt with by Sedg-"wick in the treatise just mentioned. The illustrative English "decisions are neatly and fully collected in Halsbury's Laws of "England, vol. 10, pp. 306–307. There it is well said: 'Where "'the wounded feeling and injured pride of a plaintiff, or the "'misconduct of a defendant, may be taken into consideration, "'the principle of restitutio in integrum no longer applies. "'Damages are then awarded not merely to recompense the "'plaintiff for the loss he has sustained by reason of the "'defendant's wrongful act, but to punish the defendant in an "'exemplary manner and vindicate the distinction between a "'wilful and an innocent wrongdoer.'" Perhaps, so far as the present case is concerned, one matter, among others, justifying heavy damages is that they may well hold the defendant up as an example to the community, that is to say, that they may act as a deterrent to others who are willing to supply to the press information which they know is going to be used in a manner which will be so hurtful and distressing to the people involved.

We were referred also to *Loudon* v. *Ryder*,[5] which was a case with a jury tried before Devlin J. which came before this court for consideration on damages. Objection was there taken by the appellant to the item of punitive damages which Devlin J. had put before the jury as being damages rather like imposing a fine. In the course of his judgment Singleton L.J. referred to that objection and, whilst he may not have upheld fully the similarity with a fine, he did say it was no objection to the summing-up

[3] [1920] P. 126; 36 T.L.R. 265.
[4] [1920] P. 126, 135.
[5] [1953] 2 Q.B. 202; [1953] 2 W.L.R. 537; [1953] 1 All E.R. 741.

C. A.
1960
WILLIAMS v. SETTLE.
Sellers L.J.

that the judge had put the matter in that way. He said[6]: "... "the judge was entitled to direct the jury that they could give "damages of an exemplary or punitive kind."

In the present action the judge was clearly justified, in the circumstances in which the defendant, in breach of the plaintiff's copyright, handed these photographs to the press knowing the use to which they were going to be put, in awarding substantial and heavy damages of a punitive nature. The power so to do, quite apart from the ordinary law of the land, is expressly given by statute. By section 17 (3) of the Copyright Act, 1956, it is provided: "Where in an action under this section an infringement of copyright is proved or admitted, and the court, having "regard (in addition to all other material considerations) to— "(*a*) the flagrancy of the infringement, and (*b*) any benefit shown "to have accrued to the defendant by reason of the infringement, "is satisfied that effective relief would not otherwise be available "to the plaintiff, the court, in assessing damages for the infringement, shall have power to award such additional damages by "virtue of this subsection as the court may consider appropriate "in the circumstances." It seems that this is not a case where there is any effective relief which could be given. The benefit which can be shown to have accrued to the defendant is meagre, so much so that the judge made some references to the £15 to which exception was taken by the defendant. It is the flagrancy of the infringement which calls for heavy damages, because this was a scandalous matter in the circumstances, which I do not propose to elaborate and about which I do not propose to express a view. It is sufficient to say that it was a flagrant infringement of the right of the plaintiff, and it was scandalous conduct and in total disregard not only of the legal rights of the plaintiff regarding copyright but of his feelings and his sense of family dignity and pride. It was an intrusion into his life, deeper and graver than an intrusion into a man's property.

In the course of the argument reference was made to an old case which concerned an intrusion into property.[7] This seems to me something much more serious, as I say. I cannot think that this court is called upon to reduce the damages, high as they are, for they are damages which the judge, having seen the witnesses and heard the case, thought to be appropriate. Whether I should have given so much I do not know, but, having seen the figure, I am not prepared to say that it is too high.

There are only one or two other matters I ought to mention, just to indicate that they have not been overlooked in the argument, but I think they have no real bearing on the quantum of damages which the judge awarded. It is said that the judge took into consideration the feelings of the wife and the family and not only the feelings of the plaintiff, that the judge did not realise

[6] [1953] 2 Q.B. 202, 209.

[7] *Merest* v. *Harvey* (1814) 5 Taunt. 442.

the anguish which the murder itself would entail and that it was really the press publication which caused the trouble and not the conduct of the defendant. When one looks at the setting of this case, it seems to me that the defendant, at the time when he did what he did, ought to have realised its consequences, and that in the circumstances his conduct did aggravate all that anguish which no doubt would be present without the publication of photographs, and therefore it only added to the distress and great hurt. It is bad enough to be subjected to such distress without having further injury imposed on top of it. A very minor matter is something which the judge said about the defendant being a school friend of the plaintiff. That again, I think, is not strictly right. They were not contemporaries, but they were members of the same school, and there really is no valid criticism of the judgment which the judge has given. I would dismiss this appeal.

WILLMER L.J. I have come to the same conclusion. At the time when this action was tried the County Courts Act in force was the 1934 Act, as amended in 1955. I shall refer to the sections as they were numbered in that Act, and not as they are now numbered in the Act of 1959.

The first and most important question is whether the judge ever had jurisdiction to award more than £400. That depends on the section under which the transfer was made; for I am satisfied that the judge would have had unlimited jurisdiction if the transfer were made under section 65, that is to say if it were made on the basis that the action was one to which section 43 applied. The contrary was somewhat faintly argued, but no authority was cited and it seems to me that we ought to follow the very clear expression of view in *Reg.* v. *Judge Willes*,[8] that where the parties consent to the case being heard in the county court no question of jurisdiction arises.

The substantial question is whether section 43 is the section applying to this action or whether, on the contrary, the transfer ought to be regarded as having been made in pursuance of section 45. The plaintiff contends that the case falls within section 43; the defendant argues for section 45. It must be one or the other, because there is no other section under which the transfer could have been made in this case. So far as section 45 is concerned, the transfer could only be made if the amount claimed or remaining in dispute did not exceed £400. Here the action started as a High Court action, and on the face of the pleadings the claim was for unliquidated damages without any stated limitation. There was machinery under section 42 which enabled a plaintiff, if he so desired, to abandon the excess of his claim over £400; but if he did that, Order 7, r. 1 (2), provided that the abandonment of the excess should be entered at the end of

[8] [1954] 1 W.L.R. 136.

C. A.
1960
WILLIAMS v. SETTLE.
Willmer L.J.

the particulars. It is said that the particulars there referred to are not the same thing as the statement of claim delivered in a High Court action. That, I think, is an unnecessarily subtle point. Certainly the fact is that no note of the abandonment of the excess was ever made in this case, and neither the defendant nor anybody else has suggested that the plaintiff ought to have entered in the pleadings a statement as to the abandonment of the excess.

The power to transfer under section 45 was a discretionary power; the court or a judge might, if it or he thought fit, order that the claim or counterclaim be transferred. It is perfectly true that in this case there was no contest with regard to the order, the parties both being agreeable to the transfer; but even so one might have thought that, if the transfer was sought to be made under section 45, the master before making the order would have made some inquiry as to the abandonment of the excess, seeing that there was nothing on the face of the pleadings to show that the excess was being abandoned by the plaintiff. I am bound to say that, having regard to the failure to use the machinery available under section 42 for abandoning the excess, and having regard to the absence of any inquiry at the time of the hearing of the summons for directions, I find it difficult to accept the argument that the plaintiff, by applying for the transfer, must be taken as impliedly abandoning the excess. So much for section 45.

With regard to the other possibility, Mr. Tolstoy has presented a formidable argument in support of his contention that the transfer in this case must be regarded as having been made under section 65, that is to say, on the basis that the action was one falling within section 43. As he pointed out, there were three requirements to be satisfied under that section: first, the action must not be one which was of a kind assigned to the Chancery Division or to the Probate, Divorce and Admiralty Division; secondly, there must be an agreement between the parties; and, thirdly, there must be a memorandum signed by them or by their respective solicitors. The first requirement is clearly satisfied. The action is undoubtedly one of the type which section 43 envisaged. Secondly, the parties undoubtedly did agree. As to the question whether there was a memorandum, that which is relied upon is the exchange of letters between the solicitors. Notwithstanding the powerful argument addressed to us this morning by Mr. Payne, I can see no reason why the memorandum required by the section must necessarily be contained in one document, or why an exchange of letters between the solicitors cannot be held to amount to a sufficient memorandum within the section.

Two objections, however, have been put forward as militating against the view that this was a transfer of an action falling within section 43. In the first place it is objected that the

memorandum was not in existence at the time when the summons for directions was issued, namely, January 15, 1959. The letters relied on are in fact dated respectively January 16 and January 23. There is in my judgment no substance in that point. The memorandum, in the shape of the letters, was certainly in existence at the time when the summons for directions was heard, namely, April 2, 1959. I can see no warrant for the suggestion that the memorandum referred to by the section must necessarily be in existence at the time when the summons is taken out. Indeed, there is good authority for the proposition that a memorandum prepared and put in at the time of the trial is sufficient. That was the view expressed by Lord Goddard C.J. in *Reg.* v. *Judge Willes* [9] and concurred in by the other members of the court. There is therefore in my view no substance in that first objection taken on behalf of the defendant.

The other objection is that, according to Order 16, r. 10 (2) (*b*), where a transfer was ordered under section 65, which is what the plaintiff contends for here, the agreement that the county court should have jurisdiction had to be filed in the county court office at the time when the other documents were lodged as required by section 74 of the Act. Admittedly nothing of the sort was done in this particular case. The letters relied on were not filed at all before the hearing, but we have been informed that since the hearing, and since the judgment of the judge, they have been filed. The omission to file the letters in accordance with the rule has been relied on as showing that the transfer cannot possibly have been a transfer made in pursuance of sections 43 and 65. The answer to that point, in my judgment, is that furnished by Mr. Tolstoy, namely, that the provisions of Order 16, r. 10, are merely procedural requirements which can be waived; they are not requirements which go to the question of jurisdiction. No doubt if objection had been taken an order to file the documents could have been obtained, and such order might possibly have been coupled with a stay to operate until the order was complied with; but it is impossible to argue from that that this requirement goes to the question of jurisdiction. Moreover, as I have pointed out, there is good authority for the proposition that it is sufficient if the memorandum is actually filed in court at the time of the trial.

One other observation falls to be made, I think, as tending to assist the plaintiff's rather than the defendant's argument. That is that under section 65 no discretion was conferred upon the court, but it was mandatory to make the order if the application was made in a proper case arising under section 43. For what it is worth, it seems to me that the fact that nothing was said, and no inquiry was made, either by the master or by either of the parties, at the time when the order was made on the summons for directions goes rather to show that section 65 must

[9] [1954] 1 W.L.R. 136, 138.

C. A.
1960
WILLIAMS v. SETTLE.
Willmer L.J.

have been regarded as applying rather than section 45, which, as I have said, was a section calling for the exercise of discretion.

In those circumstances I am satisfied, as a result of Mr. Tolstoy's argument, that in this case we must regard the transfer as having been made under section 65, that is to say, on the basis that the action fell within section 43; and accordingly I am satisfied that the judge had unlimited jurisdiction with regard to the damages to be awarded.

On the other matters I have but little to add to what my Lord has already said.

The second question that arises is whether this is an appropriate case for the award of exemplary as opposed to compensatory damages. I am abundantly satisfied, for the reasons already stated by my Lord which I need not repeat, that this was a proper case in which to award exemplary damages. The third question is with regard to the quantum of damages awarded. It has been suggested that the judge misdirected himself, in that he took into consideration in awarding the damages matters which he should not have taken into consideration. For instance the judge himself said, in one passage in his judgment, that the real villains in this case were the newspapers rather than the defendant. In those circumstances it is said that it was wrong to award heavy damages against the defendant, whose act merely created the occasion for the newspapers' behaviour. As to that point, I think it is to be emphasised that the judge did not accept the defendant's evidence with regard to what the press representatives who called on him said. In particular, he did not believe the defendant when he said he was told that the photographs were required merely to assist in the discovery of the murderer; nor did he believe the defendant's evidence that he was told that only the photograph of Baker, the father-in-law, would be published. The judge was entitled to take that view of the defendant's evidence, and it is not a view with which we can interfere. If he did take that view of the defendant's evidence, it seems to me that he was abundantly justified in coming to the conclusion, as he did, that the defendant must be regarded as being in the position of an accessory before the fact, so as to share with the newspapers the guilt for what was done.

Another matter objected to was that the judge wrongly took into consideration the suffering of the plaintiff's family, and in particular the plaintiff's wife, in awarding the damages which he did. There can be no doubt that the publication must have come as a terrible shock to the plaintiff's wife, because it appears that these events, by a terrible mischance, happened to coincide with the time of her own confinement. With regard to that point it seems to me that, assuming, as I think we are entitled to assume, that the plaintiff and his wife were a normally affectionate married couple, there is no reason why the distress

caused to the wife should not be regarded as part of the injury suffered by her husband. The mere fact that injury was caused to the wife was itself distressing and injurious, I should have thought, to the husband. I am unable, therefore, to say that the judge fell into any error with regard to that aspect of the case.

If the judge is not to be criticised for having taken into consideration matters which he ought not to have done, then the only question remaining is one of pure quantum. This was a case in which the damages were very much at large. I, or any one of us, had we been sitting at first instance, might have arrived at some quite different figure; but this much can surely be said, namely, that having regard to the conduct of the defendant it was clearly a case which did call for heavy damages. The judge has arrived at his figure and, whatever figure I might have arrived at for myself, I am quite unable to say that his figure is so far wrong that we ought to interfere. In those circumstances I agree with my Lord that this appeal must be dismissed.

HARMAN L.J. I, too, agree. The procedural question of county court jurisdiction was nicely poised. It may well arise out of the fact that neither party paid particular attention at the time when the transfer was agreed on to which section it was that was being used as the vehicle of transfer. This court, however, when appealed to on the subject, must make up its mind which section is pointed at. Neither was exactly complied with but, if you treat the transfer as being under section 45, you have got to imply an agreement by the plaintiff to limit his damages. That seems to be a very big implication to make. On the other side, if you are looking at section 43, you are met with the fact that there was a procedural defect in that the memorandum was not filed as it should have been when the other papers were filed with the county court. That, no doubt, is not only a procedural defect but also some evidence that the solicitors who had charge of the matter did not think that they were pursuing a remedy under section 43. As my Lords have pointed out, a procedural defect is not fatal to the action in which it happens. It may be waived, and one finds it stated in the High Court practice (and I have no doubt that it is the same in the county court) that non-compliance with the rules never makes proceedings void. Therefore I am in agreement with my brethren in coming down on the side of section 43 as opposed to section 45. It seems to me that it would be a salutary practice that orders for transfer should state ex facie the section under which the transfer is being made. If then section 43 be here the operative one the damages are, as the judge thought, unlimited and on that footing I for one should be very far from interfering with what he has done. The new Copyright Act specifically provides by section 17 (3) that punitive damages may be awarded. If ever there was a copyright case in which that

C. A.
1960
WILLIAMS v. SETTLE.

was appropriate it is this one. Indeed, if the blow which has fallen upon the defendant comes as a shock it may be a salutary one, and possibly act as a warning to other persons holding similar documents in which the copyright is not in them not to yield to the craving of the press for sensation. If it has that effect I for one should agree that the result, though severe, is salutary.

Appeal dismissed.
Costs.

Solicitors: *Blundell, Baker & Co. for Brighouses, Southport; Michael Kramer & Co.*

[COURT OF APPEAL.]

C. A.
1960
July 18.
Hodson, Ormerod and Harman L.JJ.

* ADDISON *v.* ADDISON AND HOLDEN.

PRACTICE NOTE.

Court of Appeal—Appeal out of time—Legally aided case—Notice of appeal should be filed without waiting for the grant of legal aid.
Legal Aid—Certificate—Appeal—Notice of appeal to be filed without waiting for grant of legal aid.

Where a party desires to appeal against a decision and also wishes to obtain legal aid, the notice of appeal should be filed within the proper time without waiting for the grant of a legal aid certificate.

APPLICATION for leave to appeal notwithstanding time had expired.

F. S. Laskey for the appellant.
J. A. P. Hazel for the respondents.

In the course of granting an application for leave to appeal, notwithstanding the time within which notice of appeal should be filed and served had expired, HODSON L.J. made the following observations: We cannot do other than extend the time, but I should like it to be publicly known that a great deal of money has been wasted in this case.

We give leave, but it seems to me a very serious matter that expenditure should have been incurred as it has been in this case, and, indeed, in other cases. An appellant who has the right to appeal wishes to appeal, and a notice of appeal comes into existence. In this case the notice was sent to the opposition, but the step was not taken of filing it in the appropriate registry. The reason was because there was delay in seeking and obtaining legal aid, but the costs have been incurred today on behalf of both

parties in order to secure an extension of time for leave to appeal. If the notice had been filed within the proper time it would have been a matter involving little expense and all this could have been avoided.

I confess I cannot understand why parties are not prepared, if they wish to appeal, to incur the very small expense of giving notice of appeal, and filing it in the proper place, without waiting to see whether the public purse will bear the cost of their litigation. I do not see why, however, the appellant should suffer for what has happened, and we must I think, therefore, extend the time for leave to appeal.

ORMEROD and HARMAN L.JJ. concurred.

Solicitors: *Edwin Coe & Calder Woods for Simpson & Ashworth, Accrington; Sharpe, Pritchard & Co. for Sharples, Son & Slinger, Accrington.*

I. G. R. M.

[PROBATE, ETC., DIVISION.]

* ROBINS v. ROBINS.

1960
May 23, 24, 25.
Wrangham J.

Husband and Wife—Cruelty—Insanity—As defence—Whether genuine belief in false accusations arising from mental disorder is a defence to a charge of cruelty based thereon—Reasonable apprehension of injury to health.

A wife filed a petition seeking a decree of divorce on the ground of her husband's cruelty. She also filed a supplemental petition alleging further cruelty in that the husband had, in September, 1959, falsely accused her in the presence of a third party of an improper association with another man and of being a moral danger to the child of the parties. By a second supplemental petition she further alleged an incident in May, 1960, in which the husband slapped her across the face and took the child of the parties by the throat. The husband denied the cruelty alleged.

At the hearing of the suit Wrangham J. found that the matters alleged in the wife's petition did not amount to cruelty, that the accusations as alleged in the supplemental petition were without foundation, that at the date of the incident alleged and for some years prior thereto the husband was suffering from mental disorder as a result of which he firmly believed the accusations to be true and that the husband's conduct as alleged in the second supplemental petition was unjustifiable.

Held, (1) that, owing to mental illness, the husband did not appreciate that his conduct as alleged in the supplemental petition was wrong and that he, therefore, had a good defence to the charge of cruelty made therein.

(2) That the gravity of the assault alleged in the second supplemental petition in relation to the future was to be judged in the light of the whole previous history of the marriage and the husband's mental instability; in all the circumstances it gave rise to

1960

Robins
v.
Robins.

a reasonable apprehension that the wife's health might be impaired in the future, the wife was, therefore, entitled to a decree nisi of divorce on the cruelty alleged in the second supplemental petition only.

Astle v. *Astle* [1939] P. 415; 55 T.L.R. 1045; [1939] 3 All E.R. 967 applied.

Defended petition for divorce.

The wife filed a petition seeking the dissolution of the marriage on the ground of the husband's cruelty. She subsequently filed a supplemental petition and a second supplemental petition, each of which alleged a further act of cruelty. At the hearing of the suit Wrangham J. found that the incidents in the petition did not amount to cruelty and the matter is reported only as to the two supplemental petitions. The husband, who at all relevant times was acting in person, by his answers denied the cruelty alleged.

The events which led to the filing of the supplemental petition were as follows: The wife had for some years been a friend of a neighbouring couple. The husband objected to the association for reasons which were found to be of no substance. On September 30, 1959, a quarrel arose over the association which led to the husband refusing to let his wife into the house, with the result that the wife sent for the police. It was plain from the evidence of the police constable first, that the husband had, in fact, refused to allow the wife to enter the house: secondly, that he was objecting to her associating at all with the husband of the neighbouring couple: and thirdly, that he was saying that the child of the marriage, a girl of 12, was in some form of moral danger. To such an extent did he make that suggestion that the police officer thought it right to point out that it would be possible for a woman police constable to visit the little girl to see if she was in need of care and protection.

The mental state of the husband was on that occasion illustrated by the fact that he told the police constable that the wife's brother was spying on him (an allegation which was unfounded) and that he proposed, if anybody interfered with his domestic matters, to summons the State or the Crown, and, according to the police constable, rambled on in a way which was very difficult to follow.

On May 15, 1960, there occurred the events which gave rise to the second supplemental petition. The wife, in her evidence, said that the husband sent the child to her to say that he wanted to see her, so she went to see him upstairs. He then accused her of taking some money, quite unjustly, and when she denied it he said that he would call the police. She invited him to do that and he thereupon slapped her upon the face, in the presence of the daughter, and when the daughter screamed as a result, gripped the daughter by the throat. The wife managed to release the daughter and told her they would go for the police. Thereupon the husband repented of what he had done, put his arm round his wife's shoulders and said he loved them both and

asked her not to go for the police. The husband gave no evidence to contradict that account of the events.

Medical evidence was before the court that the husband had, in 1955, suffered from delusions of persecution and conspiracy against him, and that, as a result, he had been admitted to a mental hospital from which he had discharged himself in 1956. After his discharge the husband had exacted a promise from the wife that she would not call a doctor to him again and he had, in consequence, thereafter received no medical treatment.

Mrs. Esther Iwi for the wife.

The husband appeared in person.

The following cases were cited in argument in addition to that referred to in the judgment: *Palmer* v. *Palmer* [1]; *Swan* v. *Swan*.[2]

WRANGHAM J. referred to the facts alleged in the supplemental petition, stating that he was satisfied that at the time of the incident alleged the husband was mentally very far from well and indeed in need of medical advice, and continued: I accept that the husband did entertain the belief that the wife was improperly associating with the husband of the neighbouring couple and that the child was in moral danger. I equally accept that there was absolutely no ground whatever for either of those beliefs, and that they were entertained by him, not on any reasonable ground, but because he was a man with a sick mind who was capable of forming such unfounded ideas, as he had formed the ideas of persecution and conspiracy in November, 1955. It is said, and said with justice, that this is not pleaded in any answer. In answer to the first supplemental petition it could have been pleaded that the husband was not responsible for the way in which he behaved on that occasion owing to the operation of the M'Naughten Rules. But at the time when the supplemental petition was served, and when the answer was filed, the husband was acting for himself, and one can understand that it might be a little difficult for a husband acting for himself to plead that he was not responsible for what he did because he did not at the time understand the nature and quality of his act or that what he was doing was wrong. In those circumstances, I think I ought to give effect to my finding, whatever the state of the pleadings. I think that at that stage, by reason of his mental illness, he did not realise that it was wrong for him to make those accusations against his wife because he firmly believed them to be true.

[His Lordship then referred to the facts alleged in the second supplemental petition and continued:] I am, therefore, left with this, that at the moment when this petition was shortly to be heard, perhaps because of that fact, the husband so far lost control of himself as to slap his wife across the face, and in her presence

[1] [1955] P. 4; [1954] 3 W.L.R. 756; [1954] 3 All E.R. 494.

[2] [1953] P. 258; [1953] 3 W.L.R. 591; [1953] 2 All E.R. 854.

1960

ROBINS
v.
ROBINS.

Wrangham J.

grab the little girl by the throat. It is clear that that conduct was wrong. If one is to be technical, it was an assault on the wife and, indeed, in her presence on the child. It was not justified by anything; there was no sort of provocation. It was not justifiable or excusable in any way. So I start with this, that on May 15, 1960, the husband did something to his wife which was indefensible. Of course, the mere slaps on the face, or the momentary alarm of seeing her child taken by the throat, which had no ill consequences upon the child, was in a sense so slight that it would have had no ill effect on the wife's health at all. But the way in which the case, as I understand it, was put upon the second supplemental petition is this: Here you have an unjustifiable act committed by the husband which, although it did not affect the wife's health, did give rise to a reasonable apprehension that the wife's health might be affected in future if she continued to live with her husband. She has only lived with him for eight or nine days, or rather less than that since that event, so that the mere fact that she did continue with him for a time after the event is not really any reason for supposing that the event itself did not give rise to a reasonable apprehension that her health might be impaired in the future.

If this scene had occurred between a sane and rational husband and a sane and rational wife, I do not think that I would have inferred that the wife's health was likely to be impaired in the future because she had, on one occasion, been slapped in the face. The question, therefore, is whether I am entitled to view the quality of that act differently because the act was committed by a man who is shown by the whole history of this case to be a man of substantial mental instability. In *Astle* v. *Astle*,[1] a husband who violently assaulted his wife in 1927, at a time when he was so insane as not to know the nature and quality of his acts, in 1931 uttered a threat against his wife which, had it come from a man without the previous history of insane violence in 1927, would not have been cruelty sufficient to entitle the wife to a decree. But Henn Collins J.[2] held that as that threat had been uttered by a man who had, in fact, committed acts of violence when insane, four years before, the quality of the threat was, so to speak, thereby altered; and that he was entitled, in the circumstances, to say that there was a reasonable apprehension of danger to the wife's health in the future because the threat came from a man who had been insane, and violent when insane, four years earlier. As he pointed out,[3] by implication rather than expressly, it was, as it were, unlucky for the husband that the threat acquired the gravity which it did by reason of the acts for which he was not responsible, but, nevertheless, it did. As it seems to me, the same principle holds in the present case. If I hold, as I do, that the husband committed an indefensible assault upon his wife on

[1] [1939] P. 415; 55 T.L.R. 1045; [1939] 3 All E.R. 967.

[2] [1939] P. 415, 420.

[3] Ibid.

May 15, 1960, I am entitled to judge the gravity of that assault in relation to the future by the whole of the previous history of the marriage, and in particular by reference to the husband's mental illnesses. It does in a way seem unfair that an act committed by a man of mental instability should be visited by consequences which would not follow in the case of the same act committed by a man of mental stability. That is why I am sympathetic with both sides, because on the one side I think there is, as a result of the assault on May 15, a real reason for regarding the wife's health as endangered by continuing to live with her husband, so that it would be unfair to the wife to refuse a decree; but, on the other hand, I quite see what would apparently be the unfairness to the husband, of relying on an act which, committed by a different kind of man, would not give rise to the inference of danger for the future. But I have made up my mind that where there is an indefensible act, in the present case an assault, which when committed by the particular man who committed it gives rise to an apprehension of injury in the future, that must be good ground for a finding of cruelty, even though such an act, when committed by a different kind of man, would not give rise to that inference and, therefore, would not be described as cruelty.

I have tried as hard as I can to explain, particularly to the husband, the reasons for my finding, because I should not like him to think that I had accepted the whole story of cruelty which the wife has told me, most of which I regard as either exaggerated or untrue. But on the very limited basis which I am endeavouring to define, I think that I am bound to find the husband guilty of cruelty on the second supplemental petition only.

Solicitor: *Edward F. Iwi.*

E. J.

[HOUSE OF LORDS.]

* WHITEHOUSE . . . . . PETITIONER; H. L. (E.)†

AND

BOARD OF CONTROL AND OTHERS . . . RESPONDENTS.

1960
May 9.

House of Lords—Leave to appeal—Mental deficiency—Refusal by Court of Appeal of leave to appeal against refusal of High Court of leave to bring proceedings—Whether jurisdiction to grant leave to appeal to House of Lords—Lunacy Act, 1890 (53 *&* 54 *Vict. c.* 5), *s.* 330 (2)—*Mental Treatment Act,* 1930 (20 *&* 21 *Geo.* 5, *c.* 23), *s.* 16 (1)—*Appellate Jurisdiction Act,* 1876 (39 *&* 40 *Vict. c.* 59), *s.* 3—*Supreme Court of Judicature (Consolidation) Act,* 1925 (15 *&* 16 *Geo.* 5, *c.* 49), *s.* 31 (1) (i).

† *Present*: LORD COHEN, LORD KEITH OF AVONHOLM and LORD DENNING.

H. L. (E.)

1960

WHITEHOUSE
v.
BOARD OF
CONTROL.

No appeal lies to the House of Lords from a refusal of the Court of Appeal to grant leave to appeal from an order of the High Court refusing leave to institute proceedings under section 330 (2) of the Lunacy Act, 1890, as substituted by section 16 (1) of the Mental Treatment Act, 1930.[1]

Lane v. *Esdaile* [1891] A.C. 210, H.L. applied.

PETITION for leave to appeal.

This was a petition by Amy Jane Whitehouse for leave to appeal to the House of Lords and to appeal out of time, from two decisions of the Court of Appeal dated respectively June 8, 1959 (Morris, Ormerod and Willmer L.JJ.), and February 15, 1960 (Ormerod and Willmer L.JJ.). The respondents were the Board of Control, Dr. Arthur Noel Pearson who was a party to the certification of the petitioner under the Lunacy and Mental Treatment Acts, 1890 to 1930, and the Glamorgan County Council, and Evan John Powell, the duly authorised officer. The respondent, Dr. Cyril John Morgan, had died before the commencement of these proceedings and his personal representatives did not appear and were not represented, they not having been served with the proceedings.

On May 14, 1959, Glyn-Jones J. refused (a) the petitioner's application by originating summons for leave under section 330 (2) of the Lunacy Act, 1890, as substituted by section 16 (1) of the Mental Treatment Act, 1930, to bring proceedings against the respondents for damages for negligence and breach of statutory duty and false imprisonment; (b) leave to appeal from his decision. The petitioner thereupon applied to the Court of Appeal for leave to appeal, and, on June 8, 1959, the Court of Appeal refused such leave. On that occasion the petitioner appeared in person and the Court of Appeal went into the merits. On February 15, 1960, the Court of Appeal dismissed the petitioner's application for leave to appeal to the House of Lords. The petitioner now sought leave to appeal to the House of Lords from the refusals of the Court of Appeal to grant leave to appeal to itself and to the House of Lords. On the hearing of the petition, preliminary objection was taken on behalf of the Board of Control.

R. A. Barr for the Board of Control. In this type of case no appeal lies to the House of Lords from a refusal by the Court of Appeal to grant leave to appeal to the Court of Appeal. The order of the judge refusing leave under section 330 (2) of the

[1] Lunacy Act, 1890, s. 330 (2), as substituted by s. 16 (1) of the Mental Treatment Act, 1930: "No proceedings, civil or criminal, shall be brought against any person in any court in respect of any such matter as is mentioned in the last preceding subsection, without the leave of the High Court . . ."

Appellate Jurisdiction Act, 1876, s. 3: ". . . an appeal shall lie to the House of Lords from any order or judgment . . . (1) of Her Majesty's Court of Appeal in England . . ."

Supreme Court of Judicature (Consolidation) Act, 1925, s. 31 (1): "No appeal shall lie—. . . (i) without the leave of the judge or of the Court of Appeal from any interlocutory order . . . made or given by a judge . . ."

Lunacy Act, 1890, as substituted by section 16 (1) of the Mental Treatment Act, 1930, is an interlocutory order.

[LORD KEITH OF AVONHOLM. Interlocutory in what sense? It is final, because it disposed of the matter.]

It is submitted that the order is interlocutory, but for the purposes of the argument it matters not whether it is interlocutory or final. If it is final, the petition is misconceived because the petitioner could have given notice of the substantive appeal to the Court of Appeal and no such notice was given in this case.

Section 31 (1) (i) of the Supreme Court of Judicature (Consolidation) Act, 1925, provides that no appeal lies without leave of the judge or the Court of Appeal from any interlocutory judgment made or given by a judge. It is submitted that the refusal of the Court of Appeal to grant leave to appeal to the Court of Appeal is not an order or judgment contemplated by or within the meaning of section 3 of the Appellate Jurisdiction Act, 1876, and that, accordingly, no appeal lies to this House. Where Parliament has provided, as it has in the present case by the Act of 1925, that there should be no appeal unless some particular body or bodies named in the statute permit an appeal, such a provision is clearly intended as a check on appeals which may be brought and to prevent frivolous and unnecessary appeals. If it is to be said that there is a right of appeal against the refusal itself, the statutory provision is set at naught and becomes an absurdity, since two appeals would be possible instead of one, namely, one against refusal of leave and another against the substantive decision itself. Reliance is placed on *Lane* v. *Esdaile*,[2] which was followed in *In re Housing of the Working Classes Act, 1890, Ex parte Stevenson*,[3] where it was held that no appeal lay.

On the question whether an order made under section 330 (2) of the Lunacy Act, 1890, as substituted by section 16 (1) of the Mental Treatment Act, 1930, is interlocutory: see *In re Page* [4] and also *Hunt* v. *Allied Bakeries Ltd.*,[5] *per* Lord Evershed M.R. The principle of *Lane* v. *Esdaile* [6] would, however, apply whether the order were interlocutory or not.

To summarise: first, under section 330 (2) of the Lunacy Act, 1890, as substituted by section 16 (1) of the Act of 1930, the leave required is the leave of the High Court and that cannot be the leave of the Court of Appeal; and that upon the refusal of the leave by the judge in this case the matter was disposed of, and no appeal lies. In the alternative, the order was an interlocutory order, and the right of appeal is limited by section 31 (1) (i) of the Judicature Act, 1925, to leave given either by the judge or by the Court of Appeal, but not by your Lordships' House. If both the above contentions be wrong, then it is submitted that the order was a final order and no leave to appeal was necessary;

[2] [1891] A.C. 210, H.L.
[3] [1892] 1 Q.B. 609; 8 T.L.R. 486.
[4] [1910] Ch. 489, C.A.
[5] [1956] 1 W.L.R. 1326; [1956] 3 All E.R. 513, C.A.
[6] [1891] A.C. 210.

H. L. (E.)
1960
WHITEHOUSE
v.
BOARD OF
CONTROL.

that the proper course was for the petitioner to have instituted a substantive appeal to the Court of Appeal, and that as no substantive appeal has been heard, there is nothing from which to appeal to this House. [Reference was also made to *Kay* v. *Briggs*.[7]]

P. E. Webster for Dr. Pearson, and *J. G. Wilmers* for the Glamorgan County Council and Powell, adopted the argument for the Board of Control.

John Platts-Mills for the petitioner. *Lane* v. *Esdaile*[8] is distinguishable and should not be applied to the present case. That decision is limited by all the speeches, except that of Lord Halsbury L.C. within narrow limits, namely, that the House will not interfere with the discretion of the Court of Appeal in matters relating to the extension of time for leave to appeal to the Court of Appeal. The order asked for here is an order to the effect that the Court of Appeal should have given leave to appeal to that court.

[LORD COHEN. In the last paragraph of Lord Herschell's speech in *Lane* v. *Esdaile*[9] he says: "My Lords, I am quite "aware that Sir Henry James on behalf of the appellants "attempted to distinguish the two cases by reason of a difference "of language." I read the next sentence, altering it as I think it would have to be altered to fit the present case: "In the "present case it is said that no suit shall be instituted except by "special leave, whilst in the other case it is said that the deter-"mination of the appeal shall be final. I do not think that there "is any difference in the meaning of those two expressions."[10] The principle in the last part of the judgment applies also, I think, to the present case.]

It is submitted that since the enactment of the Supreme Court of Judicature (Consolidation) Act, 1925, a distinction should be drawn between cases in which it is provided by statute that a particular decision is final and cases where proceedings may not be taken without leave of the High Court. In regard to a provision such as the latter that means the High Court as controlled by the superior jurisdiction of the Court of Appeal, and that, in turn, by such other jurisdiction as there may be in proper cases. Accordingly, unless one finds words which necessarily point to the finality of the character of the decision, the expression the "High "Court" in such an enactment as section 16 (1) of the Act of 1930, does not exclude the right of appeal which is prescribed by the Judicature Act, 1925, and R.S.C., Ord. 58. The only group of cases where the House will not interfere with the use of the

[7] (1889) 22 Q.B.D. 343; 5 T.L.R. 256, C.A.

[8] [1891] A.C. 210.

[9] Ibid. 215.

[10] The original passage reads: "In "the present case it is said that no "appeal shall lie after a year except "by special leave, whilst in the other "case it is said that the determina-"tion of the appeal shall be final "unless special leave to appeal be "given. I do not think there is any "difference in the meaning of those "two expressions."

Court of Appeal's discretion is that narrow group relating to the extension of time for leave to appeal to the Court of Appeal.

On the question whether the original order was final or interlocutory, the proper conclusion should be that if leave to commence an action under section 330 were refused, that would be a final order because it finally disposed of the right of the party to sue. If, however, leave were granted, the order would be interlocutory because the proceedings would be continuing. It is submitted that the order of June 8, 1959, refusing the application for leave to bring proceedings is, therefore, an order within the Appellate Jurisdiction Act, 1876, and that it would be proper to allow an appeal to be heard. [Reference was also made to the first note in vol. 2 of The Annual Practice (1958) at p. 3173, on section 31 (1) (*h*) of the Supreme Court of Judicature (Consolidation) Act, 1925, and to the note in vol. 1 of The Annual Practice (1960) at p. 1663, under the heading "Interlocutory order" on R.S.C., Ord. 58, r. 4.]

The Appeal Committee refused the petition.

LORD COHEN. We are satisfied that the preliminary objection must be sustained, and that this case is covered by the principle of *Lane* v. *Esdaile*.[11] In those circumstances, we think it better to express no opinion on the merits of the appeal in the interests of the petitioner. The petition is refused.

Leave to appeal to the House of Lords refused.

Solicitors: *Edward Mackie & Co.; Solicitor, Ministry of Health; Hempsons; Lewin, Gregory, Mead & Sons for Richard John, Cardiff.*

J. A. G.

[11] [1891] A.C. 210.

[CHANCERY DIVISION.]

* COTTERELL *v.* PRICE AND OTHERS.

1960
July 14, 15.
Buckley J.

[1959 C. No. 2056.]

Limitation of Action—Mortgage—Second mortgage—Order in bankruptcy against mortgagor—Second mortgagee's rights against mortgagor statute barred—Whether entitled to redeem first mortgage—Law of Property Act, 1925 (15 *Geo.* 5, *c.* 20), *s.* 95.

Limitation of Action—Bankruptcy—Mortgage—Order in bankruptcy against mortgagor—Rights of mortgagee not barred before bankruptcy—Whether time runs—Notice to trustee to elect whether to redeem security—Whether effective—Bankruptcy Act, 1914 (4 *&* 5 *Geo.* 5, *c.* 59), *Sch. II, r.* 13 (*c*).

In March, 1930, a mortgagor created a legal mortgage of certain property. In May, 1930, he created a second legal mortgage of

1960

COTTERELL
v.
PRICE.

(inter alia) the same property in favour of the plaintiff and five other persons. All interest due on the first mortgage was paid down to June, 1959, but no part of the principal sum or interest secured by the second mortgage was ever paid.

In November, 1938, a receiving order in bankruptcy was made against the mortgagor. No proof of the debt secured by the second mortgage was then submitted by the second mortgagees. The mortgagor did not obtain his discharge and in January, 1958, the plaintiff, who was then the only person entitled to the benefit of the second mortgage, submitted a proof of debt for £3,061 18s. 9d., and valued the security constituted by the second mortgage at £2,250. In May, 1958, the plaintiff served on the official receiver, as trustee in bankruptcy of the mortgagor, a notice under rule 13 (*c*) of the Second Schedule to the Bankruptcy Act, 1914,[1] requiring him to elect whether he would or would not exercise his power of redeeming the security or of requiring it to be realised. No election was made by the official receiver within the six-month period allowed by the rule.

In June, 1959, the plaintiff issued a summons claiming (inter alia) a declaration that his right to redeem the first mortgage was still subsisting. He conceded that, as against the mortgagor, his remedies by action were statute barred:—

Held, (1) that when the plaintiff's rights against the mortgagor became statute barred in 1942, by operation of section 16 of the Limitation Act, 1939, his estate and interest in the property came to an end; that, since no one who had no estate or interest in land could have an equity of redemption, he then ceased to be entitled to redeem the first mortgage; and that, having lost his status as a legal mortgagee of the property, the plaintiff was no longer entitled under section 95 of the Law of Property Act, 1925, to give directions to the first mortgagees with regard to the redemption of the first mortgage which would override any directions given by the mortgagor (post, p. 1102).

(2) That the doctrine that time ceased to run under the Limitation Act, 1939, when a party became bankrupt only applied "in "the bankruptcy" and had no effect on the operation of the statute upon any rights or remedies which were unaffected by the bankruptcy, and a mortgagee who relied on his security, as the plaintiff did, retained and stood on rights which he had before the bankruptcy, and which were unaffected by it so that, in respect of those rights, time continued to run notwithstanding the bankruptcy; that, the plaintiff and his predecessors in title having become debarred from foreclosing or recovering possession of the property in 1942, the plaintiff was not in January, 1958, a secured creditor within the meaning of the rules in the Second Schedule to the Bankruptcy Act, 1914, and was not entitled to give notice under rule 13 (*c*); and that, therefore, the official receiver's failure to elect did not operate to vest the mortgagor's equity of redemption in the plaintiff. Accordingly, the plaintiff's right to redeem the first mortgage was no longer subsisting (post, p. 1105).

[1] Bankruptcy Act, 1914, Sch. II, r. 13 (*c*): "... the creditor may at "any time, by notice in writing, re-"quire the trustee to elect whether he "will or will not exercise his power of "redeeming the security or requiring "it to be realised, and if the trustee "does not, within six months after "receiving the notice, signify in "writing to the creditor his election "to exercise the power, he shall not "be entitled to exercise it; and the "equity of redemption, or any other "interest in the property comprised "in the security which is vested in "the trustee, shall vest in the "creditor ..."

Ex parte Lancaster Banking Corporation, In re Westby (1878) 10 Ch.D. 776 and *In re Benzon* [1914] 2 Ch. 68; 30 T.L.R. 435, C.A. considered.

ADJOURNED SUMMONS.

By a mortgage, dated March 13, 1930, the mortgagor, Lisle John Forman Mantle, demised certain freehold property known as Malvern Cottage, Malvern Road, Shirley, Southampton, to John Johnson Martin for a term of 1,000 years from the date thereof by way of legal mortgage to secure the principal sum of £900 and interest. On September 30, 1932, John Johnson Martin transferred the benefit of this mortgage to himself, Marion Lillian Martin, the first defendant Thomas Ralph Plumer Price, and the second defendant, Robert William Lewington. Marion Lillian Martin died on November 17, 1947, and John Johnson Martin on November 26, 1955.

By a further mortgage, dated May 13, 1930, made between the mortgagor of the first part, Clement George Knight, William Hector Mackenzie and the plaintiff, Frederick Wynn Cotterell as sureties of the second part, Francis Fred Hawkins, Sidney John Hawkins, Thomas Palmeiras Hawkins and Charles Robert Hawkins as first lenders of the third part, William Hector Mackenzie as second lender of the fourth part, and the plaintiff as third lender of the fifth part, the mortgagor demised (inter alia) the property comprised in the first mortgage to the first, second and third lenders for 3,000 years to secure the repayment of the principal sum of £2,321 12s. 5d. and interest. The second mortgage was expressed to be subject to the first mortgage and contained a covenant by the mortgagor and the sureties with the first lenders and by the mortgagor with the second and third lenders that the mortgagor would, on August 13, 1930, pay to the first lenders £2,121 12s. 5d.; to the second lender £125 and to the third lender (the plaintiff) £75, all with interest. The second mortgage was registered as a puisne mortgage under section 10 (1), Class C (i) of the Land Charges Act, 1925, on May 14, 1930.

Charles Robert Hawkins died on February 25, 1933, and, by a transfer of mortgage endorsed on the second mortgage, the three surviving first lenders transferred the benefit of the second mortgage to Clement George Knight, William Hector Mackenzie and the plaintiff in consideration of the aggregate sum of £2,861 18s. 9d. William Hector Mackenzie died on January 27, 1957, and on October 16, 1957, Clement George Knight and the plaintiff transferred all their interest in the second mortgage to the plaintiff. Notice of this transfer was given to the mortgagor in 1957 and to the first mortgagees' solicitors in 1958.

On November 15, 1938, a receiving order was made against the mortgagor in the Southampton County Court (In Bankruptcy). No proof of the debt secured by the second mortgage was at that time submitted by the plaintiff and his co-mortgagors.

1960

COTTERELL
v.
PRICE.

The mortgagor had never obtained his discharge and, on January 3, 1958, the plaintiff submitted a proof of debt for the sum of £3,061 18s. 9d., and valued the security constituted by the second mortgage at £2,250. By a notice dated May 13, 1958, given pursuant to rule 13 (*c*) in the Second Schedule to the Bankruptcy Act, 1914, the plaintiff required the official receiver, as the mortgagor's trustee in bankruptcy, to elect whether he would or would not exercise his power of redeeming the security mentioned in the proof of debt or of requiring such security to be realised. The notice was served on the official receiver on May 14, 1958, but no election was made by the official receiver within the period of six months allowed by rule 13 (*c*).

The mortgagor remained at all times in occupation of the property. No part of the principal sum secured by the first mortgage was repaid, but the interest was paid down to June 29, 1959. No part of either the principal sum or interest secured by the second mortgage was ever paid.

On June 16, 1959, the plaintiff issued an originating summons, to which the surviving first mortgagees and the mortgagor were defendants, claiming a declaration that his right to redeem and to require a transfer to himself of the first mortgage was still subsisting; if necessary, an account of what was due under the first mortgage and a declaration that upon payment by the plaintiff to the first mortgagees of the sum due under the first mortgage the plaintiff might be at liberty to redeem the first mortgage.

John Bradburn for the plaintiff.
P. R. De L. Giffard for the first mortgagees.
Muir Hunter for the mortgagor.

The following cases, in addition to those referred to in the judgment, were cited in argument: *In re Magneta Time Co. Ltd.*[2]; *In re McMurdo*[3]; *In re Hepburn, Ex parte Smith*[4]; *In re the Statutory Trusts Declared by the Law of Property Act, 1925, Young* v. *Clarey*[5]; *Bowring-Hanbury's Trustee* v. *Bowring-Hanbury*[6]; *In re Crosley.*[7]

BUCKLEY J. This is an originating summons taken out under R.S.C., Ord. 55, r. 5A, in which the plaintiff claims a declaration that as second mortgagee of property he is entitled to redeem a first mortgage on that property, and for consequential relief.

[His Lordship referred to the facts, and continued:] Mr. Bradburn, who appears for the plaintiff, concedes that as against the mortgagor the plaintiff's remedies by action under the second mortgage are statute barred; but he says, notwithstanding that

[2] [1915] W.N. 318; 84 L.J.Ch. 814.
[3] [1902] 2 Ch. 684, C.A.
[4] (1884) 14 Q.B.D. 394.
[5] [1948] Ch. 191; 64 T.L.R. 93; [1948] 1 All E.R. 197.
[6] [1943] Ch. 104; 59 T.L.R. 121; [1943] 1 All E.R. 48, C.A.
[7] (1887) 35 Ch.D. 266, C.A.

fact, the plaintiff's right as against the first mortgagees to redeem the first mortgage remains unaffected.

The sections of the Limitation Act, 1939, to which it is relevant to refer, are first of all section 18 (1), which provides: "No action shall be brought to recover any principal sum of "money secured by a mortgage or other charge on property, "whether real or personal, or to recover proceeds of the sale of "land, after the expiration of twelve years from the date when "the right to receive the money accrued." The legal date for redemption was August 13, 1930, and that was the date for payment under the covenant. Time would then have begun to run in respect of the obligation to pay under the covenant, and would have expired in 1942.

As regards foreclosure, section 18 (4) provides: "Nothing in "this section shall apply to a foreclosure action in respect of "mortgaged land, but the provisions of this Act relating to "actions to recover land shall apply to such an action." That refers back to section 4 (3), which provides: "No action shall be "brought by any other person to recover any land after the "expiration of twelve years from the date on which the right of "action accrued to him . . . " So that the right to foreclose or the right to sue for possession would also have become barred in the year 1942.

I ought also to mention that section 16 provides: "Subject "to the provisions of section 7 of this Act and of section 75 of "the Land Registration Act, 1925, at the expiration of the period "prescribed by this Act for any person to bring an action to "recover land (including a redemption action) or an action to "enforce an advowson, the title of that person to the land or "advowson shall be extinguished."

Mr. Bradburn says, although as against the mortgagor the plaintiff's rights to foreclose and sue for possession or to sue upon the covenant are barred, his right to redeem the first mortgage remains wholly unaffected. The only provision of the Limitation Act dealing with redemption actions is section 12, which provides that: "When a mortgagee of land has been in "possession of any of the mortgaged land for a period of twelve "years, no action to redeem the land of which the mortgagee "has been so in possession shall thereafter be brought by the "mortgagor or any person claiming through him." Mr. Bradburn's argument is that, section 12 being the only provision in the Act for barring a redemption action, that is the only way in which his client could become deprived of his right to redeem the first mortgage and that, the first mortgagees never having been in possession, the section cannot operate in the present case. In those circumstances he says he is entitled, under section 95 of the Law of Property Act, 1925, to give directions to the first mortgagees with regard to redemption of the first mortgage which override any directions that the mortgagor might give. Subsection (2) of

1960

COTTERELL
v.
PRICE.

Buckley J.

section 95 provides that "The rights conferred by this section "belong to and are capable of being enforced by each incum- "brancer, or by the mortgagor, notwithstanding any intermediate "incumbrance; but a requisition of an incumbrancer prevails "over a requisition of the mortgagor." Mr. Bradburn says that his client is an incumbrancer whose requisition is entitled to take precedence over any requisition of the mortgagor relating to the redemption of the first mortgage. To bring himself within the provisions of that section, it is necessary for him to show that he is an incumbrancer within the meaning of the Law of Property Act, 1925. That term is defined in section 205 (1) (vii) of the Act in such a way as to mean a person entitled to the benefit of a legal or equitable mortgage, or a trust for securing money, or a lien or a charge of a portion, annuity or other capital sum or annual sum, so that, in the circumstances of the present case, the plaintiff's right to be regarded as an incumbrancer within the meaning of the Law of Property Act depends upon the answer to the question whether he is entitled to a legal mortgage of the property.

In my judgment, on the second mortgagee's right against the mortgagor becoming statute barred, the second mortgagee lost all estate and interest in the mortgaged property. He could no longer foreclose as against the mortgagor; he could no longer sue for possession, and as a result of the provisions of section 16 (to which I have referred) his estate in the land had come to an end. It seems to me that, as a result, he lost his status as a mortgagee. An equity of redemption is an incident of the status of mortgagor or puisne incumbrancer entitled to redeem the higher mortgage. It is part of the machinery provided by equity for enabling anyone who is mortgagor of land, or who stands to any extent in the shoes of the mortgagor of land, to redeem the pledge of the land. The very term "equity of "redemption" suggests that that is the character of the right; the equity of redemption exists for the purpose of assisting him who has a right to redeem to redeem the land and to get the land back.

In my judgment, no one who has no estate or interest recognised by law in the land can have an equity of redemption of that land, and, when a second mortgagee loses his position vis-à-vis the mortgagor, as a mortgagee of the land, he ceases to be entitled to an equity of redemption of any prior mortgage. What the plaintiff is really attempting to assert here is not a right to redeem the land but a right to insist upon a transfer of the first mortgage to him. He wants to get in the first mortgage in order that he may be in a position to exercise certain rights under the first mortgage, and thereby to put himself in a position to retain moneys in satisfaction of the debt due under the second mortgage without having to have recourse to remedies in the courts which, as against the mortgagor, he is debarred

from having by reason of the Limitation Act. Therefore, it seems to me that Mr. Bradburn's submissions on this part of the case are fallacious because they assume (wrongly, as I see it) that the plaintiff's equity of redemption of the first mortgage can survive, in gross, the demise of the second mortgage as a mortgage enforceable against the mortgagor.

That is not the end of the matter, for Mr. Bradburn says that as a result of the notice which was served under rule 13 (*c*) of the Second Schedule to the Bankruptcy Act, 1914, he has a statutory title (under the rules and schedules to that Act) which enables him to assert against the first mortgagees that he is in a position to redeem their first mortgage. The plaintiff's rights as second mortgagee to redeem the first mortgage were not barred by statute at the commencement of the bankruptcy. As I have stated, time began to run in 1930, and the receiving order was made in November, 1938, so only a little over eight years had run at the time when the receiving order was made. Mr. Bradburn says the effect of the receiving order was to put an end to the operation of the Statutes of Limitation so far as any remedies within the bankruptcy are concerned so that, vis-à-vis the trustee in bankruptcy, the plaintiff remained a secured creditor entitled to adopt any of the courses open to him under rules 10 to 13 of the rules contained in the Second Schedule to the Bankruptcy Act. Those are the rules which deal with proofs by secured creditors. The first rule, rule 10, provides what shall happen if the secured creditor realises his security; rule 11 provides what happens if he surrenders his security; and rule 12 requires that "If a secured creditor does not either realise or "surrender his security, he shall, before ranking for dividend, "state in his proof the particulars of his security, the date when "it was given, and the value at which he assesses it," he is only to be entitled to prove for the balance. Rule 13 applies where a security is so valued: "the trustee may at any time redeem it on "payment to the creditor of the assessed value," or he may require the property to be sold. Sub-paragraph (*c*) of rule 13 provides: "Provided that the creditor may at any time, by "notice in writing, require the trustee to elect whether he will "or will not exercise his power of redeeming the security or "requiring it to be realised, and if the trustee does not, within "six months after receiving the notice, signify in writing to the "creditor his election to exercise the power, he shall not be "entitled to exercise it; and the equity of redemption, or any "other interest in the property comprised in the security which "is vested in the trustee, shall vest in the creditor, and the "amount of his debt shall be reduced by the amount at which the "security has been valued."

Mr. Bradburn's contention is that, as the result of the notice served under rule 13 by the plaintiff and the default of the trustee in electing within the six months, the mortgagor's equity of

1960

Cotterell v. Price.

Buckley J.

redemption of the second mortgage has become barred and the estate of the mortgagor, including his equity, to reedem the first mortgage, has vested in the plaintiff.

The doctrine that time ceases to run under the Statute of Limitations where a party becomes bankrupt has been dealt with in certain cases to which I have been referred. The first I should mention is *Ex parte Lancaster Banking Corporation*,[1] a decision of Bacon V.-C., as he later became, who was then Chief Judge in Bankruptcy. In the course of his judgment he said[2]: "The Statute of Limitations has nothing to do with the "bankruptcy laws. When a bankruptcy ensues, there is an end "to the operation of that statute, with reference to debtor and "creditor. The debtor's rights are established and the creditor's "rights are establishd in the bankruptcy and the Statute of "Limitations has no application at all to such a case, or to the "principles by which it is governed." What the judge was saying there is that the operation of the statute is at an end with reference to debtor and creditor. He is not asserting that the bankruptcy puts an end altogether to the operation of the statute in relation to all matters affecting the debtor's property, but in regard to the relation between the debtor and his creditor.

The other case I wish to refer to is *In re Benzon*,[3] a decision of the Court of Appeal. There the court had to consider whether, in a case where a debtor was adjudicated bankrupt in 1890 and remained bankrupt until his death in July, 1911, the fact that he had by his will exercised a general testamentary power and thereby made the subject-matter of that power assets for payment of debts on his own death, enabled creditors against whom time had started to run before bankruptcy, to say that they were entitled to come in and participate in the distribution of that asset and were not statute barred. Channell J., who delivered the judgment of the court, said[4]: "On the point of the Statute of "Limitations, inasmuch as the debts were incurred by the "bankrupt before 1890 and 1892 respectively, they would prima "facie have been barred long before his death in 1911. The "contentions of Mr. Hansell on this point on behalf of the appel-"lants were, first, that the exercise of the power of appointment "which made the fund available as assets gave them a new right "of action or proceeding which was not barred, and, secondly, "that, even if that was not so, the effect of the bankruptcy was "to prevent the statute running." I need not deal with the first point, which the court did not think a good point. Channel J. went on[5]: "As to the second point, cases were quoted beginning "with *Ex parte Ross*,[6] which show that in the bankruptcy a debt "does not become barred by lapse of time if it was not so barred "at the commencement of the bankruptcy, and of this there can

[1] (1878) 10 Ch.D. 776.
[2] Ibid. 776, 784.
[3] [1914] 2 Ch. 68; 30 T.L.R. 435, C.A.
[4] [1914] 2 Ch. 68, 75.
[5] Ibid.
[6] (1827) 2 Gl. & J. 330.

"be no doubt, but this is only *in the bankruptcy.*" The court, accordingly, held that, although the appointment at death gave creditors a new fund out of which they could get payment, and a new mode of proceeding in order to get it, that was merely a new remedy and not a new cause of action—the cause really being the old debt—and that the statute, having begun to run against the creditors before the commencement of the bankruptcy, continued to run notwithstanding the bankruptcy, and that the claims of the creditors on that fund, not being claims in the bankruptcy, were statute barred.

The importance of that case [7] and of the way in which the doctrine is stated in the judgment of the court is that it makes it clear that it is only "in the bankruptcy" that the statute ceases to operate. It does not have any effect on the operation of the statute on any rights or remedies which are unaffected by the bankruptcy. In my judgment, a mortgagee who relies upon his security retains and stands on rights which he had before the bankruptcy, and which remain unaffected by the bankruptcy. Rules 10, 11, 12 and 13 do not in any way regulate what a mortgagee is to do qua mortgagee; they only limit the extent to which he is to be entitled to prove in competition with unsecured creditors, notwithstanding that he is a mortgagee and has rights and remedies which are peculiar to him and available to him outside the bankruptcy.

Section 7 of the Bankruptcy Act, after providing in subsection (1) that once a receiving order has been made "no "creditor to whom the debtor is indebted in respect of any debt "provable in bankruptcy shall have any remedy against the "property or person of the debtor in respect of the debt, or shall "commence any action or other legal proceedings, unless with "the leave of the court and on such terms as the court may "impose," goes on in subsection (2): "But this section shall not "affect the power of any secured creditor to realise or otherwise "deal with his security in the same manner as he would have "been entitled to realise or deal with it if this section had not "been passed."

Although the bankruptcy takes away the rights of ordinary creditors to sue for their dues and regulates their right of proof in the bankruptcy, the rights of secured creditors are unaffected under that section, and there is no reason, in my judgment, why time should not continue to run under the Limitation Act as regards those rights and remedies which the secured creditors have outside the bankruptcy.

In the present case, the second mortgagees' right to foreclose or to take possession of the subject-matter of the second mortgage arose not later than August 13, 1930. Many more than twelve years have elapsed since those rights accrued and they have long

[7] [1914] 2 Ch. 68.

1960

COTTERELL v. PRICE.

Buckley J.

been barred, and were barred long before the date in 1958 when the plaintiff served the notice under rule 13.

Therefore, the plaintiff and his predecessors having become debarred from foreclosing or recovering possession of the land, whether as against the trustee in bankruptcy or against the mortgagor, in my judgment, in 1958 the plaintiff was no longer a secured creditor within the meaning of the rules in the Second Schedule to the Bankruptcy Act, and I do not think that, at that date, it was open to the plaintiff to give the notice which he did give. It may be that his right to sue on the covenant for payment contained in the second mortgage (being a right which was merely a right to sue in debt) was a right which was affected by the supervention of the bankruptcy so as not to have become statute barred, but that is not a matter with which I have any concern, because that right alone would not constitute the plaintiff a secured creditor within the meaning of the rules. A secured creditor must, for present purposes, be somebody who has some interest in property which is security for his debt, and not merely the benefit of a covenant.

In those circumstances Mr. Bradburn's second submission also fails because, for the reasons which I have endeavoured to express, the notice which was served in 1958 was served in circumstances in which the plaintiff was not entitled to serve it, and, accordingly, was of no effect. I therefore declare that the plaintiff's right to redeem the first mortgage is no longer subsisting.

Declaration accordingly.
Plaintiff to pay defendants' costs.

Solicitors: *Wrentmore & Son for Philip Evans & Co., Bournemouth; T. R. Plumer Price & Beswick; Hepherd, Winstanley & Pugh, Southampton.*

V. A. M.

[CHANCERY DIVISION.]

1960
July 13, 14.

Cross J.

*INLAND REVENUE COMMISSIONERS *v.* H. DUNNING & CO. (1946) LTD.

Revenue—Profits tax—"Distribution"—Director-controlled company—Royalties paid to director for licence to manufacture patented article—Genuine commercial transaction—Whether payments made by way of "remuneration, loans or otherwise"—Whether "distributions"—Finance Act, 1947 (10 *&* 11 *Geo.* 6, *c.* 35), *s.* 36 (1) (*c*).

A company, incorporated in 1946 to carry on the business of light engineering, was director-controlled within the meaning of

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[Reported by Miss PHILIPPA PRICE, Barrister-at-Law.]

the profits tax legislation. In 1951 H., a director and member of the company, invented a special type of "cable gland" used for engineering purposes which he patented in 1952. On December 31, 1954, he entered into an agreement with the company whereby he granted a licence to the company to manufacture and sell the patented article, and the company covenanted to pay him £7 10s. per cent. of the selling price of every such article manufactured and sold. The company made payments under the agreement totalling £4,072 during the period March, 1955, to its termination in September, 1955. The Crown claimed that these payments were an amount applied for the benefit of H. within the meaning of section 36 (1) (*c*) of the Finance Act, 1947,[1] and must accordingly be deemed for the purposes of section 35 of the Act to be a "distribution" to him of that amount. The special commissioners found that the agreement was a genuine commercial agreement under which the company received full consideration for the payments made to H., and that the payments were not a "distribution" within the meaning of the subsection. On appeal by the Crown:—

Held, that, a payment made for the benefit of any person by way of "remuneration; loans or otherwise" did not require an element of bounty in order to bring it within the scope of section 36 (1) (*c*), and, therefore, although the company had received full consideration for the payments made to H., the payments were nevertheless to be deemed a "distribution" under section 36 (1).

Inland Revenue Commissioners v. *Chappie Ltd.* (1953) 34 T.C. 509, C.A. applied.

Inland Revenue Commissioners v. *Lactagol Ltd.* (1954) 35 T.C. 230 distinguished.

CASE STATED by the Commissioners for the Special Purposes of the Income Tax Acts.

The respondent company, H. Dunning & Co. (1946) Ltd., appealed to the special commissioners against assessments to profits tax for the chargeable accounting periods March 1, 1955, to October 31, 1955, and November 1, 1955, to February 29, 1956, in the sums of £1,000 and £600 respectively, the question for determination being whether a sum of £4,072 paid to one, William Hawke, a director of the company, under the terms of an agreement of December 31, 1954, was to be deemed to be a distribution within the meaning of section 36 (1) (*c*) of the Finance Act, 1947,[1] more particularly, whether that sum of £4,072 was "applied . . . otherwise for the benefit of" William Hawke.

The following were among the facts stated by the commissioners: The company was incorporated in 1946, and carried on the business of light engineering. It was director-controlled, within the meaning of section 36 (1) (*c*) of the Act of 1947, and William Hawke (hereinafter called "the director") had been a director since its incorporation, but was not a whole-time service

[1] Finance Act, 1947, s. 36 (1): ". . . (*c*) where the trade or business "is carried on by a body corporate "the directors whereof have a con-"trolling interest therein, an amount "is applied, whether by way of "remuneration, loans or otherwise, for "the benefit of any person, there shall "be deemed for the purposes of the "last preceding section to be a dis-"tribution to that person, . . ."

1960

INLAND REVENUE COMRS. v. H. DUNNING & CO. (1946) LTD.

director. At all material times he held one £1 share out of 1,000 issued shares. In 1951 the director invented a special type of "cable gland" for engineering purposes and obtained provisional patent protection for that invention. On May 4, 1951, he and the company entered into an agreement whereby he granted to the company a licence to manufacture and sell the invention. That agreement provided for the payment of a "royalty" of £7 10s. per cent. of the selling price of each patented article manufactured and sold by the company, and was to last for five years from January 1, 1951 (subject to certain provisions for earlier termination). The director obtained full patent protection for his invention some time in 1952. On December 31, 1954, the agreement of May 4, 1951, was cancelled as from March 1, 1953. Also on December 31, 1954, a fresh agreement was entered into between the director and the company whereby the director granted to the company a licence to manufacture and sell the patented article. The only differences between that agreement and the agreement of May 4, 1951, were that the word "commission" was used instead of royalty (the "commission" remaining £7 10s. of the selling price), and a slight alteration in the dates of payment of the "commission." That agreement was terminated in September, 1955. The sum of £4,072 was the gross sum paid by the company to the director for the period March 1, 1955, to the termination of the agreement in September, 1955, but for the purposes of the assessments under appeal it was apportioned on a time basis over the whole year to February 29, 1956. It was admitted on behalf of the Crown that the payments to the director were fixed at a reasonable commercial rate.

It was contended on behalf of the company that the payments to the director were not amounts applied for his benefit, within the meaning of section 36 (1) (*c*) of the Finance Act, 1947; that the decision in *Inland Revenue Commissioners* v. *Chappie Ltd.*[2] dealt only with the question of loans, specifically mentioned in section 36, and had no application to genuine commercial transactions of a different kind, and that the decision in *Inland Revenue Commisisoners* v. *Lactagol Ltd.*[3] was to the effect that payments other than loans, made by a company on a genuine commercial basis, were not to be deemed to be distributions, within the meaning of section 36 (1) (*c*).

It was contended on behalf of the Crown that the sum of £4,072 paid to the director was an amount applied for his benefit within the meaning of section 36 (1) (*c*) of the Finance Act, 1947, and by virtue of section 36 (1) must, accordingly be deemed for the purpose of section 35 of the Act to be a distribution to him of that amount; and that *Inland Revenue Commissioners* v. *Chappie Ltd.*[4] and *Inland Revenue Commissioners* v. *Latagol Ltd.*[5] did not provide authority for the proposition that a payment

[2] (1953) 34 T.C. 509.
[3] (1954) 35 T.C. 230.
[4] 34 T.C. 509.
[5] 35 T.C. 230.

was necessarily excluded from the provisions of section 36 (1) (*c*) of the Finance Act, 1947, by reason of its having been paid in the course of a commercial transaction.

The commissioners decided that the only question they had to decide was whether the payments made by the company to the director were to be deemed to be distributions, within the meaning of section 36 (1) (*c*); for if they were not distributions in that sense, they could not be net relevant distributions; and that the answer to that question depended on whether those payments had been applied for his benefit "otherwise" than as remuneration or loans.

In the view of the commissioners the decision in *Inland Revenue Commissioners* v. *Chappie Ltd.*[6] dealt only with "loans" in the context in which that word appeared in section 36 (1) (*c*); they thought that Lord Evershed M.R., in that case, only came to the conclusion that loans at a commercial rate of interest were to be deemed to be applied for the borrower's benefit because loans were specifically dealt with in that subsection. They held that the effect of the decision in *Inland Revenue Commissioners* v. *Lactagol Ltd.*[7] was that genuine commercial payments other than loans at a commercial rate of interest were not to be deemed to be distributions within the meaning of the subsection, and that the appeal, accordingly, succeeded.

The Crown appealed.

Sir Lynn Ungoed-Thomas Q.C. and *Alan S. Orr* for the Crown.
P. J. Brennan for the taxpayer.

The cases cited in argument are referred to in the judgment.

CROSS J. This case concerns the profits tax liability of the respondent company, H. Dunning & Co. (1946) Ltd., for two chargeable accounting periods, March 1, 1955, to October 31, 1955, and November 1, 1955, to February 29, 1956.

The question arises in this way. The company was incorporated in 1946 and carries on the business of light engineering. It is director-controlled, within the meaning of the profits tax legislation. One, William Hawke, has been a director of the company since its incorporation, though he is not a whole-time director, and he has been at all material times a member of the company holding one £1 share out of the 1,000 issued shares. In 1951 he invented a special type of "cable gland" for engineering purposes and obtained patent protection for this invention in 1952. On December 31, 1954, he entered into an agreement with the company whereby he granted to the company a licence for a period of years to manufacture and to sell the patented article, and the company covenanted during the continuance of the licence to pay him a commission of £7 10s. per cent. of the selling price of each patented article. There was

[6] 34 T.C. 509. [7] 35 T.C. 230.

1960

INLAND REVENUE COMRS. v. H. DUNNING & Co. (1946) LTD.

Cross J.

provision for the termination of the agreement before the expiry of the period, and it was in fact terminated in September, 1955.

It is found in the case stated that that was a perfectly genuine commercial agreement under which the company got full consideration for the payments which they had to make to the director, Hawke. The total of the payments which were made under the agreement for the period from March 1, 1955, to its termination in September, 1955, was £4,072, and the whole question at issue is whether or not those payments were "distributions" by the company within the meaning of section 36 of the Finance Act, 1947. If they were distributions then (on the assumption which hitherto has been made that they would not be deductible for the purpose of ascertaining the gross relevant distribution for the purpose of section 35) the amount of profits tax payable by the company for the accounting periods in question would be larger than it would be if the payments were not distributions.

Section 36 (1) is in these terms: "Subject to the provisions "of the next succeeding subsection, wherever—(*a*) any amount "is distributed directly or indirectly by way of dividend or cash "bonus to any person; or (*b*) assets are distributed in kind to any "person; or (*c*) where the trade or business is carried on by a "body corporate the directors whereof have a controlling interest "therein" (which is the case here) "an amount is applied, "whether by way of remuneration, loans or otherwise, for the "benefit of any person, there shall be deemed for the purposes "of the last preceding section to be a distribution to that person "of that amount or, as the case may be, of an amount equal to "the value of those assets." Then there is a proviso: "Provided "that no sum applied in repaying a loan or in reducing the "share capital of the person carrying on the trade or business "shall be treated as a distribution." That proviso certainly seems to suggest that, if it were not there, a sum applied by the company in repaying a loan would be a distribution. I need not read subsection (2), but subsection (3) contains special provisions in regard to loans, to this effect: "Where—(*a*) a loan "has been treated as part of the gross relevant distributions to "proprietors for a chargeable accounting period; and (*b*) as a "result, the amount of tax payable for that period has been "increased," then, if the loan is repaid, the gross relevant distributions to the proprietors are to be treated as reduced by the amount corresponding to the increase caused by treating the loan as a distribution.

The question which I have to decide is whether these payments were amounts applied by the company for the benefit of the director "by way of remuneration, loans or otherwise." They were certainly not "remuneration," or "loans"; but do they come under the head "or otherwise"? They were, as I have said, payments made under a commercial agreement for full consideration given by the director to the company in the form of a grant to the

company of a licence to exploit his patent. If the words had been simply "an amount is applied for the benefit of any per-"son," I should have thought it very doubtful whether they would have covered payments, whether of capital or income, under an ordinary commercial agreement. According to the ordinary use of the English language, a payment for which you have given full consideration is not an amount applied for your benefit by the payer. But, of course, the words are not simply "an amount is applied for the benefit of any person"; there are the additional words "whether by way of remuneration, loans or "otherwise." In *Inland Revenue Commissioners* v. *Chappie Ltd.*[1] the Court of Appeal had to consider the case of loans made by a company to one of its members, an associated company, on what were found to be ordinary commercial terms, and the court, affirming the decision of Danckwerts J. held that such a loan was a distribution within the meaning of this section.

It has been argued by Mr. Brennan that that decision turned simply on the special provisions contained in the section with regard to loans. The section, of course refers to loans expressly, and there is, in subsection (3), a provision for adjusting the matter if and when the loan is repaid. In the case of loans, therefore, it is particularly difficult to avoid the conclusion that they count as distributions even if they are made on commercial terms; but I do not regard the decision in the *Chappie* case[1] as throwing no light on the question which I have to consider. The members of the Court of Appeal, as I read their judgments, definitely rejected the idea that there had to be an element of bounty in a payment in order to bring it into the scope of the section. It is true that they were dealing with loans, but they were construing the section as a whole. If once you say that payments by way of loan or remuneration are distributions, even if made on commercial terms, it is very difficult to say that what falls under the heading of "or otherwise" as opposed to what falls under the heading "remuneration" or "loans" must contain an element of bounty.

If you read the subsection as widely as that, it follows, of course, that any payment made by a company, whether it be an income or a capital payment, and whether there is consideration for it or not, may be a distribution; if, for example, the company buys a motor-car from a member for a proper price, even that may be a distribution. But, I think that the members of the Court of Appeal in the *Chappie* case[2] were aware that that might be the result of their decision. That is shown by what was said by Jenkins L.J. to Mr. Tucker at the end of the case.[3] But, of course, it is true to say that the decision itself related only to loans.

The section was considered again a little later by Harman J. in *Inland Revenue Commissioners* v. *Lactagol Ltd.*[4] There the

[1] 34 T.C. 509.
[2] Ibid.
[3] Ibid. 527.
[4] 35 T.C. 230.

1960

INLAND REVENUE COMRS. v. H. DUNNING & Co. (1946) LTD.

CROSS J.

company had made a lump sum payment to a director-member, one Adams, in consideration of a covenant that after his term of service with the company ceased he would not compete with the company. So for a lump sum payment the company got the benefit of a capital asset in the form of Adams' covenant. Harman J. was impressed, as anybody must be, with the absurdity of treating such a payment—a capital payment for a capital asset under a genuine commercial transaction—as being an amount applied for the benefit of the payee. He was not prepared to accept the view that in the *Chappie* case [5] the Court of Appeal had impliedly decided that all payments were distributions. He thought that a line must be drawn somewhere, and influenced, I think, by the fact that the Act taxes profits, he drew the line at payments of capital for capital assets. Whether or not it is logical to draw any line, or to draw it there, is not for me to say. If I were faced with a similar case to that which was before Harman J., I should, of course, follow his decision. But the case before me is not one of a payment of capital for a capital asset; but of recurring payments of income. I do not, therefore, think that decision of Harman J. covers this case, and I feel myself at liberty to reach the conclusion at which, but for his decision, I would have arrived without hesitation in view of the decision of the Court of Appeal in the *Chappie* case.[6]

I should have said that the commissioners decided this case in favour of the taxpayer on the ground that the *Chappie* case [6] dealt only with loans, and that this case was covered by the *Lactagol* case.[7] For the reasons I have tried to give, I think that their decision was wrong, and therefore I shall allow the appeal. There will be a declaration that the slum of £4,072 paid to William Hawke was an amount paid for his benefit within the meaning of section 30 (1) (*c*) of the Finance Act, 1947, and is deemed to be a distribution under that section.

Appeal allowed with costs.

Solicitors: *Solicitor of Inland Revenue; Amelan & Roth. Manchester.*

[5] 34 T.C. 509.
[6] Ibid.
[7] 35 T.C. 230.

[COURT OF APPEAL.]

C. A.

1960
July 14, 15.

Hodson, Ormerod and Harman L.JJ.

* CHUNG KWOK HOTEL CO. LTD. *v.* FIELD.

[Plaint No. 01191.]

Landlord and Tenant—Assignment—Judgment for possession—Sale of property—Assignment of property to company without benefit of judgment—Whether company entitled to enforce order for possession—County Court Rules, 1936 (*S.R. & O.,* 1936, *No.* 626/*L.*17), *Ord.* 25, *r.* 6.

The owner and landlord of a dwelling-house obtained by consent on February 23, 1959, an order from the county court for possession of a flat on the premises occupied by the defendant. By an agreement of May 8, 1959, she agreed to sell the property subject to and with the benefit of the order for possession. That purchase was not completed, and the benefit of the agreement of May 8 was later sold to a sub-purchaser. On July 4, 1959, the landlord transferred the property to the sub-purchaser, who on the same day executed a deed of trust declaring that he held the property on trust for the plaintiff company and a deed transferring the property to the company. He did not transfer the benefit of the contract of May 8 to the company. The defendant refused to give up possession, and the plaintiff company sought to enforce the order for possession:—

Held, that there being no assignment to the company of the benefit of the order for possession, it did not pass to them as one of the appurtenances under the general words of conveyance:—

Goldthorpe v. *Bain* [1952] 2 Q.B. 455; [1952] 1 T.L.R. 1512; [1952] 2 All E.R. 23, C.A. explained.

Quaere, whether the order for possession was assignable.

Judgment of Judge Andrew reversed.

APPEAL from Judge Andrew.

The defendant, Louis Kenneth Field, appealed from a judgment dated January 18, 1960, at Marylebone County Court of Judge Andrew by which he declared (1) that a tenancy of an unfurnished first floor flat at 24, Inverness Terrace, Paddington [occupied by the defendant as a statutory tenant] had not been created in favour of the defendant; (2) that all necessary assignments had been made and that the plaintiffs, Chung Kwok Hotel Co. Ltd., were entitled to issue a warrant for possession. Only the second point was argued on the appeal.

The defendant was originally in occupation of the flat under a written agreement for a year, but had held over and thereby became a statutory tenant. In 1957 the then owner and landlord, Mrs. Silvester, brought an action for possession against the defendant on grounds connected with his written tenancy. The Rent Restrictions Act, 1957, applied to the tenant and in 1958 he was in fact served with six months' notice under the Act. The parties came to terms in the action and on February 23, 1959, an order was made by consent under which the defendant agreed to give up possession of the first floor flat to Mrs. Silvester on September 1, 1959; and she agreed to pay all his costs of the action and of a counterclaim on Scale 4, but she did not carry this into effect.

By a contract of sale dated May 8, 1959, which incorporated certain special conditions of sale and the Law Society's Conditions of Sale, Mrs. Silvester agreed to sell her interest in 24, Inverness Terrace to two purchasers. Special condition 5 provided that: "The property is sold subject to and with the "benefit of the existing tenancy of the first floor of the premises "in the unfurnished occupation of a Mr. Louis Kenneth Field "and subject to and with the benefit of an order made by the "county court dated February 23, 1959, ordering the said tenant

C. A.
1960
CHUNG KWOK HOTEL CO. LTD. v. FIELD.

"of the said first floor to give up possession thereof on September "1, 1959."

Those purchasers did not complete the sale, but by an agreement of June 5 1959, they agreed to sell the benefit of the contract of May 8 to one, Chan, who was stated to be purchasing the property with the intention of assigning it to the plaintiff company which was about to be incorporated.

By an agreement of June 15, 1959 (which was stated to be supplemental to the agreement of May 8), the two purchasers assigned to Chan the benefit of the agreement of May 8. On July 4, 1959, Mrs. Silvester executed a registered transfer of the property to Chan on the payment by him of the purchase price therefor. By documents executed subsequently on the same day, July 4, 1959, Chan executed: (1) a deed of trust of the property in favour of the plaintiff company (which was by now incorporated); and (2) a registered transfer of the premises to the company. He did not assign to the company the benefit of the agreement of May 8, 1959.

The defendant refused to give up possession of the first floor flat, and in county court proceedings brought by the plaintiff company, the judgment above referred to was given on January 18, 1960.

P. A. W. Merriton for the defendant.
Robin Dunn for the plaintiff company.

The following cases, in addition to those referred to in the judgment, were cited in argument: *Williams* v. *Protheroe* [1]; *Ellis* v. *Torrington* [2]; *Kayley* v. *Hothersall.* [3]

HARMAN L.J. delivered the first judgment in which he stated the facts and continued: Chan, being the inheritor of the benefit of the contract with Mrs. Silvester, probably does have a right against her to call upon her to do what was necessary to enforce her judgment; but very unfortunately he omitted to transfer that right to the plaintiff company, merely executing in their favour a common form registered transfer. Consequently, so far as I can see, the company has not the benefit of the covenant with Mrs. Silvester that it was so desirable they should have. It may be that they can call upon Chan to exercise his rights against her, but they have not ever purported to do so.

In August 1959 the time was drawing near when the defendant had agreed to vacate the property. He was not the sort of person who would propose to keep his word if he could get out of it, and he made an application of a very strange sort to the county court to vacate the judgment on the ground that Mrs. Silvester no longer had any interest in the property.

[1] (1829) 2 M. & P. 779.
[2] (1920) 1 K.B. 399; 36 T.L.R. 82, C.A.
[3] [1925] 1 K.B. 607, C.A.

The county court judge had no hesitation in treating that as nonsense; and counsel for the defendant very candidly agrees that it was nonsense; but the attention of the judge was drawn by counsel to Ord. 25, r. 6 of the County Court Rules, 1936, which provides: "Where (a) any change has taken place after "judgment, by death, assignment, or otherwise, in the parties "entitled to enforce a judgment or order or in the parties liable "under a judgment or order . . . the party claiming to be "entitled to enforce the judgment or order may apply on affidavit "to the court for leave to issue the necessary process, and the "court may—(i) if satisfied that the party so applying is en-"titled to issue such process, make an order to that effect; "or (ii) if not so satisfied, order that any issue or question "necessary to determine the rights of the parties be tried in "an action."

Such an application as that, in the High Court anyhow, can be made in the first place ex parte, and of course if the judge or master to whom it is made is not satisfied he will then direct an issue to be tried. Something of that sort apparently happened here. When the issue came on the county court judge, having heard argument on the matter, decided it in favour of the company and his order, which is dated January 18, 1960, is in these terms: First, that "the new owners" (that is to say the company) "have not created a tenancy in favour of "the defendant"—that was a point that was argued below and not taken here so I need say no more about it—secondly, that "All necessary assignments have been made and the plaintiffs "are entitled to issue a warrant for possession."

When the judge said "All necessary assignments have been "made," he must, I suppose, be construing the legal documents because there is nothing oral in the way of an assignment, nor could there be in a matter of this sort. The judge did not give any reason: he simply held that it was quite enough for the company to show that they had had a registered transfer of the land and were the registered owners of it at the present date; and held the point taken (which it is true has no merits except the ingenuity of its inventor) to have been abandoned.

On appeal to this court two points are taken: first that an order for possession of this sort is not assignable at all: secondly, that, even if it is, there has been no assignment. I do not think that it is necessary to decide finally whether an order of this kind is assignable at law. I myself rather doubt it. There would be an obvious difficulty in this case in that the order itself contains an order for costs. Whether you can assign part of an order without the rest seems to me at least very doubtful. On the whole I should think that one could not; and I should be inclined to the view without deciding it that this order, or part of the order which deals with possession, is probably not at law assignable.

C. A.

1960

CHUNG KWOK HOTEL CO. LTD. v. FIELD.

Harman L.J.

But of course that is not the end of the matter at all. The order which I have read mentions the words "assignment." There is no doubt that many orders are assignable. Judgments for debt clearly are; though that example does not sufficiently explain the word "assignment" in the order. Another kind of assignment is that by operation of law, where the judgment creditor or the judgment holder dies or becomes bankrupt or of unsound mind: in those events the statutory assignee—that is to say the trustee in bankruptcy or the receiver in lunacy or the personal representative—will have devolved upon him without more the benefit of the judgment obtained by his predecessor.

The corresponding order in the Annual Practice, R.S.C., Ord. 42, r. 23, does not contain the word "assignment" at all: it simply says: "Where . . . any change has taken place by death "or otherwise in the parties entitled . . . to execution" then the party alleging himself to be entitled to issue execution "may "apply to the court for leave to issue execution accordingly." That may have a little significance. The question here, then, is whether there has been any assignment if the judgment, or that part of it which relates to possession, be assignable. It is said by Mr. Dunn that the benefit of such a judgment passes on a mere conveyance of the land—as if it were one of the appurtenances passing under the general words of a conveyance. That is not a view I can take at all.

Mr. Dunn cited in support of that proposition *Goldthorpe* v. *Bain*,[1] where Jenkins L.J. was dealing with a case of death, and where the bold argument was put up that a judgment for possession, anyhow in a statutory tenancy case, was a thing merely personal to the person who obtained it, and did not devolve on his or her personal representative. That view Jenkins L.J. had no difficulty in rejecting. He used words which, if they were taken without relation to the context in which they were used, might cover a case like the present. He said[2]: "In such a case, the "judgment, being one which concerns a proprietary interest of the "deceased landlord which would normally pass to the landlord's "personal representatives, those representatives, or a beneficiary "claiming through them by means of an assent, on proof to the "court of the grant of probate, and of the assent, if there is one, "would prima facie be entitled as of right to an order (under "Order 25, r. 6 of the County Court Rules) declaring them "entitled to enforce the order for possession." That is all he decided; and the fact that he talks about such an assignee being a successor in title does not mean that a mere assignment of the land inter vivos and without more will pass the benefit of an order of this sort. Therefore it seems to me that the difficulty that the plaintiffs are in is that they have not got an assignment of the benefit of this judgment.

[1] [1952] 2 Q.B. 455; [1952] 1 T.L.R. 1512; [1952] 2 All E.R. 23, C.A.

[2] [1952] 2 Q.B. 455, 464.

The other case cited to us was *Knight* v. *Clarke*,[3] where the landlord had (as Mrs. Silvester has) parted with the whole interest in the property after the date when he obtained judgment. The headnote reads: "Where a landlord has recovered judgment in "an action against his tenant for the possession of premises "which had been held over after the expiration of the tenancy, "he will be allowed to issue the writ of possession notwith-"standing that his estate in the premises terminated after the "commencement of the action and before the trial, unless it be "unjust and futile to issue such writ. . . ." Therefore, the proper person to enforce this judgment was Mrs. Silvester. It is quite true that the defendant might have come forward and said that it would be futile to do this because she has lost all interest in the premises; but if she was supported by the present landlords, who now have the beneficial interest, I do not doubt at all that the writ would go in Mrs. Silvester's favour. Therefore they are not without remedy: they have merely taken the wrong way to achieve it.

In my judgment this point, although it is a technical point, succeeds, and the appeal must be allowed.

HODSON L.J. I agree, and for the same reasons.

ORMEROD L.J. I agree, for the same reasons.

Appeal allowed with costs.

Solicitors: *Beach & Beach; Cliftons.*

I. G. R. M.

[3] (1885) 15 Q.B. 294.

[CHANCERY DIVISION.]

* ACKLAND & PRATTEN LTD. (IN LIQUIDATION) *v.* INLAND REVENUE COMMISSIONERS.

1960
July 19, 20, 25.

Cross J.

Revenue—Profits tax—Avoidance—Capitalisation of profits followed by liquidation and reconstruction—Distribution of surplus assets by liquidator—Direction by commissioners of basis of computation of profits tax liability—Whether main purpose of transaction avoidance or reduction of tax liability—No determination of last accounting period—Whether direction premature—Liability of company to profits tax—Finance Act, 1937 (1 *Edw.* 8 *&* 1 *Geo.* 6, *c.* 54), *s.* 20 (2) (*b*)—*Finance Act,* 1947 (10 *&* 11 *Geo.* 6, *c.* 35), *ss.* 35 (1), 36 (1) (4); *Finance Act,* 1951 (14 *&* 15 *Geo.* 6, *c.* 43), *s.* 32 (1) (3) (4).

A private company with a capital of £60,000, divided into 10,000 £1 preference shares, all of which had been issued, and 50,000

1960

ACKLAND & PRATTEN LTD. (IN LIQUIDATION) v. INLAND REVENUE COMRS.

£1 ordinary shares, of which 36,002 had been issued, on July 24, 1957, passed a special resolution that the capital be increased by £190,000 divided into 190,000 £1 ordinary shares, and that £198,011, part of the company's profit and loss appropriation account, be capitalised and applied in paying up in full at par 198,011 unissued £1 ordinary shares to be allotted to the existing shareholders in the proportion of eleven new shares for every two ordinary shares held. On October 21, 1957, these shares were allotted to the shareholders, thus increasing the nominal amount of the ordinary share capital to £234,013. On November 27, 1957, the company went into a voluntary liquidation, a reconstruction being considered desirable. By an agreement made with the new company on November 28, 1957, the company and the liquidator transferred to the new company almost all its assets, amounting to £161,517, of which £10,721 was reserved for taxation, so that there was available for distribution by the liquidator £150,796. 117,006 fully paid £1 ordinary shares were allotted by the new company in favour of the shareholders of the old company, who were substantially the same as those of the new company.

On October 14, 1957, inspectors of taxes were informed that the Commissioners of Inland Revenue were not seeking leave to appeal to the House of Lords in *Inland Revenue Commissioners* v. *Pollock & Peel Ltd.* (*In Liquidation*) [1957] 1 W.L.R. 822; 37 T.C. 240; [1957] 2 All E.R. 483, C.A., and were instructed to apply the decision of the Court of Appeal in appropriate cases. Since the paid up capital of the old company, as increased by the capitalisation of undistributed profits and the allotment of paid up shares, exceeded £150,796, the result of that decision was that distribution of that sum by the liquidator would not be a gross relevant distribution for the purpose of section 35 (1) (*c*) of the Finance Act, 1947,[1] and there would

[1] Finance Act, 1947, s. 30: "(2) "Subject to the provisions of this "Part of this Act, if, in the case of "any trade or business, the net "relevant distributions to proprietors "(as defined in the subsequent pro-"visions of this Part of this Act) for "any chargeable accounting period "are less than the profits thereof for "that period chargeable to the profits "tax, the amount chargeable by way "of the profits tax in respect of that "period shall be reduced by an "amount equal to [a certain per-"centage] of the difference.

"(3) Subject to the provisions of "this Part of this Act, if, in the "case of a trade or business, the net "relevant distributions to proprietors "(as defined in the subsequent pro-"visions of this Part of this Act) for "any chargeable accounting period "are greater than the profits thereof "for that period chargeable to the "profits tax, there shall be charged "for that period, in addition to the "other profits tax, if any, chargeable "therefor, profits tax at the rate of "[a certain percentage] on the amount "of the difference.

"(4) The reductions falling to be "made under subsection (2) of this "section, and the charges falling to "be made under subsection (3) there-"of are hereafter in this Act respec-"tively referred to as 'reliefs for non-"'distribution' and 'distribution "'charges.'"

S. 35: "(1) Subject to the pro-"visions of this and the two next "succeeding sections, the gross rele-"vant distributions to proprietors for "any chargeable accounting period of "a body corporate, society or other "body, are the total distributions to "the members of the body corporate, "society or other body, not being "distributions allowable as deduc-"tions in computing the profits of the "trade or business for any period for "the purposes of the profits tax, and "being either—(*a*) dividends declared "not later than six months after the "end of that period which are "expressed to be paid in respect of "that period or any part thereof; or "(*b*) distributions (other than divi-"dends which, under paragraph (*a*) "of this subsection, are to be "treated as part of the gross "relevant distributions to pro-"prietors for any previous chargeable "accounting period) made in the "period; or (*c*) in the case of the

be no liability to profits tax in respect of it. On December 3, 1957, the old company and the new company gave notice to the commissioners of their election that section 36 (4) of the Finance Act, 1947, should apply to the agreement of November 28, 1957, with the result that the distribution to the shareholders of the company of the shares in the new company on the liquidation of the old company would not count as a distribution by the old company. On August 15, 1958, the commissioners, being of the opinion that avoidance or reduction of liability to profits tax was the main purpose, or one of the main purposes, of the transactions made a direction under section 32 (1) of the Finance Act, 1951,[2] that the

"last chargeable accounting period in "which the trade or business is "carried on, so much of any distri-"bution made after the end of that "period (not being a distribution to "which paragraph (*a*) of this sub-"section applies) as is not a distribu-"bution of capital, and, for the "purposes of paragraph (*c*) of this "subsection, the distributions which "are to be treated as distributions "of capital shall not, in the case of "distributions made by a body cor-"porate with a share capital, "exceed an amount equal to the total "nominal amount of the paid-up "share capital thereof together, "where the body corporate has issued "shares at a premium for cash, with "the aggregate of the amounts of "the premiums."

S. 36: "(1) . . . Provided that no "sum applied in repaying a loan or "in reducing the share capital of the "person carrying on the trade or "business shall be treated as a dis-"tribution.

"(4) Where—(*a*) as part of a "scheme of amalgamation or recon-"struction a trade or business carried "on by a body corporate (in this "subsection referred to as 'the first "'company') is transferred to an-"other body corporate (in this sub-"section referred to as 'the second "'company'); (*b*) the consideration "for the transfer consists wholly or "mainly of shares in the second "company; and (*c*) the first and "second companies jointly so elect by "notice in writing given to the "Commissioners within six months "after the transfer or such longer "time as the Commissioners may in "any case allow, the provisions of "this Part of this Act shall apply "subject to the following modifica-"tions, that is to say—(i) any dis-"tribution of those shares to any "person in a winding up of the first "company shall, notwithstanding any-"thing in subsection (1) of this sec-"tion, not be deemed for the pur-"poses of the last preceding section "to be a distribution to that person; "and (ii) in considering what distri-"bution charge, if any, falls to be "made on the second company, any "difference on which non-distribu-"tion relief for chargeable account-"ing periods before the transfer was "given to the first company or other "person assessable to profits tax on "the profits of the trade or business "of the first company shall, except "so far as it has already operated to "increase a distribution charge on the "first company, be taken into "account as if it had been a difference "arising in relation to the second "company on which non-distribution "relief had been given to that "company. . . ."

[2] Finance Act, 1951, s. 31: "(1) "Subject to the provisions of this "section, where—(*a*) whether before "or after the passing of this Act but "after the sixth day of April, 1949, "a body corporate, unincorporated "society or other body capitalises any "distributable sum; and (*b*) then or "thereafter, whether before or after "the passing of this Act but after "the tenth day of April, 1951, any "sum is applied in reducing its "capital, there shall be deemed for "the purposes of section 35 of the "Finance Act, 1947 (which defines "the expression 'gross relevant dis-"'tributions to proprietors' for pro-"fits tax purposes), to be a distribu-"tion to the members of the body "corporate, society or other body of "an amount equal to the sum so "applied or to the total amount of "the distributable sums previously "capitalised by it as aforesaid, "whichever is the less, taking place "when the sum is so applied.

"(5) . . . references to the re-"duction of capital shall be deemed "to include references to the repay-"ment or return of share capital and "the repayment or redemption of "loan capital, other than loan capital "issued for full consideration paid in

1960

Ackland & Pratten Ltd. (In Liquidation) v. Inland Revenue Comrs.

liability of the old company to profits tax for the chargeable accounting period ended November 28, 1957, should be computed as if, for the purposes of section 35 (1) (*c*) of the Finance Act, 1947, the total nominal value of the paid up ordinary share capital of the company were at all relevant times £36,002 and no more, so that any distribution in excess of that amount would attract profits tax. At the time of making the direction the commissioners had not determined an accounting period under section 20 (2) (*b*)[3] of the Finance Act, 1937. On appeal by the old company from the decision of the special commissoners dismissing an appeal against the direction:—

Held, (1) that in the absence of an explanation by the company that the liquidation was not contemplated at the time of the resolution of July 24, 1957, and that avoidance of profits tax liability was not in its mind until all the transactions were completed, the Commissioners of Inland Revenue were justified in finding that the conditions of section 32 (1) of the Act of 1951 were satisfied and that the main purpose, or one of the main purposes, of the transactions was the avoidance or reduction of liability (post, p. 1129).

(2) That it was, however, sufficient under section 32 (3) of the Act of 1951 if the main benefit which might have been expected to accrue from the transaction was the avoidance of tax liability, and if the commissioners were satisfied of that, then the avoidance of such liability was to be deemed to have been a main purpose, and that

"cash to the body corporate, society "or other body or redeemable prefer- "ence shares so issued."

S. 32: "(1) Where the Commis- "sioners are of opinion that the main "purpose or one of the main purposes "for which any transaction or trans- "actions was or were effected "(whether before or after the pass- "ing of this Act) was the avoidance "or reduction of liability to the pro- "fits tax, they may, if they think "fit, direct that such adjustments "shall be made as respects liability "to the profits tax as they consider "appropriate so as to counteract the "avoidance or reduction of liability "to the profits tax which would other- "wise be effected by the transaction "or transactions.

"(3) If it appears in the case of "any transaction or transactions, "being a transaction which involves, "or transactions one or more of "which involve—(*a*) the transfer or "acquisition of shares in or deben- "tures of a company; or (*b*) a "change or changes in the person or "persons carrying on a trade or "business or part of a trade or busi- "ness; or (c) a change or changes "in the directors of a company the "directors whereof have a controlling "interest therein, that, having regard "to the provisions of the law relating "to the profits tax other than this "section which were in force at the "time when the transaction or trans- "actions was or were effected, the "main benefit which might have "been expected to accrue from the "transaction or transactions in the "three years immediately following "the completion thereof was the "avoidance or reduction of liability "to the tax, the avoidance or reduc- "tion of liability to the profits tax "shall be deemed for the purposes "of this section to have been the "main purpose or one of the main "purposes of the transaction or trans- "actions.

"(4) Any direction of the Com- "missioners under this section shall "specify the transaction or trans- "actions giving rise to the direction "and the adjustments as respects "liability to the profits tax which "the Commissioners consider appro- "priate."'

[3] Finance Act, 1937, s. 20: "(2) "For the purpose of the national "defence contribution, the accounting "periods of a trade or business shall "be determined as follows: . . . "(*b*) in a case where the accounts "of the trade or business have been "made up as aforesaid but have "ceased to be so made up, the "accounting periods from the end of "the last period of twelve months for "which they were so made up shall "be such periods not exceeding "twelve months as the Commis- "sioners of Inland Revenue may "determine."

it was manifest that an independent, objective third party would think that it was a probability that the avoidance of tax was the main benefit to be expected; that the reference in section 32 (3) to the benefit in "the three years immediately following the com-"pletion of the transactions" meant that during the next three years, whether there had been a liquidation or not, there would in fact be some saving of tax, and that the subsection was, therefore, apt to cover a case such as the present where there had been a liquidation (post, pp. 1129, 1130).

Dictum of Lord Greene M.R. in *Crown Bedding Ltd. and South Wales Flock Co. Ltd.* v. *Inland Revenue Commissioners* (1946) 34 T.C. 107, p. 120; [1946] 1 All E.R. 452, C.A. applied.

(3) That the commissioners in their direction had sufficiently specified "the adjustments as respects liability to the profits tax" within the meaning of section 32 (4) of the Act of 1951, which they considered appropriate, and the fact that the last chargeable accounting period under section 20 (2) (*b*) of the Act of 1937 had not been determined when the direction was made did not invalidate the direction since it clearly referred to whatever might prove to be the last chargeable accounting period (post, pp. 1130, 1131).

(4) That section 36 (4) (ii) of the Act of 1947 dealt with the liability of the new company, and that "already" referred not only to the time before liquidation but to the whole of the time before the question of the amount of any distribution charge on the new company fell to be considered, so that any distribution charge to which the old company became subject after liquidation would be taken into account in estimating the liability of the new company when it fell to be determined; and that there was, therefore, no justification for reading into the subsection a freeing of the old company from all liability to profits tax from the date of liquidation (post, pp. 1131, 1132). Accordingly, the appeal must be dismissed.

APPEAL from the Commissioners for the Special Purposes of the Income Tax Acts.

A company, Ackland & Pratten Ltd., appealed to the special commissioners against a direction made on August 15, 1958, by the Commissioners of Inland Revenue ("the commissioners"), under section 32 of the Finance Act, 1951. The direction was as follows:

"We, the undersigned, being two of the Commissioners of "Inland Revenue, have had under consideration the following "transactions: (a) The special resolution passed by the members "of Ackland & Pratten Ltd. at an extraordinary general meeting "held on July 24, 1957, whereby it was resolved, inter alia, that "the sum of £198,011, being part of the amount standing to the "credit of the company's profit and loss appropriation account, "should be capitalised and applied in paying up in full at par "198,011 unissued ordinary shares of £1 each in the capital of "the company and that such shares so fully paid up be issued "and allotted to the existing shareholders of the company in "the proportion of eleven new shares for every two ordinary "shares already held by them. (b) The application of the said "capitalised sum and the allotment to the said shareholders of "198,011 shares in the manner directed by the said resolution "and the consequent increase of the nominal amount of the

1960

ACKLAND & PRATTEN LTD. (IN LIQUIDATION) v. INLAND REVENUE COMRS.

"paid-up ordinary share capital of the company from £36,002 "to £234,013. (c) The special resolution passed at an extra-"ordinary general meeting held on November 27, 1957, whereby "it was resolved, inter alia, that the company be wound up "voluntarily. (d) The distribution to the said shareholders in "due course of liquidation of the company of certain assets of the "company. And being of the opinion that avoidance or reduction "of liability to the profits tax was, or as being the main benefit "which might have been expected to accrue from the transaction "in the three years immediately following the completion thereof "is deemed to have been, the main purpose or one of the main "purposes of the transaction, direct, by virtue of the powers "conferred upon us by section 32 (1) of the Finance Act, 1951, "that the liability to the profits tax of the company for the "chargeable accounting period ended November 28, 1957, shall "be computed as if, for the purposes of section 35 (1) (*c*) of the "Finance Act, 1947, the total nominal amount of the paid-up "ordinary share capital of the company was at all relevant times "£36,002 and no more."

The following were among the facts stated by the special commissioners: The company was incorporated in 1920 as a private company, and carried on business as stationers. Prior to July 24, 1957, its authorised capital was £60,000, divided into 10,000 £1 preference and 50,000 £1 ordinary shares. All the preference shares and 36,002 ordinary shares had been issued and were held by a small number of shareholders. In past years the company had retained a substantial part of its profits. Its liability to the profits tax had therefore been substantially reduced by reason of non-distribution relief (section 30 (2) of the Finance Act, 1947), but if those accumulated profits were to be distributed it would incur liability to distribution charge (section 30 (3) of the Finance Act, 1947).

On May 24, 1957, the Court of Appeal gave judgment in *Inland Revenue Commissioners* v. *Pollock & Peel Ltd. (In Liquidation)*.[4] The first paragraph of the headnote was as follows[5]: "Profits Tax—Capitalisation of profits followed by "liquidation and reconstruction—Distributions by liquidator—"Whether gross relevant distributions—Finance Act, 1947 (10 & "11 Geo. 6, c. 35), s. 35 (1); Finance Act, 1951 (14 & 15 Geo. 6, "c. 43), s. 31." The issues in question in that case were complicated, but for the purposes of the present appeal the effect of the decision might be shortly stated as follows: Only the excess value of assets distributed in a liquidation over the nominal amount of paid-up share capital is to be treated as a gross relevant distribution within the meaning of section 35 of the Finance Act, 1947.

On July 24, 1957, certain special resolutions were passed by

[4] [1957] 1 W.L.R. 822; 37 T.C. 240; [1957] 2 All E.R. 483, C.A.

[5] 37 T.C. 240.

the company, the only material ones being (a) that the share capital of the company be increased by £190,000 divided into 190,000 £1 ordinary shares, and (b) that £198,011 (being part of the amount standing to the credit of the company's profit and loss appropriation account) be capitalised and applied in paying up in full at par 198,011 unissued £1 ordinary shares, such fully paid-up shares to be allotted to the existing shareholders in the proportion of eleven new shares for every two ordinary shares already held by them. On October 14, 1957, instructions were issued to inspectors of taxes that the commissioners were not seeking leave to appeal to the House of Lords in *Inland Revenue Commissioners* v. *Pollock & Peel Ltd.* (*In Liquidation*),[6] and that the decision of the Court of Appeal in that case should be applied in appropriate cases. On October 21, 1957, the unissued shares were duly issued and allotted to the shareholders. On November 27, 1957, the company went into voluntary liquidation, a reconstruction being considered desirable. The liquidator was authorised to agree to the registration of a new company and to enter into an agreement with the new company when incorporated. The new company was duly incorporated, the shareholders being substantially the same as those in the company, and the liquidator entered into an agreement with it on November 28, 1957. By that agreement the company and the liquidator transferred to the new company all its undertaking, assets and goodwill, with the exception of certain government securities and bank balances, the total value of which was £161,517 10s. 6d. Out of that sum there was reserved £10,721 15s. for taxation, so that there was left available for distribution by the liquidator £150,795 15s. 6d. A substantial part of the consideration for the transfer of the company's business was shares in the new company.

As appeared from a letter dated January 17, 1958, addressed by the company's accountants to the inspector of taxes, 117,006 fully-paid £1 ordinary shares were allotted by the new company in favour of the shareholders of the old company. The last paragraph of the letter was in the following terms: "The assets "remaining in the hands of the liquidator are government securi-"ties and the balance of the banking account. A part of the "securities has already been realised, and a distribution of 5s. in "the £ on the issued capital of £234,013 has already been made. "The remaining assets will not be sufficient to repay the increased "capital in full (excluding the share distribution) and we presume "that under the decision in *Pollock & Peel*[7] no distribution charge "will be payable." Those shares were allotted and distributed. The shareholders in the new company were substantially the same as were those in the old company.

Since the paid up share capital of the company as increased by the above-mentioned capitalisation of undistributed profits and

[6] [1957] 1 W.L.R. 822.

[7] Ibid.

1960

ACKLAND & PRATTEN LTD. (IN LIQUIDATION) v. INLAND REVENUE COMRS.

the subsequent allotment of paid-up shares exceeded the above-mentioned sum of £150,795 15s. 6d., the effect of the decision in *Inland Revenue Commissioners* v. *Pollock & Peel Ltd.* (*In Liquidation*) [7] was that distribution of that sum by the liquidator would not be a gross relevant distribution for the purposes of section 35 (1) (*c*) of the Finance Act, 1947, and there would be no liability to the profits tax in respect of such distribution.

On December 3, 1957, the company and the new company gave notice to the commissioners that they elected that section 36 (4) of the Finance Act, 1947, should apply to the reconstruction agreement—i.e., the agreement of November 28, 1957.

This notice had a two-fold effect, described by Lord Evershed M.R. in *Inland Revenue Commissioners* v. *Pollock & Peel Ltd.* (*In Liquidation*), where he said [8]: "That, of course, throws you "back to the provisions of section 30, and particularly to subsec-"tion (3) of section 30. But the effect is that, in making your "calculations to see (among other things) what limit ought to be "placed on the distribution charge, the second company is treated "as though the differences from which the non-distribution relief "was calculated for the first company have been facts in the life "of the second company. The last few lines of the subsection, to "which some attention was directed in the argument, do not, "I think, assist to solve the present problem. For one thing the "last chargeable accounting period of the second company has "not arisen, and I cannot find in these last few lines, and in "particular in the reference to 'distribution of capital,' anything "which materially affects, when I come to it, the proper con-"struction of the phrase 'distribution of capital' in section 35. "But there is this significance to the present facts of section 36. "Election by the first and second Pollock & Peel companies was "made pursuant to subsection (4), and it seems to me inevitably "to follow that the distribution of the shares in Pollock & Peel "No. 2 to the persons who were in fact the shareholders of Pollock "& Peel No. 1 cannot be treated as distributions to those persons "at all for any relevant purposes, including, of course, the pur-"poses of the earlier subsection (1) of section 36 and also of "section 35."

At the time of the appeal hearing it was not possible to calculate the precise amount of the profits tax lost to the Revenue as the immediate result of the above-mentioned transactions, but a calculation supplied to the special commissioners on behalf of the Revenue showed it to be in the neighbourhood of £22,000, and this figure was not challenged on behalf of the company. On August 15, 1958, the commissioners made the direction, the subject of the appeal. Up to and including 1956 the company made up its accounts at December 31, annually. In 1957 it only made up accounts for the period January 1 to November 27 (the date of liquidation). The commissioners had not, however, before

[7] [1957] 1 W.L.R. 822. [8] 37 T.C. 240, 254.

making the direction, determined an accounting period under section 20 (2) (*b*) of the Finance Act, 1937.

It was admitted on behalf of the commissioners that the onus of satisfying the special commissioners, that avoidance or reduction of liability to profits was the main purpose or one of the main purposes of the transactions in question, was on the commissioners.

No evidence was adduced on behalf of the company.

It was contended on behalf of the company: (1) That the direction was bad, for the following reasons: (a) Four heads were set out in the direction. There was no evidence that those heads were in any way linked. Each head, therefore, was separate and distinct. Capitalisation of undistributed profits, considered as a separate operation, could not give rise to avoidance or reduction of liability to the profits tax. (b) If the four heads in the direction were taken together, their combined effect in November, 1957, as the law then stood, would not have resulted in the avoidance or reduction of liability to the profits tax. (c) The direction did not contain a computation of the profits tax on the basis on which the direction stated that the tax should be computed. (d) The commissioners had not determined an accounting period, as they were required to do under section 20 (2) (*b*) of the Finance Act, 1937. Without such a determination there could not be a chargeable accounting period: a direction under section 32 of the Finance Act, 1951, must specify a chargeable accounting period. (e) The direction was premature, since until the liquidation of the company was complete, the amount of the distribution by the liquidator could not be known; nor could it be known by how much it would exceed the paid-up capital of the company. (f) The direction was premature for an additional reason. Under section 36 (4) of the Finance Act, 1947, the new company might in certain circumstances become liable to the profits tax by reference to the non-distribution relief enjoyed by the company. Until it was known whether or not this would happen, a direction under section 32 of the Finance Act, 1951, could not be issued. (2) That the transaction in the present case was not struck at by section 32 of the Finance Act, 1951, at all. Section 31 of the Act dealt with "the effect of capitalisation of "profits on rate of profits tax" (sidenote to the section) and was the section which dealt with the type of transactions in issue in the present case. If the transactions were covered by section 31—and they were—section 32 did not apply to them (3) That if the above contentions were not correct, the commissioners had failed to discharge the onus which was on them of proving that avoidance or reduction of liability to the profits tax was the main purpose or one of the main purposes of the transactions in question. (4) That the direction should be discharged.

It was contended on behalf of the Crown: (1) That the direction given by the Commissioners of Inland Revenue was competent. (2) That on the evidence adduced on behalf of the

1960

Ackland & Pratten Ltd. (In Liquidation) v. Inland Revenue Comrs.

said commissioners, the only inference to be drawn was that the main purpose of the transactions in question was the avoidance or reduction of the company's liability to the profits tax. (3) Alternatively, (a) that, having regard to the provisions of law relating to the profits tax, other than section 32, which were in force at the time when the transactions in question were effected, the only inference to be drawn from the evidence adduced on behalf of the commissioners was that the main benefit which might have been expected to accrue from the transactions was the avoidance or reduction of the company's liability to the profits tax; (b) that therefore, avoidance or reduction of the company's liability to the profits tax must be deemed to have been the main purpose or one of the main purposes of the transactions in question. (4) That the direction should be confirmed.

The special commissioners held that the direction was competent and dismissed the appeal. The company appealed, the questions of law for the opinion of the High Court being: (a) whether the direction was competent; (b) if it was, whether the special commissioners were justified on the evidence in finding that avoidance or reduction of the company's liability to the profits tax was the main purpose, or one of the main purposes, of the transactions in question; (c) if they were wrong in so finding, whether they were justified on the evidence in finding that the main benefit, which might have been expected by a person surveying all the facts and knowing all the law relating to the profits tax at the time when the transactions in question were effected, was the avoidance or reduction of the company's liability to the profits tax; (d) whether they were justified in finding that the basis of computation set out in the direction was appropriate; and (e) whether direction for a period, which was not a chargeable accounting period, was valid.

P. J. Brennan for the company.

Peter Foster Q.C. and *Alan S. Orr* for the Crown.

The following cases, in addition to those referred to in the judgment, were cited in argument: *Inland Revenue Commissioners* v. *White Bros. Ltd. (In Liquidation)* [9]; *E.* v. *Saxton & Sons Ltd.* v. *Inland Revenue Commissioners.*[10]

Cur. adv. vult.

July 25. Cross J. read the following judgment: This case concerns the profits tax liability of the appellant company, Ackland & Pratten Ltd., for the chargeable accounting period January 1, 1957, to November 28, 1957, when the company went into voluntary liquidation. Profits tax was first imposed, under the name of "national defence contribution," by section 19 of the Finance Act, 1937, on the profits arising in each chargeable acounting period from any trade or business to which the section

[9] (1956) 36 T.C. 587. [10] (1946) E.P.T. Leaflet No. 43.

applied. [His Lordship read section 20 (2) (*b*) of the Act and continued:] The nature of the tax was drastically altered by the Finance Act, 1947, in that the rate of tax was made to depend on the amount of profits distributed to proprietors. [His Lordship read sections 1, 30 (2) (3) (4), 34, 35 (1), 36 (1) proviso and 36 (4) of the Finance Act, 1947, and sections 31 (1) (5), 32 (1) (3) of the Finance Act, 1951, and continued:] Then, finally, to complete this history, section 25 of the Finance Act, 1958, which operated from April 1, 1958, provided: " . . . the profits " tax shall be charged on the profits arising in any chargeable " accounting period from a trade or business to which section 19 " of the Finance Act, 1937, applies at the rate of ten per cent. on " the amount of those profits, subject to [certain provisions for " abatement], but without any relief for non-distribution or any " distribution charge for chargeable accounting periods ending " after the beginning of that month." So from that time onwards, the elaborate two-tier system introduced by the Act of 1947 came to an end. However, the transactions with which I am concerned took place before that Act was passed.

On May 24, 1957, the Court of Appeal gave judgment in *Inland Revenue Commissioners* v. *Pollock & Peel Ltd.* (*In Liquidation*).[1] What had happened in that case, briefly, was this. In November, 1952, the company's issued capital was increased from 2,004 shares of £1 each to 30,060 shares of £1 each, in pursuance of a special resolution passed on November 6, 1952, in the following terms: " Capitalisation of profits: That it " is resolved that it is desirable to capitalise the sum of £28,056 " being part of the amount standing to the credit of a capital " reserve account and a profit and loss appropriation account and " that such sum be capitalised accordingly and used for the " purpose of paying up as fully paid bonus shares 28,056 ordinary " shares of £1 each and that such bonus shares be issued and " allotted to the existing shareholders of the company on the basis " of fourteen new bonus shares for each ordinary share now held."

On October 31, 1953—that is, nearly a year afterwards—the company went into voluntary liquidation. A new company subsequently took over the assets of its business, except a sum of cash, in consideration for shares in that company, the distribution of which to the members of the old respondent company did not, by virtue of an election by the two companies made under section 36 (4) of the Finance Act, 1947, which is one of those I have read, affect its liability to profits tax. After paying all the debts and the costs of the winding up, the liquidator was left with £15,030 in cash, which he distributed to the members of the company as a final step in the liquidation—and it is to be noted that, of course, that sum was less than the nominal amount of the share capital of the company as increased by the resolution passed in November, 1952. The amount of £15,030 was included

[1] [1957] 1 W.L.R. 822; 37 T.C. 240; [1957] 2 All E.R. 483.

1960

ACKLAND & PRATTEN LTD. (IN LIQUIDATION) v. INLAND REVENUE COMRS.

Cross J.

in the gross relevant distributions in an assessment to profits tax made on the company for the last chargeable accounting period of its trade or business, ending on October 31, 1953, on the footing that section 31 of the Finance Act, 1951, the relevant parts of which I have read, applied.

On appeal to the special commissioners, the company contended, among other things, that section 31 of the Finance Act, 1951, did not override section 35 (1) of the Finance Act, 1947, limiting the amount of distributions made after the last chargeable accounting period which might be treated as gross relevant distributions to the excess over the nominal amount of the paid-up share capital. Of course, there was no excess in that case. Secondly, they contended that the sum in question was not applied in reducing share capital so as to give rise to a distribution under section 31. They said, in effect, that it was an abuse of language to say that money paid by a liquidator in a liquidation was a sum applied in reducing share capital.

The Court of Appeal, upholding the judgment of Upjohn J., held that those contentions were perfectly right. They held, first, that the payment was not a repayment or return of share capital so as to be a "sum applied in reducing capital" within section 31 of the Finance Act, 1951, and that it was a "distribution of "capital" within section 35 (1) of the Finance Act, 1947; and that, inasmuch as the amount distributed was less than the nominal amount of the share capital, there was no profits tax chargeable. It is to be noted that section 32 of the Finance Act, 1951, was not invoked by the Revenue in that case at all.

Now that being the legal position in the middle of 1957 as regards these matters, I must now come to the transactions which are in question in this case. [His Lordship stated the facts and continued:] It is to be noted, as Mr. Brennan pointed out, that there was no finding that the instructions issued to inspectors of taxes on October 14, 1957, which presumably were of a confidential nature, were communicated to the company.

Mr. Brennan, on behalf of the company, first argued that there was no evidence on which the special commissioners could properly come to the conclusion that this was a case within section 32 at all. He pointed out, first, that the resolution of July 24, 1957, would not by itself reduce the profits tax liability at all; and, similarly, that the resolution to wind up would, again, not by itself reduce the liability to profits tax. Given, of course, that the company was going to pass both resolutions, the resolution to increase the capital would necessarily have to precede the resolution to go into liquidation; but he argued that it was not proper to infer that both of them were part of a scheme, or should be linked together. He said that it might be, for all one knew, that in July the company resolved to increase its capital without any thought of subsequently going into liquidation, and then, in November, decided to go into liquidation for reasons that

were quite unconnected with the previous resolution to increase its capital. He also urged that the state of the law was so obscure at the time that no reasonable man would in any case have any confidence in the view that this increase of capital and subsequent going into liquidation would reduce the profits tax liability of the company.

I cannot accept those contentions. Why the company passed those resolutions was a matter peculiarly within the knowledge of the directors. They chose to give no evidence at all. Much the most likely explanation, especially in view of the terms of the company's own accountants' letter of January 17, 1958, was that the transactions were connected and were part of a scheme. If, contrary to all probability, the liquidation was not contemplated in July, and tax relief was never in the mind of the parties at all until the whole matter was completed, then the directors could have said so; and if they did not say so, they ran the risk of the special commissioners drawing the obvious inference from their failure to do so.

Then, again, apart from section 32—if you put that aside—it seems to be that the chance of saving profits tax under the *Pollock & Peel* decision [2] was very good indeed. It is perfectly true that the decision of the Court of Appeal might have been upset by the House of Lords, and I am prepared to assume that the directors of the company were not aware at the time of the liquidation that there would not be an appeal; but, still, the Court of Appeal had upheld the decision of Upjohn J.,[3] and it seems to me that there was a very good chance at that time that profits tax would be avoided. Again, it was the view of the company's accountants, as one can see from the last paragraph of the letter they wrote in January, that it would be avoided. I think that the commissioners were fully justified in finding that the conditions of section 32 (1) were satisfied and that the main purpose, or one of the main purposes, for which these transactions were effected was the avoidance or reduction of liability to profits tax.

But, in any case, it was not in fact necessary for them to find this. It was sufficient if, under section 32 (3) (*c*), "the main bene-"fit which might have been expected to accrue from the trans-"action or transactions in the three years immediately following "the completion thereof was the avoidance or reduction of "liability to the tax." If they were satisfied of that, then the avoidance or reduction of liability to profits tax was to be deemed, for the purposes of the section, to have been the main purpose, or one of the main purposes, of the transaction or transactions.

These provisions in section 32 of the Finance Act, 1951, reproduce, I think, almost verbatim, similar provisions in the excess profits tax legislation, and it was pointed out by Lord Greene with reference to those provisions in *Crown Bedding Co. Ltd.*

[2] [1957] 1 W.L.R. 822; 37 T.C. 240; [1957] 2 All E.R. 483.

[3] [1956] 1 W.L.R. 951; 37 T.C. 240; [1957] 2 All E.R. 483.

1960

ACKLAND & PRATTEN LTD. (IN LIQUIDATION) v. INLAND REVENUE COMRS.

CROSS J.

and South Wales Flock Co. Ltd. v. *Inland Revenue Commissioners*,[4] that the test to be applied in considering section 32 (3) is the objective test: would a reasonable man in fact expect that the main benefit which would accrue from these transactions would be the avoidance of tax? It seems to me to be manifest that that is what an independent, objective third party would think was the main benefit to be expected from it. It was not a certainty, but it was, to my mind, more than a possibility. It was, indeed, a probability.

Mr. Brennan argued that, whatever might be the position with regard to subsection (1), subsection (3) could not apply to this case because it contemplated a benefit to accrue "in the three "years immediately following the completion thereof." He argued that that was a reference to the tax which would have been payable in the next three years, and that, therefore, subsection (3) does not cover a case such as this, where the tax is chargeable in respect of a period before the liquidation of the company, and where there will be no further chargeable accounting periods in respect of which the tax could be charged. I do not think that that argument is sound. To my mind, the words mean only that, during the next three years, whether or not there has been a liquidation, there will in fact be some saving of tax. I therefore reject that argument. But, as I have pointed out, in any case I do not think subsection (3) very much matters, because, in my judgment, the commissioners were fully justified in holding that subsection (1) applied.

Mr. Brennan next argued that the direction was premature, and in that connection he referred to section 32 (4). That, as I have said, provides: "Any direction of the Commissioners . . . "shall specify the transaction or transactions giving rise to the "direction"—it did that—and shall specify (and these are the words on which Mr. Brennan relies) "the adjustments as respects "liability to the profits tax which the Commissioners consider "appropriate." Mr. Brennan argued that it was necessary for the commissioners to go into much more detail than they did in this case, and for them to indicate what precisely the liability to tax was going to be; and that, of course, they would not be able to do until the liquidation had been completed.

In my judgment, that submission is ill-founded. I think that all that is needed under section 32 (4) is an indication of the method which is to be followed in assessing the company to profits tax. The direction which they gave was that the profits tax for the chargeable accounting period ended November 28, 1957, was to be computed on a certain hypothesis; that is to say, as if, for the purposes of section 35, the total amount of the paid-up capital was the unincreased amount and not the increased amount. That, in my judgment, is an ample specification of "the adjustments "as respects liability to the profits tax which the commissioners "consider appropriate."

[4] (1946) 34 T.C. 107; [1946] 1 All E.R. 452, C.A.

In this connection, Mr. Brennan also argued, as a further formal objection to the direction, that in fact the commissioners had not at that time determined what was the last chargeable accounting period of the company under section 20 (2) (*b*) of the Finance Act, 1937. The chargeable accounting periods of this company were annual periods, from January 1 to December 31, and the last chargeable accounting period would, of course, be from January 1, 1957, up to the date of liquidation. In point of fact, that last period has not yet been determined by the Commissioners of Inland Revenue under section 20 (2) (*b*); but, again, in my judgment, I do not think that that fact in any way invalidates the direction. The direction was: " . . . that the liability " to the profits tax of the company for the chargeable accounting " period ended November 28, 1957, shall be computed as if," etc. In my judgment, those words simply mean " for whatever the " last chargeable accounting period of the company running up " the date of liquidation shall in fact prove eventually to be." I do not think that there can be any doubt in anyone's mind what at that time it would be.

Mr. Brennan next founded an argument on the wording of section 36 (4) of the Finance Act, 1947. Where an election is made under that section—as happened in this case, of course, and also in the *Pollock & Peel* case [5]—then the second way in which the provisions of the Act relating to profits tax are modified is this: that, in considering what distribution charge (if any) falls to be made on the second company, any distribution relief to which the first company became entitled is to be taken into account as if it had been given to the second company. Then, these are the words on which Mr. Brennan particularly relies: " . . . except so far as it has already operated to increase a " distribution charge on the first company." Mr. Brennan submits that the word " already " relates to the date of liquidation and that, therefore, the second company, as it were, irrevocably takes over all the potential liability to tax resulting from any unexhausted distribution relief on the books, so to say, of the first company at the date of liquidation; and it must follow from this, he says, that the first company, on liquidation, is freed from all further liability to tax in respect of such unexhausted distribution relief.

In my judgment, that argument, which is an ingenious one, rests on a misconstruction of the word " already." This part of section 36 (4) is not dealing with the liability of the first company at all, but simply with the liability of the second company; and the word " already," I think, refers not simply to the time before liquidation but to all the time before the question of the amount of any distribution charge on the second company falls to be considered. Consequently, any distribution charge to which the first company becomes subject after liquidation will be taken into

[5] [1957] 1 W.L.R. 822.

1960

Ackland & Pratten Ltd. (In Liquidation) v. Inland Revenue Comrs.

Cross J.

account in estimating the liability of the second company, as and when that liability falls to be determined. I appreciate that difficulties might arise in applying this provision to a case where the question of the distribution charge to be paid by the second company arises before the liquidation of the first company is completed, and where there is still a possibility of a future charge on the first company in respect of a future possible distribution of some assets not taken over by the second company, but such circumstances would, I think, be very unlikely to occur, and any difficulty which might arise if they did occur is, to my mind, no sort of justification for reading into the subsection a freeing of the first company from all liability to profits tax as from the date of liquidation, which I do not think was in the mind of the legislature for one moment.

Mr. Brennan finally advanced another argument, to which I should refer. It was, as I understand it, that as the Revenue authorities obviously thought that section 31 covered a case such as this until the Court of Appeal showed them that they were quite wrong, this case ought not to be treated as within section 32. For my part, I cannot follow that reasoning at all. The case, as I have tried to explain, appears to me precisely within section 32, and the fact that the Revenue authorities thought, quite wrongly, that such a case was within section 31, has, so far as I can see, nothing whatever to do with the matter.

I think I have dealt, or I have tried to deal, with all the arguments which were put before me. In the result, I think that the commissioners have discharged the onus which was on them, the Revenue authorities. I think the special commissioners came to a right conclusion, and the appeal must therefore be dismissed.

Appeal dismissed with costs.

Solicitors: *Rider, Heaton, Meredith & Mills for Osborne, Ward, Vassall, Abbot & Co., Bristol; Solicitor, Inland Revenue.*

M. G. T.

[CHANCERY DIVISION.]

1960
July 12, 13.

Cross J.

*H. J. RORKE LTD. *v.* INLAND REVENUE COMMISSIONERS.

Revenue—Income tax—Capital or income expenditure—Opencast coal mining—Payment for right of entry on land—Compensation payment for diminution in value—Payments normal and recurrent incident of trade—Whether revenue or capital expenditure—Whether "wholly and exclusively laid out . . . for the purposes of "the trade"—Profits tax—Income Tax Act, 1952 (15 *&* 16 *Geo.* 6 *&* 1 *Eliz.* 2, *c.* 10), *s.* 137 (*a*).

[Reported by Miss Philippa Price, Barrister-at-Law.]

A company which carried on the business of opencast coal mining entered into an agreement dated December 16, 1957, with a landowner, whereby certain land was let to the company for one year on payment of a royalty for every ton of coal won from the land, the company covenanting to restore the surface of the land on the completion of the opencast mining operations. The company further agreed to pay to the lessor £250 for the right to enter upon the land demised and a further sum of £250 as compensation for the diminution in value of the land and the destruction of land drains, etc. In 1958 the company made two further agreements with landowners in substantially the same terms. The payments for the right of entry and for diminution in value of the land provided for in all three agreements were a normal and recurrent incident in the trade of opencast coal mining as carried on by the company and others in the industry.

On an appeal by the company against assessments to profits tax on the ground that the whole of the payments made by them for the right of entry and for distribution of value pursuant to the agreements were revenue expenditure and fell to be allowed as deductions under section 137 of the Income Tax Act, 1952 [1]:—

Held, that no distinction could be drawn between the payments for the right of entry and the payments for diminution in value, and that, since the company in making the payments were not buying circulating capital, i.e., coal, but were acquiring rights which enabled them to obtain circulating capital, the whole of the payments were marked as being of a capital nature, and, notwithstanding that the transactions were transient and recurrent, fell to be disregarded in computing the profits or gains of the company for profits tax purposes.

Stow Bardolph Gravel Co. Ltd. v. *Poole* (1954) 35 T.C. 459 applied.

Knight v. *Calder Grove Estates* (1954) 35 T.C. 447 considered.

Case stated by the Commissioners for the Special Purposes of the Income Tax Acts.

The appellant company, H. J. Rorke Ltd., appealed to the special commissioners against assessments to profits tax for the chargeable accounting periods, May 1, 1957, to March 31, 1958, and April 4, 1958, to April 30, 1958, in the sums of £2,550 and £200 respectively.

The grounds of the appeal were that in computing the amounts of the profits or gains of the company for the purposes of the assessments, certain disbursements made by the company, i.e., lump sum payments made by the company under the terms of three leases entered into between the company and two landowners, in the course of carrying on its business of opencast coal mining and quarrying, had not been allowed as expenses contrary to law.

The following were among the facts found by the commissioners: The company was incorporated on February 19, 1955.

[1] Income Tax Act, 1952, s. 137: "... in computing the amount of the "profits or gains to be charged under "Case I or Case II of Schedule D, no "sum shall be deducted in respect of "—(*a*) any disbursements or expenses "... exclusively laid out ... for the "purposes of the trade, profession or "vocation; ..."

1960

H. J. Rorke Ltd. v. Inland Revenue Comrs.

The memorandum and articles of association of the company contained, inter alia, the following objects: "(A) To purchase, take "on lease, or otherwise acquire (either with or without the surface) "for any estate or interest, any coal mines, iron mines, and other "mines, mining ground and minerals, and any mining rights, "grants, concessions and easements, and any lands or other property necessary or convenient for the advantageous possession "and use of the mines or works for the time being owned or worked "by the company or any interest therein and to search for, get, "bring to surface, make merchantable, and sell and dispose of "coal, ironstone and other ores, metals and minerals, and substances of the earth whatsoever. (B) To carry on business as "colliery and mine proprietors, mining engineers, metallurgists, "electricity manufacturers and suppliers, gas manufacturers and "suppliers, coal masters, iron masters, smelters, engineers, iron-"founders, patent fuel manufacturers, blast furnace proprietors, "steel makers, steel converters, metal and alloy makers, tinplate "makers, and contractors for and dealers in coal, coke, iron, or "ironwork in all the branches of such businesses and to carry on "the business of brick makers and farmers, to make, purchase, "hire, let out and sell railway and other plant, fittings, machinery, "rolling stock, stock in trade or any portions or parts of such "articles or things."

During the period relevant to the appeal, the company's trade or business was opencast coal mining, and it was one of the leading companies in Yorkshire carrying on such business. Opencast coal mining became generally practised as a trade in the United Kingdom from 1942 to 1943 onwards, and at the relevant time comprised about 100 operators. The trade required specialised machinery, and the company owned all its own plant and machinery, different plant being used at different stages in operations. In order to employ economically and fully the staff, machinery and equipment of the company it was necessary to have three or four sites actively producing coal at the same time. The method of operating employed by the company was as follows. In order to find a beneficial site they first obtained information locally from farmers and miners of the presence of a coal seam. On occasions they made payments of introductory commission to persons who informed them of coal deposits. They also studied the geological maps to see if they could be checked up with the local information. There was no reliable geological survey covering the whole of the United Kingdom. Only about one in ten of the sites which thus came to their knowledge as potential coal-bearing sites were eventually worked for coal. The sites which they used were all on agricultural land in Yorkshire. Having obtained information about a site and studied the geological survey, they approached the landowner concerned, usually a farmer, and endeavoured to enter into an agreement whereby in return for an immediate payment of £5 they were granted permission to prospect the site and an option to take a

lease thereof if found suitable. Such an agreement having been made, not always in writing, the specialised staff went on to the land and bored it extensively. The boring machines were not large machines, and the operations were done by hand. The preparations were lengthy and it might take any time between one and six months between the time they got to know of a possible site and the time they actually decided to work it. As soon as they decided that a site was worth working they exercised their option and made an agreement for a lease with the landowner or farmer, such agreement being made either subject to the granting of the appropriate licence by the National Coal Board or after such had been obtained. Thereafter application was made to the local authority for planning permission. On obtaining the National Coal Board licence and the consent of the local authority, the company installed their plant and machinery on the site and removed and stacked up the topsoil and subsoils. A site normally produced coal within two to three weeks after being entered and, weather permitting, the whole operation was completed in about six to nine months. After extracting the coal they were obliged to replace the topsoil, but could not replace hedges, trees and walls, except at considerable expense, or the natural drainage. The result was a definite and permanent impairment to the site from an agricultural point of view.

The procedure leading to the winning of coal by opencast mining and the method of operating set out above was similar to that commonly and generally followed by other persons carrying on the trade or business of opencast coal mining.

On December 16, 1957, one Donald Parker, the lessor, entered into an agreement with the company whereby it was provided, inter alia: "1. The lessor being the owner of a plot of land con-
"taining four acres and five perches or thereabouts situate at
"Netherton near Wakefield in the County of York . . . shall let
"the same to the lessee from the fifth day of November, 1957,
"TO HOLD the same unto the lessee for the term of one year
"paying therefor a royalty of One shilling and threepence per
"ton for all coal recovered from the demised land and accepted
"by the Coal Sales Department of the National Coal Board or
"the sum of Three hundred and twelve pounds Ten shillings
"whichever is the greater such payment to be made by calendar
"monthly instalments. 2. It is the intention of the lessee to
"obtain coal from the demised land by opencast coal workings
"(hereinafter called 'the said works') and the lessee shall within
"three calendar months after completion of the said works restore
"the surface of the said land in a proper and efficient manner to
"the satisfaction of the lessor . . . 3. The lessee shall upon the
"signing hereof pay to the lessor (a) the sum of Two hundred and
"fifty pounds for the right to enter upon the demised land for
"the purpose of working and getting the said coal and (b) the
"further sum of Two hundred and fifty pounds as compensation

1960

H. J. Rorke Ltd. v. Inland Revenue Comrs.

"for the diminution in value of the demised land and the destruc-
"tion of the land drains therein as a result of the working and
"getting of the said coal and of the adjoining land belonging to
"the lessor used as a means of access to the demised land and
"for the destruction of the roadway at present existing upon
"the demised land. 4. The lessee will within three calendar
"months from the completion of the said works re-sow the whole
"of the demised land and replace the fencing disturbed by the
"said works in a proper and efficient manner and to the satisfac-
"tion of the lessor and as a guarantee for the due performance of
"the works in this clause set out the lessee will deposit with the
"lessor the sum of Eighty pounds on the signing of this agree-
"ment *AND* on default of completion of the works in this clause
"set out within the time and in the manner aforesaid or other-
"wise howsoever the lessor shall be at liberty to give notice to
"the lessee of his intention personally to carry out the same and
"thereupon—(i) the lessor shall be entitled to retain the said sum
"of Eighty pounds on account of and towards the cost of such
"works and (ii) the lessee shall be released from all liability in
"connection therewith."

In or about 1958 the lessor entered into an oral agreement with the company with regard to another plot of land which was in substantially the same terms. It provided for a rental payment, and for lump sum payments of the same character as the first agreement—that is to say, a payment for the right to enter and a payment for the diminution in value, each to be made on the signing of the agreement.

On January 18, 1958, one George Norton entered into an agreement with the company which again was on the same lines as the first two agreements.

The provisions contained in the first Parker agreement, the second Parker agreement and the Norton agreement were drawn in similar terms to those commonly and normally found in agreements for leases entered into between the company and farmers, and between farmers and other persons carrying on the trade or business of opencast coal mining, particularly the provisions relating to the payment of a sum of money by the lessee to the lessor upon the signing of the agreement for the right to enter upon the land for the purpose of working and getting the coal, and the payment of a further sum estimated as compensation for the diminution in the value of the land and damage likely to be caused as a result of working and getting the coal. The payments so provided to be made were a normal and recurrent incident in the trade or business of opencast coal mining as carried on by the company and other persons in the industry.

[The case then set out the total amounts as to which the dispute arose: legal and advisory expenses in connection with the granting of the leases, exploitation rights, that is, payments for the right of entry on the land and payment for diminution in value, amounting in total to £2,105.]

It was contended on behalf of the company that in computing on income tax principles the profits or gains of the company for the year ended April 30, 1958, the whole of the expenses incurred by the company under the provisions of the lease agreements fell to be allowed as deductions under the provisions of section 137 of the Income Tax Act, 1952; that in computing for profits tax purposes the profits or gains of the company for the chargeable accounting periods relevant to the appeal, such expenses incurred by the company, as aforesaid, likewise fell to be treated as deductions; that the agreements set out above and the payments made thereunder by the company constituted an ordinary incident of carrying on an opencast coal mining business and were of a kind so extensively adopted as to constitute a custom of that trade; that, on the facts, the expenditure arising under those agreements was part of the ordinary expense of getting and mining the coal, was of a revenue nature, and resulted in no benefit of an enduring nature to the company; and that the appeal should be allowed and the assessments adjusted accordingly.

It was contended on behalf of the Commissioners of Inland Revenue that in computing on income tax principles the profits or gains of the company for the year ended April 30, 1958, the whole of the expenses set forth above, being expenses incurred under the provisions of the lease agreements, fell to be excluded under the provision of section 137 (*f*) of the Income Tax Act, 1952; accordingly, that in computing for profits tax purposes the profits or gains of the company for the chargeable accounting periods relevant to the appeal, the expenses incurred by the company, as aforesaid, fell to be disregarded; and that the appeal should be dismissed.

The special commissioners in this decision distinguished between the payments for the exploitation rights and the payments in respect of compensation for diminution in value. They held that the right of entry payments were capital payments and could not be allowed as deductions but that the payments for diminution in value were of a revenue nature and could be allowed. Having drawn that distinction they considered it appropriate to apportion the legal and advisory expenses in connection with the leases and held that half of them should be treated as capital and half of them as income expenditure.

The company appealed and the Crown cross-appealed.

R. Borneman Q.C. and *P. W. I. Rees* for the company.
F. N. Bucher Q.C. and *Alan Orr* for the Crown.

The cases cited in argument are referred to in the judgment.

Cross J. This case raises the familiar problem whether certain expenditure is to be regarded as expenditure on revenue account or capital expenditure. [His Lordship stated the facts and continued:] Unfortunately, the commissioners do not say

1960

H. J. Rorke Ltd. v. Inland Revenue Comrs.

Cross J.

in the case why they distinguished as they did between the two sorts of payments, and counsel have not been able to suggest to me any logical basis for drawing the distinction. I cannot see any reason for drawing it. If one of these sums is capital, I should have thought that it followed that the other was capital, and vice versa.

What is said now by Mr. Borneman on behalf of the company is that, having regard to the findings in the case as to the methods of operating and that the making of payments of this nature were normal and recurrent incidents of the trade, both payments should be treated as revenue payments. He referred me to Lord Dunedin's words in *Vallambrosa Rubber Co. Ltd.* v. *Farmer.*[1]: "but in a rough way I think it is not a bad criterion "of what is capital expenditure as against what is income expen-"diture to say that capital expenditure is a thing that is going "to be spent once and for all, and income expenditure is a thing "that is going to recur every year." These payments, he argued, were not going to be made once and for all. On the contrary, payments of the same nature were being made constantly, year in and year out. Then he referred me to another test suggested by Lord Cave L.C. in *Atherton* v. *British Insulated and Helsby Cables Ltd.*[2] After quoting the words of Lord Dunedin which I have just read, Lord Cave went on to say[3]: "But when an "expenditure is made, not only once and for all, but with a view "to bringing into existence an asset or an advantage for the "enduring benefit of a trade, I think that there is very good "reason (in the absence of special circumstances leading to an "opposite conclusion) for treating such an expenditure as properly "attributable not to revenue but to capital." If you apply that test here, said counsel, how can you say that an asset or advantage has been brought into existence for the enduring benefit of the trade? These leases were only for a year or, at the most, two years, and the work of extracting the coal only lasted for six to nine months. Then the soil was put back and the company went somewhere else. You cannot say that any asset or advantage had been brought into existence for the enduring benefit of the trade. From a common-sense point of view, he argued, whether you look at the transient character of the operations or whether you look at the constant recurrence of similar operations and the making of similar payments, these payments should be regarded as of a revenue nature.

Mr. Bucher, for the Crown, does not dispute that the payments in question were within the words of section 137 (*a*) of the Income Tax Act, 1952, "wholly and exclusively laid out or "expended for the purposes of the trade." But he says that notwithstanding the transient character of the operations and the constant recurrence of similar payments, they are nevertheless

[1] (1910) 5 T.C. 529, 536.
[2] (1925) 10 T.C. 155, 192.
[3] Ibid.

to be regarded as capital payments and so within section 137 (*f*). He says that here what was being acquired by these lump sum payments (or what these payments were helping to acquire) was not stock-in-trade but rights which would enable the company to obtain stock-in-trade—that is to say, coal. They were not payments for the purchase of coal but payments to put the company into the position to get coal. Lump sum payments of that character, he says, are necessarily of a capital nature, and the fact that the leases lasted only for a very short time, that the operations were transient, and that fresh leases were constantly being entered into and payments of this character constantly being made to farmers or landowners is nihil ad rem.

The cases, the most recent of which is *Stow Bardolph Gravel Co. Ltd.* v. *Poole*,[4] undoubtedly draw a distinction between payments made to acquire stock-in-trade and payments made to acquire rights which will enable you to get stock-in-trade for yourself. In the *Stow Bardolph* case[4] the appellant taxpayers carried on the business of dealers in sand and gravel and, in order to supply themselves with sand and gravel, they entered into an agreement with a landowner, the Luddington Estates Ltd., under which the landowner was to sell and the company was to purchase the deposit of gravel and sand contained in and upon certain lands. The landowner was to allow the gravel company free access to the land with or without carts, lorries or vehicles for the purposes of removing the sand ballast, and there was a right for the gravel company to take machinery and haulage equipment onto the land for the purpose of excavating and carrying away the gravel and sand ballast. Then there was an option given for a period of five years to purchase additional deposits of gravel and sand ballast on adjoining land of the landowner, and finally a provision that no legal estate in the land should be created by virtue of the agreement. The agreement, that is to say, gave a licence to enter and a right to remove the sand or gravel—a profit à prendre. Harman J. decided the case in favour of the taxpayer on the ground that the agreement amounted substantially to an agreement for the purchase of stock-in-trade from the landowner. The Court of Appeal, however, reversed that decision on the ground that the agreement was not an agreement for the direct acquisition of circulating capital but an agreement giving rights under which the taxpayers could, if they chose to use them, obtain circulating capital, namely, gravel, for themselves. That case, which followed a number of earlier cases, illustrates the distinction for which Mr. Bucher argued. Jenkins L.J., in his judgment,[5] pointed out that it is not a distinction which would commend itself to all minds, but it is a distinction which is clearly drawn in the cases. The present case is really a stronger case from this point of view than the *Stow Bardolph* case,[6]

[4] (1954) 35 T.C. 459.
[5] Ibid. 473–474.
[6] 35 T.C. 459.

1960

H. J. Rorke Ltd. v. Inland Revenue Comrs.

Cross J.

because here there was a lease granting a legal interest in the land, not merely a lease and a profit à prendre. It is, however, to be observed that the *Stow Bardolph* case [6] did not raise the problems of transience and frequent recurrence of the operations which are raised here. There was nothing in the facts of that case as reported to show how long the particular operation was going to last or whether the taxpayer was at the same time conducting similar operations under which they had to make similar payments to other landowners. Mr. Borneman therefore says that as that aspect of the matter was not canvassed in the case at all, it does not assist Mr. Bucher very much.

The questions of transience and recurrence in connection with operations of this character were raised before Upjohn J. in *Knight* v. *Calder Grove Estates.*[7] The headnote there reads: "The respondents, who carried on in partnership the trade of "open-cast coal mining, purchased the freehold in ten acres of "land for £2,000. The conveyance included covenants under "which they undertook after getting the coal to reinstate the "land and the vendor undertook to repurchase the land for £500 "after mining operations were completed." It is to be observed that there was considerable similarity between that case and this. Although the traders purchased the land and did not simply lease it, the conveyance contained a provision for the repurchase of the land by the landowner at a much reduced price after the operation was finished and the land reinstated as far as it could be. The difference in price, £1,500, represented in part at least the diminution in value of the land brought about by the operation. The headnote goes on: "On appeal against assessments "to Income Tax under Case I of Schedule D for the years 1948–49 "and 1950–51, the respondents contended that the cost of the "land was a revenue charge in the ordinary course of business, "and that the price on resale was a receipt on revenue account." The General Commissioners accepted that contention, but the Crown appealed to the High Court, and Upjohn J. held that the payments must be regarded as capital payments and the receipt as a capital receipt. Mr. Mustoe, on behalf of the taxpayer, put forward two arguments which have some bearing on this case. There was a finding in the case that the respondents had purchased other land for the purpose of carrying on their opencast mining business. The case referred to two other conveyances, but they were conveyances which did not contain any provision for reconveyance by the purchasers to the vendor after the operations were concluded. In reliance on that paragraph in the case, Mr. Mustoe argued, as has been argued here, that it was a case of a recurring expenditure which ought to be treated as revenue expenditure. The judge, however, decided that he had not enough facts to enable him to deal with that aspect of the matter and that in all the circumstances it would not be right

[6] 35 T.C. 459. [7] 35 T.C. 447.

to send the case back for a further finding of fact. The most, therefore, that Mr. Borneman can say about that aspect of the case is that it did not strike Upjohn J. as hopeless to contend on suitable facts that the frequency of operations of this character might make the payments revenue payments rather than capital payments.

The judge then dealt with another argument of Mr. Mustoe's based on the transience of the operation, on the footing that there was no question of recurrence in the case at all. The relevant passage in the judgment is as follows [8]: "I come next to what "I may call Mr. Mustoe's main point. He submits that this "expenditure of £2,000, or, if you like, £1,500 net, was really "a purely transitory matter. The transaction should be looked "upon as one and the expenditure of £1,500 net should be "regarded as the expense of getting and winning the coal. It is "submitted that that was the view taken by the commissioners "and that it ought not to be disturbed. He points to, and relies "upon, the contrast put by Lord Cave L.C. in *Atherton* v. *British* "*Insulated and Helsby Cables Ltd.*[9]" Then the judge read the words from Lord Cave's speech which I have already read, and went on [10]: "Here it is said that there is no purchase with a "view to bringing into existence any asset for the enduring benefit "of the trade, but it is a purely transitory purchase in order that "coal may be won from that particular area and, when won, the "area will go back to its normal use of being used by Mr. "Thompson as farming land. I am quite unable to accept that "submission. The case seems to me a perfectly plain one. The "parties, being minded to get and win coal from this particular "area by open-cast methods, purchased the land. They could "have done it by some other means, but that is the means they "chose—that of purchasing the land. That adventure in the "nature of things is not likely to continue for more than two or "three years, and they prudently arranged for the sale of this "land when the adventure in relation to it comes to an end. No "one suggests that the purchase of this land is circulating capital "or stock-in-trade or anything of that sort. It is a purchase of "land for the adventure and so, on ordinary principles, the "transaction must be regarded as a capital expenditure, just as "when you buy land and put a factory on it, or buy land and "sink a shaft. In my judgment, the fact that the adventure is "not likely to continue for many years is quite irrelevant."

Mr. Borneman sought to distinguish that part of the judgment on the ground that there was a purchase (albeit coupled with an obligation to repurchase when the operation was concluded), whereas here there is not a purchase but a lease for a short period with these lump sum payments made on the signing of the lease. I cannot see that there is any distinction on this aspect of the matter between a purchase and a lease. If there had been only

[8] 35 T.C. 447, 453.
[9] 10 T.C. 155, 192.
[10] 35 T.C. 447, 453.

1960

H. J. Rorke Ltd. v. Inland Revenue Comrs.

Cross J.

one transaction here, if this company had simply entered into one lease for the purpose of opencast mining, and had made these initial payments to get the lease, the fact that the whole operation was only to last a few months would, I think, have made no difference. The point would have been covered by the judgment of Upjohn J.,[11] with which I entirely agree.

That leaves the question of recurrence which Upjohn J. left open. Mr. Borneman has, of course, in his favour the finding of fact that the payments made were a normal and recurrent incident in the trade or business of opencast coal mining; and he says truly that the Crown has not been able to point to any case in which in face of a finding that the payments were a normal and recurrent incident in the trade or business in question, it has yet been held that they were capital payments. Logically, however, I cannot see that the recurrence of the payments makes any difference. If once you accept—as I must—the distinction between buying circulating capital and acquiring rights which enable you to get circulating capital, it seems to me that these payments are marked as being of a capital nature, and, if once you find that, the fact that the trader is conducting many transactions of a similar kind cannot really make any difference. In arriving at that conclusion, I get some help from the case of *Eastmans Ltd.* v. *Shaw*.[12] The facts were very different, but what Rowlatt J. said [13] does, I think, tend to support the view that I have taken. Again, if the mere recurrence of similar operations made a difference, a very large concern could apparently be in a better position than a small one, to argue that expenditure of the sort in question was revenue expenditure. In the result, therefore, I come to the conclusion that I must dismiss the appeal and allow the cross-appeal.

Appeal dismissed.
Cross-appeal allowed with costs.

Solicitors: *Nordon & Co.; Solicitor of Inland Revenue.*

[11] 35 T.C. 447.
[12] 14 T.C. 218.
[13] Ibid. 224.

[PROBATE, ETC., DIVISION.]

1960
Oct. 12.

* PRACTICE DIRECTION (REVIEW OF TAXATION).

Husband and Wife—Practice—Costs—Taxation—Application to review —Supreme Court Costs Rules, 1959 (*S.I.* 1959, *No.* 1958, *Sch.* 2), *r.* 35.

The President has given the following directions:

1. Every application in the Probate, Divorce and Admiralty Division under rule 35 of the Supreme Court Costs Rules, 1959, to

review a registrar's decision in respect of the taxation of a bill of costs shall be made to a judge nominated by the President.

2. Every application shall be made by summons to be served within three days after issue, and returnable on a day to be appointed by the judge.

3. Every summons must contain full particulars of the item or items or the amount allowed in respect of which the application to review is made.

4. Each party shall within four days after service of the summons lodge with the chief clerk of the contentious department all documents produced in evidence by that party at the hearing before the registrar relating to the item or items or the amount allowed; and the chief clerk shall then deliver these documents and the summons, objections and answers made and given by the parties respectively at the review of the taxation of the bill of costs by the registrar to the judge.

5. When appointing a day for the hearing of the summons the judge may decide to exercise his power to appoint two or more assessors to sit with him at the hearing, and if the judge does so decide, the chief clerk of the contentious department shall give notice of the decision to each of the parties and will, in any case, give to each of them notice of the day appointed by the judge for the hearing of the summons.

6. If the judge decides to appoint assessors the party applying shall within four days after the receipt of notice thereof lodge with the chief clerk of the contentious department two or more copies, as the case may be, of the summons, objections and answers made and given by the parties respectively at the review of the taxation of the bill of costs by the registrar for the use of the assessors.

7. When each of the assessors has signified his acceptance of his appointment the chief clerk of the contentious department shall send to each of them the notice of his appointment including the day appointed for the hearing of the summons, and a copy of the documents mentioned in paragraph 6.

B. LONG,
Senior Registrar.

October 12, 1960.

[CHANCERY DIVISION.]

* *In re* ROYAL MUTUAL BENEFIT BUILDING SOCIETY.

1960
Oct. 10.

Pennycuick J.

[00705 of 1960.]

Company—Winding up—Costs—Petition abandoned—Whether company entitled to order dismissing petition with costs—Companies (Winding Up) Rules, 1949 (*S.I.* 1949, *No.* 330 (*L.* 4)), *r.* 33.

A member of a building society who presented a petition to have the society wound up by the court failed to comply with rule 33

1960

Royal Mutual Benefit Building Society, *In re.*

of the Companies (Winding Up) Rules, 1949.[1] Subsequently he notified the society that he did not intend to proceed further with the petition. The petitioner did not attend at the hearing of the petition, but the society appeared and asked for an order dismissing the petition with costs against the petitioner:—

Held that, in principle, the society had the right to an order for costs where the prayer in the petition was unsuccessful, whether on the ground of non-compliance with rule 33 or for any other reason; that the concluding sentence of rule 33 meant no more than that no order should be made in favour of a petitioner who had not complied with the rule and did not operate to protect a petitioner from an order for costs where the petition was unsuccessful, and that, therefore, the society was entitled to costs.

Petition.

On July 20, 1960, a petition was presented for the compulsory winding up of the Royal Mutual Benefit Building Society by Clifford John Edwards, a member of the society. The petitioner failed to comply with the requirements of rule 33 of the Companies (Winding Up) Rules, 1949, and on September 30, 1960, his solicitors wrote to the society informing it that he intended to take no further steps in connection with the petition and that he did not intend to attend on the date fixed for the hearing of the petition. The petition was heard on October 10, 1960, when the society asked for an order dismissing the petition with costs.

R. A. K. Wright for the society.

The petitioner did not appear and was not represented.

No cases were cited in argument.

Pennycuick J. This is a petition by one Clifford John Edwards, a member of the Royal Mutual Benefit Building Society, for the compulsory winding up of the society. The petitioner, for his own good reasons, has omitted to comply with the requirements of rule 33 of the Companies (Winding Up) Rules, 1949. [His Lordship read rule 33 and continued:] The ordinary practice where the petitioner fails to comply with the requirements of rule 33 is to strike out the petition. In the present case, however, the society has appeared by counsel and asks that, instead of it being struck out, the petition should be dismissed with costs against the petitioner.

It appears to me that the society is entitled to the order for which it asks. It is quite clear that the society has the right

[1] Companies (Winding Up) Rules, 1949, r. 33: "After a petition has "been presented, the petitioner, or his "solicitor shall, . . . attend before "the Registrar and satisfy him that "the petition has been duly adver-"tised, that the prescribed affidavit "verifying the statements therein and "the affidavit of service (if any) have "been duly filed, and that the provi-"sions of the Rules as to petitions "have been duly complied with by "the petitioner. No order shall be "made on the petition of any peti-"tioner who has not, prior to the "hearing of the petition, attended "before the Registrar at the time "appointed, and satisfied him in "manner required by this Rule."

to be represented by counsel at the hearing of a petition for the winding up of the society. It seems to me, further, that, in principle, the society must have the right to an order for costs where the petition is unsuccessful, whether on the ground of non-compliance with the requirements of rule 33 or for any other reason.

The petitioner was not represented, but my attention was called to the words in rule 33: "No order shall be made on the "petition of any petitioner who has not . . . attended before the "Registrar . . . and satisfied him in manner required by this "Rule." It seems to me that those words mean no more than that no order shall be made in favour of a petitioner who has not complied with the requirements of the rule, and do not operate to protect a petitioner from an order for costs where for any reason his petition is unsuccessful.

I propose, therefore, to make the order asked for by the society, that is to say, an order dismissing this petition with costs.

Petition dismissed with costs.

Solicitors: *Lewis & Dick.*

V. A. M.

[CHANCERY DIVISION.]

*CARL-ZEISS-STIFTUNG *v.* RAYNER & KEELER LTD. AND OTHERS.

[1955 C. No. 4445.]

In re TRADE MARKS ACT, 1938, *In re* TRADE MARKS. NO. 294457, ETC.

[1960 C. No. 271.]

1960
July 8, 12, 15, 19, 22, 26, 28, 29.
Russell J.

Contempt of Court—Witnesses—Passing off action—Application to rectify Register of Trade Marks—Statement to persons engaged in the trade that defendant entitled to trade marks—Whether likely to deter possible witnesses from giving evidence—Whether contempt.

In 1955, an East German corporation brought an action against a West German corporation to restrain it from using certain names in connection with its business or goods and from passing off its business or goods as those of the East German corporation. In 1960, an English company, which marketed the goods of the East German corporation, began proceedings to have certain trade marks registered in the name of the West German corporation taken off the Register of Trade Marks.

In June, 1960, the solicitors to the West German corporation wrote two letters, each of which contained two statements: (1) that the East German corporation had no right to use a particular trade

1960

CARL-ZEISS-STIFTUNG
v.
RAYNER & KEELER LTD.

mark, and (2) that the West German corporation had that right, being the registered proprietor of the trade mark. Neither letter contained any reference to the fact that there were pending proceedings in which those statements were being challenged. Each letter was sent to a person connected with or engaged in the same trade as the East German and West German corporations.

On a motion in each of the proceedings for an injunction to restrain the West German corporation and its solicitors from making representations similar to those contained in the two letters, and generally from making any representations calculated to prejudice the fair trial of the proceedings or, alternatively, for an order that a writ of sequestration might be issued against the property of the West German corporation, and that the solicitors might be committed to prison for contempt of court in writing the letters:—

Held, that the letters and others like them could only be contempt of court if they were prejudicial to the current proceedings as being intended or likely to deter or discourage witnesses from giving evidence in favour of the plaintiff in the one proceedings and the applicant in the other proceedings; that a finding of contempt of court must be based on a solid view of the likelihood of such harm being done to the plaintiff and applicant respectively, and not upon fanciful notions of the susceptibility of the recipients of the letters; and that, on the facts of the particular case, the letters did not constitute contempt of court. Accordingly, the motions must be refused (post, pp. 1150, 1151, 1163).

Mullard Radio Valve Co. Ltd. v. *Rothermel Corpn. Ltd.* (1933) 51 R.P.C. 1 considered.

Daw v. *Eley* (1868) 7 Eq.Cas. 49 and *J. & P. Coats* v. *Chadwick* [1894] 1 Ch. 347; 10 T.L.R. 226 distinguished.

MOTIONS.

Prior to the Second World War, Carl-Zeiss-Stiftung, a body corporate constituted in Germany in 1896, owned and operated two factories at Jena in what is now East Germany, one of which, the Carl Zeiss Optical Works, made optical instruments, and the other of which, the Schott Glass Works, made glass. The Stiftung was the registered proprietor of certain trade marks in the United Kingdom. During the Second World War, these trade marks became vested in the Custodian of Enemy Property for England.

In October, 1945, the factories and assets of the optical and glass businesses were sequestered by a Decree (No. 124) issued by the Soviet Military Administration in East Germany. After 1948, the optical works and the glass works were operated as separate and independent corporate entities called respectively VEB Carl Zeiss Jena and VEB Jenaer Glasswerk Schott & Gen., Jena. It was claimed by the applicants in the motions, Carl-Zeiss-Stiftung, a corporation with its registered office at Jena, and C. Z. Scientific Instruments Ltd., an English company which marketed the goods manufactured at the factories at Jena, that VEB Carl Zeiss Jena and VEB Jenaer Glasswerk Schott & Gen., Jena, used the trade marks under and in accordance with a written licence dated April 8, 1954, from Carl-Zeiss-Stiftung of Jena.

By a deed of assignment dated December 21, 1959, the

Custodian of Enemy Property for England transferred the trade marks to a West German corporation, Carl-Zeiss-Stiftung of Heidenheim, Brenz, in West Germany, which claimed that it and not Carl-Zeiss-Stiftung of Jena was the original Stiftung.

On October 20, 1955, Carl-Zeiss-Stiftung of Jena issued a writ against Rayner & Keeler Ltd., Degenhardt & Co. Ltd., retailers of optical instruments, and Carl-Zeiss-Stiftung of Heidenheim claiming, as amended in 1960, an injunction to restrain the defendants from advertising, offering for sale or selling any optical instruments or any articles containing or consisting of glass under or by reference to the name of "Carl Zeiss," or any name containing "Zeiss," unless such goods were those of Carl-Zeiss-Stiftung of Jena, or an organisation associated with it, and generally from passing off any business or goods as and for those of Carl-Zeiss-Stiftung of Jena or an organisation associated with it; an injunction to restrain Carl-Zeiss-Stiftung of Heidenheim from using the name "Carl-Zeiss-Stiftung" or "Carl Zeiss," or any name containing "Zeiss" in relation to their business or goods; delivery up or destruction upon oath of all articles calculated to lead to passing off and an inquiry as to damages or an account of profit. The defendants issued a summons for an order that all further proceedings in the action be stayed, and that the action be dismissed on the ground that it was commenced and was being maintained without the authority of the plaintiff, Carl-Zeiss-Stiftung of Jena. This summons was still pending at the date of the hearing of the motions.

By an originating notice of motion dated January 20, 1960, the applicant, C. Z. Scientific Instruments Ltd., asked for an order that the trade marks be taken off the Register of Trade Marks in respect of all the goods in respect of which they were registered upon the grounds set out in and having regard to section 26 (1) (*b*) of the Trade Marks Act, 1938; and that the register might be rectified by expunging therefrom the entries of each of the trade marks as being entries wrongly remaining on the register having regard to sections 11, 15, 22 and 32 of the Act.

On June 15, 1960, Dehn & Lauderdale, the solicitors to Carl-Zeiss-Stiftung of Heidenheim, wrote a letter addressed to The Editor, The Optician, Columbia House, Aldwych, W.C.2, as follows: "Dear Sirs, It has been brought to our notice that you "have published in your issue of the 10th instant an advertise-"ment for Zeiss Binoculars on behalf of C. Z. Scientific Instru-"ments Ltd., of 12A Golden Square, W.1. We must inform "you that our clients Carl-Zeiss-Stiftung, a body corporate having "its principal place of business at Heidenheim a.d. Brenz Würt-"temberg in the Federal Republic of Germany are the registered "proprietors of the trade mark No. 335738 being the words 'Carl "'Zeiss Jena' as depicted in the lenticular device shown in that "advertisement, while C. Z. Scientific Instruments are the "agents of an East German nationalised concern which calls itself "VEB Carl Zeiss Jena, but which has no right to use the trade

1960

CARL-ZEISS-STIFTUNG v. RAYNER & KEELER LTD.

"marks of which our clients are the proprietors. We think it "right to warn you that our clients will take all legal steps "available to them to protect their rights in their registered trade "marks."

On June 29, 1960, Dehn & Lauderdale wrote a letter addressed to Dixons Camera Centre, 75, Park Street, Bristol, as follows: "Dear Sirs, It has been brought to our notice that you are "advertising for sale cameras with what are stated to have "'Tessar' lenses but which are manufactured by an East "German nationalised concern calling itself 'VEB Carl Zeiss "'Jena.' We must inform you that our clients, Carl Zeiss "Stiftung, a body corporate having its principal place of business "at Heidenheim a.d. Brenz Württemberg in the Federal Repub-"lic of Germany, are the registered proprietors of trade mark "No. 249457, being the word 'Tessar.' The East German "nationalised concern has no right to use any trade mark "registered in the name of our clients, and we think it right to "warn you that our clients will take all legal steps available to "them to protect their rights in their marks. No doubt you will "inform your other offices of the contents of this letter."

By two notices of motion dated July 5, 1960, one in the action and one in the originating motion, the respective applicants, Carl-Zeiss-Stiftung of Jena and C. Z. Scientific Instruments Ltd., asked for an order that Carl-Zeiss-Stiftung of Heidenheim and its solicitors, Frank Nathaniel Steiner and Harold Bruce Dehn, practising as Dehn & Lauderdale, be restrained until judgment in the respective proceedings or further order from representing either (a) that VEB Carl Zeiss Jena had no right to use trade marks containing the words "Carl Zeiss Jena," or (b) that Carl-Zeiss-Stiftung of Heidenheim was the registered proprietor of the trade marks without indicating that its rights to be so registered were being challenged, and generally from making any representation calculated to prejudice or impede the fair hearing of the proceedings or, alternatively, an order that a writ of sequestration against Carl-Zeiss-Stiftung of Heidenheim might be issued, and for an order that Frank Nathaniel Steiner and Harold Bruce Dehn be committed to Brixton Prison for contempt of court in writing or sending or causing it to be written and sent the letter dated June 15, 1960. The letter of June 29, 1960, was exhibited as evidence on the motions.

Guy T. Aldous Q.C. and *D. W. Falconer* for the applicant in each motion.

T. M. Shelford for Carl-Zeiss-Stiftung of Heidenheim as respondent to the motion in the action.

John W. Mills for the solicitors, respondents to both motions.

R. G. Lloyd for Carl-Zeiss-Stiftung of Heidenheim as respondent to the motion in the originating motion.

The following cases, not referred to in the judgment, were

cited in argument: *M. Ravok (Weatherwear) Ltd.* v. *National Trade Press Ltd.*[1]; *In re William Thomas Shipping Co. Ltd.*[2]; *Plating Co.* v. *Farquharson*[3]; *Brodribb* v. *Brodribb & Wall*[4]; *R.* v. *Evening Standard Co. Ltd.*[5]; *Alliance Perpetual Building Society* v. *Belrum Investments Ltd.*[6]; *Roach* v. *Garvan*[7]; *R. J. Reuter Co. Ltd.* v. *Muhlens.*[8]

The following case, not cited in argument, was referred to in the judgment: *Fenner* v. *Wilson & Co. (Barnsley) Ltd.*[9]

RUSSELL J. These are two motions alleging contempt of court in two different proceedings. One of them is a passing-off action and the other is an originating motion for expunging certain trade marks. The action started in 1955. The plaintiff in the action is called Carl-Zeiss-Stiftung, which asserts itself to be a legal entity in the East Zone of Germany; and the main defendant in the action bears exactly the same name, Carl-Zeiss-Stiftung, asserting itself to be a legal entity in West Germany. I will refer to them for convenience as respectively East Stiftung and West Stiftung.

The originating motion, which was launched in 1960, is a motion to expunge registered trade marks, including a mark "C. Z. Jena" and another mark "Tessar." All those marks are at present registered in the name of the West Stiftung.

[His Lordship stated the facts and read the letter of June 15, 1960, and continued:] The trade mark referred to in that letter is one of the trade marks in issue in the proceedings. It was at one time suggested that that was a letter which was written to the editor, The Optician, for publication, but, in my judgment, it is plain that it was not written for publication at all but was intended as a warning to the editor that proceedings might be taken against him or against his paper should they continue to insert the East Stiftung's advertisements under these trade marks in their publication. Whether or not such an action could lie against the proprietors of a trade publication of this kind it is quite unnecessary for me to determine; but it is clear that it was not really written for publication but as a warning letter to the proprietors of The Optician.

[His Lordship read the letter of June 29, 1960, and continued:] It is quite plain that the West Stiftung proposes, providing it is permissible, in appropriate cases where retailers are selling the products of the East Stiftung under any of these trade marks, to write such a warning letter to retailers, though

[1] [1955] 1 Q.B. 554; [1955] 2 W.L.R. 583; [1955] 1 All E.R. 621.
[2] [1930] 2 Ch. 368.
[3] (1881) 17 Ch.D. 49.
[4] (1886) 11 P.D. 66.
[5] [1954] 1 Q.B. 578; [1954] 2 W.L.R. 861; [1954] 1 All E.R. 1026, D.C.
[6] [1957] 1 W.L.R. 720; [1957] 1 All E.R. 635.
[7] (1742) 2 Atk. 469.
[8] (1935) 70 R.P.C. 102; [1954] Ch. 50; [1953] 3 W.L.R. 789; [1953] 2 All E.R. 1160, C.A.
[9] (1893) 9 T.L.R. 496; 10 R.P.C. 283, C.A.

1960

Carl-Zeiss-Stiftung v. Rayner & Keeler Ltd.

Russell J.

there is no suggestion of any general campaign or circularisation of all retailers or of publicity in the press. It is said on behalf of the East Stiftung that letters such as these constitute contempt of court, and, on the basis of that, in each of the two proceedings the motion was launched asking for an order that the West Stiftung and their solicitors "be restrained until "judgment in these proceedings or further order from representing "either (a) that the East German nationalised concern V. E. B. "Carl Zeiss Jena have no right to use trade marks containing "the words 'Carl Zeiss Jena' or (b) that the said respondents "are the registered proprietors of the Trade Mark 335738 or "any of the other trade marks sought to be taken off the register "in the above-named proceedings without indicating that the "said respondents' rights to be so registered are being challenged, "and generally from making any representation calculated to "prejudice or impede the fair trial" of this action. Then the motion proceeds alternatively, to ask for a writ of sequestration against the property of the defendants, that is the West Stiftung, and for an order committing the two partners in the firm of solicitors to Brixton Prison for contempt. So far as actual relief is concerned, the battle has been confined to the question whether or not these letters and others which may be written similar to them constitute contempt of court. If so, it is said that there should be an injunction and no order was actually sought either to sequestrate or to commit.

It is to be observed that such letters contain two dogmatic statements (1) that the East German concern has no right to use the relevant trade mark and (2) that the West Stiftung has the right, being the registered proprietor of the trade mark; and there is no mention of any proceeding and no suggestion that there is any challenge in proceedings to the dogmatic statements made in the letters.

The respondents to the motion submit that those letters and others like them are not a contempt of court and that any further letters which they write like those will not be contempt of court. There is no evidence, as I have indicated, that there is ever any intention behind the respondents to the motion or their solicitors to do more than write such letters in particular cases. The letters were written by the solicitors pursuant to general instructions by the West Stiftung to take all such steps as they considered desirable to protect the trade marks of their clients, short of actually initiating proceedings without further reference to their clients.

It seems to me clear that these letters and other letters like these letters can only be contempt of court if they are prejudicial to the current proceedings as being intended or likely to deter or discourage witnesses from giving evidence in favour of the plaintiffs in the one proceedings or the applicants in the other proceedings. There are, of course, other general aspects of contempt by interference with legal proceedings, for example,

attempting to influence a judge or jury, or where there is a campaign calculated to discourage litigation by intimidation or ridicule of a party and so forth; but none of these other aspects of contempt are, in my judgment, relevant to the present case.

There are no general rules by which any particular case may be judged as constituting contempt; each must plainly be considered separately and on its own facts. In this case I ask myself the question (and I ask it at the moment apart from authority) whether the letters complained of and similar letters hereafter to be written are likely to harm the plaintiff and the applicant respectively in the preparation and presentation of their cases by tending to discourage people from giving evidence on their behalf. I will accept for the purposes of my judgment that there are, or may be, issues in the proceedings upon which evidence of persons in the trade, such as the recipients of these letters, may be relevant.

I myself think that the answer to the question I have posed must, as a matter of common sense, be, "No." It is, of course, of the first importance in the administration of justice that parties to litigation should not be in any way hampered in the prosecution of their claims or the putting forward of their contentions; but I think that a finding of contempt of court must be based on a solid view of the likelihood of such interference and not upon fanciful notions of the susceptibility of the recipients of letters such as those; but, only incidentally, I do observe that in fact the recipients of these two letters did nothing except refer the question immediately to the East Stiftung, or, rather, I think, to C. Z. Scientific Instruments, Ltd.

Mr. Aldous, for the East Stiftung, submitted that it must be a contempt pending proceedings to assert dogmatically in letters to people who might be potential witnesses that one side was entitled to trade marks and that the other side were infringers and without rights, particularly without any reference at all to the fact that there were pending proceedings in which those dogmatic statements were being challenged. To pursue such a course of conduct, he argued, would tend to crystallise in the minds of the recipients a wrong and fanciful notion of what the position actually was, and thus would be inclined to assist the opposing side in putting forward the contrary view in proceedings.

For the respondents to the motion it was said that these letters were no more than warning letters addressed to alleged infringers which might or might not be followed by proceedings. It was said (and correctly) that they were not a broadcast circular, they contained no abuse of the other side, they were mere warning letters and as such are not a contempt of court. It is pointed out that it is impossible to write a warning letter in a case such as this without asserting on the one hand that one side is entitled and on the other hand that the other side has no right. It is also argued for the respondents that the addition to such a letter of some reference to pending proceedings

1960

CARL-ZEISS-STIFTUNG v. RAYNER & KEELER LTD.

Russell J.

cannot be required in order to save the letter from being contemptuous as being likely to discourage the recipient from giving evidence in those proceedings which are not mentioned at all. I must say that I for my part assent to those arguments.

My attention was drawn to a great many cases, to some of which I must refer, although I must bear in mind that, as has been said in some of them, each case must depend upon its particular facts. I will refer first to those upon which particular reliance was placed by the applicants in the motion.

Goulard and Gibbs v. *Sir Coutts Lindsay & Co. Ltd.*[1] is very shortly reported. There was an action by the plaintiffs against the defendants for infringement of certain patents, and the motion was brought in that action to restrain the plaintiffs from continuing to publish an advertisement which had appeared already in "The Times" and other newspapers signed by the plaintiffs' solicitors having reference to proceedings in the action, and their publishing or permitting to be published any advertisement alleging that the plaintiffs' patent had been or was being infringed by the defendants or either of them. This was the form of the advertisement signed by the plaintiffs' solicitors: "We are instructed by the directors of the National Company "to warn the public that in consequence of the continued infringement of their patents by the defendant company, and by "Mr. Ferranti, an action has been commenced in the High "Court of Justice, Chancery Division, against Sir C. Lindsay "and Co. (Limited), and Mr. Ferranti to restrain them from "further infringing the said patents, and that actions will be "commenced against all persons employing or using apparatus "which is not according to the letters patent without leave of "the patentees." I am bound to say that, on reading that, it looks as if a "not" has crept in, and that it should be "to restrain "them . . . from using apparatus which is according to the "letters patent without leave of the patentees."

Mr. Moulton, for the defendants in the action, contended that the advertisement was calculated to prejudice the public mind and to prevent a fair trial of the action. On the other hand reliance was apparently only placed upon the terms, which are not relevant to the present matter, of section 32 of the Patents, Designs and Trade Marks Act, 1883. There were some interlocutory observations from Kay J. who did not deliver any judgment. One was[2]: "You can warn as much as you like, "but can you advertise I have brought an action against A. B. "which is certain to succeed?" At a later stage he said[3]: "To "advertise a positive statement that the defendants had "infringed was wrong, and asked if the plaintiffs would under-"take not to go on advertising to that effect. He further stated "that he should not grant an injunction except to restrain this."

[1] (1887) 4 R.P.C. 189.
[2] Ibid. 190.
[3] Ibid.

Ultimately the undertaking was given; and, as I said, there was no formal judgment at all.

My only comment upon that case is to state that it differs from the present case in that it involved an advertisement in all the leading newspapers as distinguished from individual letters written warning individual people. Secondly I observe that Kay J. said[4]: "You can warn as much as you like, but can "you advertise I have brought an action against A.B. which is "certain to succeed?" I am bound to say that, if the judge meant to answer his own question in the affirmative, as I think he did, because he said that to advertise a positive statement that the defendants had infringed was wrong, it seems to me that in this very short case, which did not take the ordinary course, he was making a mistake, and I find it very difficult to reconcile that case with the other decisions.

The next case referred to by Mr. Aldous was *Daw* v. *Eley*.[5] I need not go much into the details of the facts except to state that, broadly speaking, there were patent proceedings pending, and the solicitor for one side, under a pseudonym, participated very actively in correspondence in the public press discussing and arguing fully the pros and cons of the infringement of a particular patent which was in issue in the proceedings and, if I may borrow a phrase which we shall find in subsequent cases about this sort of contempt, in every sense of the word discussing the merits in public. Lord Romilly M.R., having said that he thought that the conduct of the solicitor could not be defended, went on to say,[6] "The principle is quite established in all these "cases, that no person must do anything with a view to pervert "the sources of justice or the proper flow of justice; in fact they "ought not to make any publications, or to write anything, "which would induce the court, or which might possibly induce "the court, or the jury, the tribunal that will have to try the "matter, to come to any conclusion other than that which is to "be derived from the evidence in the cause between the parties; "and certainly they ought not to prejudice the minds of the "public beforehand by mentioning circumstances relating to the "case. Now, if that is done with the intention of perverting "the ends of justice there is no question that the court would "stop it, and very often the court will judge for itself what are "the fair inferences to be derived from the publications which "appear; but it must also go beyond this; it must stop the "publication where the evident result would be to affect the "administration of justice, though that might not have been "the intention of the person who did it."

Having dealt with the facts of the case and with matters that the solicitor had written in his letters and published in the papers, Lord Romilly M.R. went on[7]: "Can anybody doubt "that if I were persuaded that the whole of the statements in

[4] 4 R.P.C. 189, 190.
[5] (1868) 7 Eq.Cas. 49
[6] Ibid. 59.
[7] Ibid. 60.

1960

CARL-ZEISS-STIFTUNG v. RAYNER & KEELER LTD.

Russell J.

"that letter were true, it would very seriously affect my opinion "as to the validity and the originality of Mr. Daw's patent? "Then it is to be observed that this is written, not by a mere "stranger, who might say that he really knew nothing at all "about the cause, but it is written by the solicitor of the gentle-"man who is opposed to Mr. Daw in this suit. Surely that is "a very strong feature in the case; he must wish that his client "should succeed; and I venture to say that there is no solicitor "who would not in the same position feel the same thing; and it is "impossible that a solicitor can safely act in a matter of this "description in writing an article in a paper which, if believed, "must have a beneficial effect upon his client, and afterwards "say 'I had no intention of that sort at all, however much I "'may wish for it.'" Then a little lower down he said [8]: "There is one distinct line drawn, which is this, that gentlemen "who are concerned for contending clients in this court, whether "solicitors or counsel, should abstain entirely from discussing "the merits of those questions in public print; if they do it at "all, they ought to put their names to their communications; "but to let the public suppose that it is merely done by a person "who takes a great interest in, and has great knowledge of the "subject, and discusses it from a public point of view, when, "if the fact were known, he is the solicitor of the defendant, "and has the strongest possible interest in his success, is, in my "opinion, highly reprehensible."

Let me say at once that in the present case there is no suggestion whatsoever that it was intended or indeed thought likely by Dehn & Lauderdale in any way to prejudice the minds of the recipients with a view to making it the more difficult for the East Stiftung to prepare and conduct their case.

It is perfectly correct to say that in *Daw* v. *Eley* [9] there was in the fullest sense a discussion of the merits of the case in public print, and that is a very different situation from that which obtains in the present case, where there are what I regard as mere warning letters not involving any discussion of facts as such addressed in the form of individual letters to individual members of the retail trade.

The next case referred to was *J. & P. Coats* v. *Chadwick*,[10] the decision in which did not find favour in the eyes of the Divisional Court in the later case of *Reg.* v. *Payne* [11]; in another case, another judge took the same view of the remarks which I have just referred to. The headnote in *J. & P. Coats* v. *Chadwick* [12] reads: "Pending an action for infringing a trade-mark the "plaintiffs are at liberty to warn the trade by circular; but to "introduce discussion of the merits of the action is a contempt."

The circular in that particular case, being a circular sent out to the retail dealers in the same cotton trade as the plaintiff was

[8] 7 Eq.Cas. 49, 61.
[9] 7 Eq.Cas. 49.
[10] [1894] 1 Ch. 347; 10 T.L.R. 226.
[11] [1896] 1 Q.B. 577; 12 T.L.R. 321.
[12] [1894] 1 Ch. 347.

in this form: "We regret to have to draw your attention to the "fact that Messrs. James Chadwick & Brother (Limited) have "recently attempted to injure our trade by adopting a blue label "for 400 yards six cord which so closely resembles ours as to "produce the result of their goods being passed off as ours, "nor can there be any doubt that this is intended. . . . They "have now adopted the device of imitating ours in order more "readily to find purchasers for their thread. We are determined "to use every means in our power to put a stop to unfair competi-"tion of this sort, and have therefore commenced proceedings "against Messrs. Chadwick. We have also been compelled to "take proceedings against retail dealers selling goods manu-"factured by Messrs. Chadwick and bearing the blue label which "is an imitation of ours. We think it right to warn the trade "in general of the course we are pursuing, and, for your informa-"tion, we beg to give you at foot an extract from a recent "judgment given in the Chancery Division of the High Court "of Justice."

Chitty J. said [13]: "This circular has been widely distributed "by the plaintiffs among retail dealers in the sewing-cotton trade "and others. The special ground of complaint is that the class "of persons to whom the circular is addressed is the very class "to whom the defendants will have to look for evidence in "support of their defence, and that it is calculated to create a bias "against the defendants in the minds of those who receive it, "and to deter them from coming forward as witnesses for the "defendants. It appears to me that it is calculated to prejudice "the defendants in their defence, and that it thus falls under "the well-established head of contempt, by interfering with the "course of justice. It is a strong, one-sided statement by one "of the parties to the action on the merits of the case which "is pending before the court. It unhesitatingly imputes fraud "and dishonesty to the defendants. It charges them, not merely "with imitating the plaintiffs' goods, but with the deliberate "intention of imitating. The fact that Messrs. Coats hold a "high position in the trade, being, as their counsel stated, at the "very head of the trade, gives additional force to these state-"ments, and renders it the more probable that the traders, and "particularly the smaller retail traders, will be thereby affected "adversely to the defendants." Then he said [14]: "I grant the "injunction as asked, with costs, adding that I should not have "intervened if the circular had amounted to a mere warning to "the trade against infringement or imitation. The plaintiffs are "at liberty to warn the trade as much as they like, notwith-"standing the pendency of this action; but they are bound to "refrain during its pendency from public discussion on the merits "or demerits of the case."

It is to be observed that Chitty J. came to the conclusion that

[13] [1894] 1 Ch. 347, 349. [14] Ibid. 350.

1960

CARL-ZEISS-STIFTUNG v. RAYNER & KEELER LTD.

Russell J.

the circular was a contempt on the basis of all the facts which he mentioned in the passage which I have just read, including, in effect, accusations of deliberate and fraudulent attempts to steal the good-will of Messrs. Coats. But, in addition to the accusations, the facts of that case wholly distinguish it from the present case. I bear in mind very much the language used by the judge in the last passage of his judgment, in which he recognised—as indeed did Kay J. in the *Goulard case* [15]—that you are at liberty to warn the trade. If one considers the circulars in this case, I ask myself the question: How can you warn the trade, the retailers, not to sell the products of the Eastern Stiftung under these trade marks except in the course of a letter saying "We are entitled to the trade marks" mentioning also expressly that the other side are not entitled to the trade marks? To go beyond that might come into the field of discussion of the merits of the case; but I cannot bring myself to think that it is discussion of the merits of the case to assert that which one is bound to assert in the course of a warning letter, namely, that the writer is entitled to the trade marks and that the other people concerned are not.

The next case referred to was the Scottish case of *St. Mungo Manufacturing Co.* v. *Hutchinson Main & Co. Ltd.*[16] That was a case in which the defendants were the owners of a registered design for a golf ball, and they brought an action to restrain the St. Mungo Manufacturing Company from infringing it. During that litigation Hutchinson distributed a circular to retailers which said that the St. Mungo Company had applied a fraudulent or obvious imitation of their design to golf balls and that proceedings had been commenced against the St. Mungo Manufacturing Company, and warning retail dealers against selling such golf balls. The St. Mungo Manufacturing Company applied for an injunction to restrain Hutchinson from distributing those circulars, on the ground, first, that they constituted contempt of court, and secondly and alternatively (a ground which is not in point in these present proceedings) that the circular was unfair and misleading. It is to be observed that the circular there contained the phrase "a fraudulent or obvious imitation," and that phrase is a phrase taken from the then section 58 (*b*) of the Designs Act, 1883; but it is the fact that, although "fraudulent" in that section did not mean fraudulent in the fullest sense but in the sense of being a fraudulent copying, as suggested in the course of the hearing it is unlikely that such niceties were normally present to the mind of golf retailers in Scotland, and to them I should have thought that the word "fraudulent" would have meant that somebody was accusing the St. Mungo Manufacturing Company of being a fraudulent concern, and to that extent the circular was evasive in its nature and calculated to bring discredit upon the St. Mungo Manufacturing Company in relation to the pending proceedings.

[15] 4 R.P.C. 189.

[16] (1908) 25 R.P.C. 356.

Lord Salvesen, who tried the case, said [17]: "The decisions "relied on by the complainers, that the issue of the circular in "question constituted a contempt of court, seem to support their "proposition. In the earliest case on the subject (*Henderson* v. "*Laing* [18])"—a Scottish case—"a person who published and "circulated a statement tending to create an impression as to "the merits of the question which formed the subject of pending "actions unfavourable to his opponent, was found to have com-"mitted an improper and unwarrantable interference with the "proceedings of the court and was subjected in payment of the "expenses of a petition and complaint. In *McLauchlan* v. "*Carson* [19] it was held to be an interference with the administra-"tion of justice to publish a report of a statement, made at a "public meeting of road trustees by their agent, relative to a "case depending in court against them. The Lord President "(Hope) in sustaining the petition and complaint and finding "the respondents liable in expenses, said [20]: 'Reports of "'depending cases are at all times very dangerous and tend to "'interfere with the administration of justice. It may be "'perfectly lawful to report that an interesting point of law has "'arisen, and is depending in court but it is extremely improper "'to enter upon all the facts of the case.' No doubt there "was a specialty in that case that the newspaper, in which the "report appeared, was likely to be read by persons who might "be jurors or witnesses at the approaching trial, but the observa-"tions made were perfectly general. In the subsequent case of "*Smith* v. *Mitchell*,[21] although nothing had been done by the "respondent except to print in the form of a pamphlet a "memorial and queries previously submitted by him to counsel, "and calculated to produce an impression prejudicial to his "opponents, he was found liable in the expenses of a petition "and complaint to have the circulation interdicted although "the copies complained of had not been circulated by his "direction or authority. It thus appears that according to our "law any publication bearing upon the merits of a dispute sub "judice which prejudges the case or discounts the judgment before "it is issued is liable to be restrained. I think the circular "complained of is of this nature. It states as a fact that the "complainers had applied a fraudulent or obvious imitation of "a registered design belonging to the respondents to their "golf ball called the 'Colonel,' and it warned retail dealers that "if they sold 'Colonel' golf balls with this design they would "expose themselves to certain statutory penalties. The respon-"dents were practically therefore by means of this circular "endeavouring to obtain the same advantages as they would "have got if an interim interdict had been granted, and, if their

[17] 25 R.P.C. 356, 359.
[18] (1824) 3 S. 384.
[19] (1826) 5 S. 147.
[20] Ibid. 147, 149.
[21] (1835) 14 S. 172.

1960

Carl-Zeiss-Stiftung v. Rayner & Keeler Ltd.

Russell J.

"argument is sound, without exposing themselves to any "liability for damages."

In my view, having regard to the very general statement which I have read, the statement[22] "It thus appears that "according to our law any publication bearing upon the merits "of a dispute sub judice which prejudges the case or discounts "the judgment before it is issued is liable to be restrained," if the words "according to our law" are meant to include the law of this country, is far too wide. It seems to me, having regard to the later cases, quite plain at least that these letters could have been written in the form in which they are written with a reference to the fact that there were proceedings pending; but the phrase of Lord Salvesen would suggest quite clearly that, in his view, a letter with such an addition would, nevertheless, since it suggests dogmatically that there is infringement and so forth, be restrained as contempt of court. I observe also that he goes on to say that, if not restrained, the respondents in that case would have been getting for themselves the advantage of an interlocutory injunction without any cross-undertaking as to damages. With great respect, that appears to me not to be relevant on the question whether or not there was contempt. Then Lord Salvesen goes on to another general observation[23]: "I think "it is a wholesome rule that in all cases, that have been sub-"mitted to a legal tribunal for decision, the merits of the case "should not be tried or discussed in publications by interested "parties or by the newspapers; and that any breach of this rule "should be visited by the penalty that the court may deem "appropriate." Again, with respect, if the judge there was intending to include in that a letter of a character which we have in the present case, and to say that such a letter would constitute contempt, I would respectfully disagree with him; but, as has been pointed out, every case must be dealt with on its own facts, and there is always a danger, in my view, of taking from cases such as this general statements which are made in the course of a judgment by judges which are made really with the judicial eye, if I may put it in this way, only upon the particular facts of the particular case.

The next case to which I propose to refer is *Gaskell & Chambers Ltd.* v. *Hudson, Dodsworth & Co.*[24] In that case both sides were manufacturers of beer pumps and both sides had sent circulars out to brewers. The defendants' circulars, according to the report, allegedly criticised the plaintiffs' beer pumps, and the action was brought in respect of statements in those circulars. After the statement of claim had been delivered the defendants sent round to the brewers a circular letter in these terms: "Since "the commencement of this business our sales have shown con-"siderable increases week by week, and this unbounded success "seems to arouse the rabid jealously of" the plaintiffs "as

[22] 25 R.P.C. 356, 359.
[23] Ibid. 356, 360.
[24] [1936] 2 K.B. 595, D.C.

"shown by the enclosed 'statement of claim' which we have "received from them. Please keep the enclosed copy for refer-"ence. Our reason for bringing this to your notice is because" the plaintiffs "commenced a similar action against us on July "18th last, which they wholly discontinued on November 30th, "and we refuse to be intimidated by these actions, and we intend "to contest this 'cock and bull' claim to the uttermost degree." A copy of the statement of claim was enclosed. It was held that that did not constitute contempt.

Mr. Aldous has pointed out that there had been a previous circular by the other side to which, in a sense, this was a counter-blast, and he also pointed out that it did include the statement of claim of the other side; but I think that there is considerable force in the submission on behalf of the respondents to this motion that that decision,[25] a decision of the Divisional Court, does reveal a more robust approach to the question of contempt than is perhaps disclosed in earlier decisions, and, to my mind, does suggest that the letters complained of in the present proceedings should not be treated as a contempt of court.

The next decision to which my attention was drawn is *Haskell Golf Ball Co.* v. *Hutchinson.*[26] In that case the Haskell Golf Ball Co. started an action against Robert Hutchinson for infringement of letters patent relating to golf balls. After the action had been commenced an advertisement was inserted by the plaintiffs in a paper known as the "Irish Golfer," with a large circulation, saying: "Important Notice. It has come to the notice of the "Haskell Golf Ball Company that golf balls known as the "'Springvale Eagle,' the 'Springvale Hawk' . . . are being "offered for sale in the United Kingdom in infringement of "letters patent belonging to the Haskell Company. This is to "give notice that actions have been commenced against the "manufacturers of or dealers in such balls claiming injunctions "to restrain such infringements and damages. And further "notice is given, that the Haskell Company will enforce its rights "against all persons buying or selling or otherwise dealing in or "using such infringing golf balls"; and that was signed by the solicitors to the Haskell Golf Ball Co.

Buckley J., in the course of his judgment, said[27]: "Then it "is said the advertisement ought to be stopped because it is an "interference with the course of justice, and in that sense a "contempt of court; that it is a proceeding that will embarrass "the court in coming to a fair decision in the action when it "comes on for trial. I confess that I have great difficulty in "understanding how that contention can be put forward seriously. "The contention as I understand it is this: that by this notice "the patentee says, 'You are infringing my patent; you are sell-"'ing an infringement of my patent; I have commenced an

[25] [1936] 2 K.B. 595.
[26] (1904) 20 T.L.R. 606; 21 R.P.C. 497.
[27] Ibid. 497, 500.

1960

CARL-ZEISS-STIFTUNG v. RAYNER & KEELER LTD.

Russell J.

"'action to restrain the infringement of my patent,' and he is "thereby affirming that the decision in the action will be in his "favour. Would it have made any difference had he said 'offer-"'ing for sale that which I allege to be an infringement of my "'patent'? I think certainly not. The circular simply means "this: 'I say my patent is good, and I say you are infringing it; "'I have commenced an action in which I am going to main-"'tain the affirmative of that, in which, of course, I may be "'defeated, and I may be wrong.' In *Fenner* v. *Wilson & Co.* "(*Barnsley*) *Ltd.*[28] the language of the threat was this: 'The "'public are especially warned that users of' certain things 'are "'liable to damages and injunction in respect of such user'— "which is stronger language than this. That was a direct affirma-"tion that they were liable and that the decision would be in the "patentee's favour. Upon that Lindley L.J. said[29]: 'We think "'we ought to say that we could not possibly treat these advertise-"'ments as a contempt of court; it would be extravagant to treat "'them as anything of the sort.' That language is stronger than "this. The circular in this case, in my opinion, amounts to "nothing more than this; the patentee says, 'The patent is a good "'one. I am going to maintain that it is a good patent, and you "'are infringing it.' Of course, it would be competent for the "patentee to commence actions against all the persons dealing in "these alleged infringing articles. What he has done is some-"thing less than that. Instead of suing them all, he gives them "notice that they are doing that which, as he claims, is a wrong-"ful act. To use the language of Lindley L.J., it seems to me "that it is extravagant to treat anything of that kind as a matter "which calls for the interference of the court or one which will "interfere in any way with the course of justice."

That is a case which differs from the present case in two respects, one, that the advertisement was actually published in a newspaper (and, of course, the publications, if I may use the expression, in this case are on a far more restricted basis) and, secondly, that it did mention that actions had been commenced against the manufacturers; and Mr. Aldous distinguishes that case in particular by saying that it would have been different if the letters in the present case had drawn to the attention of the recipients the fact that there were proceedings pending and therefore, that some people were presumably challenging the validity of the statement already made.

I observe in passing that *Haskell* v. *Hutchinson*[30] was a case which seems to have been concerned not only with the same subject-matter, but with the same parties, or, at any rate, one of the same parties, as Lord Salvesen's case, *St. Mungo* v. *Hutchinson*.[31]

The next case to which I will refer is *Mullard Radio Valve Co.*

[28] (1893) 10 R.P.C. 283.
[29] Ibid. 283, 288.
[30] 20 T.L.R. 606; 21 R.P.C. 497.
[31] 25 R.P.C. 356.

Ltd. v. *Rothermel Corpn. Ltd.*,[32] a decision of Farwell J. That was a case in which Mullard Radio Valve Co. Ltd. was suing Rothermel Corporation Ltd. claiming an injuiction to restrain the infringement of certain letters patent. After the writ had been issued the plaintiffs inserted in a trade paper an advertisement in the following terms: "Warning. Our attention "has been called to the fact that Radio Valves are being "imported into and sold in Great Britain constituting an "infringement of Letters Patent No. 287,958. We have accordingly found it necessary for the protection of our rights and of "the radio industry in general, to issue writs against," and then four names and addresses, including the defendants, were given, "all of whom have been importing and selling infringing valves. "We feel it our duty to warn both suppliers and users of "infringing valves that they are rendering themselves liable to "legal proceedings, and our reason for issuing this notice is to "avoid, if possible, causing unnecessary annoyance and expense "to any such suppliers or users who have purchased valves, "without knowledge of the existence of the above patent."

In that case the conclusion was arrived at that it was not a contempt of court. It was argued that the circular, on its true construction, represented that the court had already decided the issues in the action in favour of the person who had inserted the warning. Farwell J. held, as a matter of construction, that it did not do that, although he deprived the respondents to the motion of their costs, because some people might well have so construed it. But it was because it did not represent that a case existed which had been decided in favour of the advertiser that the judge held that it was not contempt.

It was submitted by Mr. Aldous that the judge appeared to hold that it was not contempt because there was a mention of the proceedings, of the writ, and therefore the proper inference to be drawn was that they were not making an unqualified statement but a statement coupled with the qualification that somebody was in some proceedings challenging an otherwise dogmatic assertion of infringement. Farwell J. said[33]: "I have been "referred to various authorities on somewhat similar lines, and "I confess it seems to me this case is very near the line." I take him as meaning that the case was very near the line rather than to be referring to the question which he decided as a matter of construction, whether the advertisement was properly to be read as asserting that the decision of the court had been arrived at. "I have no doubt," he continues, "in my own mind that "it is most objectionable that a party to an action should insert "in a newspaper or elsewhere a public statement which could "fairly be taken as in any way prejudicing a case which has to "be determined. A plaintiff commences an action, and it is for "the court to determine whether he is right or not, and it is

[32] (1933) 51 R.P.C. 1.

[33] Ibid. 1, 3.

1960

Carl-Zeiss-Stiftung v. Rayner & Keeler Ltd.

Russell J.

"most undesirable in my view that there should be any public "statement which can be said in any sense to anticipate the "result of the pending proceedings. On the other hand, I think "it would be impossible to say that the plaintiff was guilty of "contempt of court if he stated that he was bringing an action "against some other person and that he had no doubt that he "would win his action. A mere statement of confidence in the "success of a pending action could not be said to be contempt "of court. In my judgment the whole question here really "depends on what is the true construction of this particular "document. Let me say at once that I think the document is "unfortunate in its terms"; and I interpose to say that that is the reason, as I understand it, why the judge did not give the respondents their costs. "I am not suggesting," he continues, "any bad faith against the plaintiffs or the plaintiffs' solicitors. "I am quite satisfied that they did not intend to do anything "which would be improper, but, on the other hand, I think the "language is unfortunate in that it is capable of being construed "as suggesting that the validity of the patent has already been "established, and a statement of that kind, if this amounts to "such a statement, would, to my mind, be most objectionable. "But, on the other hand, in my judgment, this document is "certainly capable of being read, and in its true meaning ought "to be read, as stating not that there has already been a deter-"mination in the courts as to the validity of the patent, but that "an action is pending in which the question of the validity is "going to be determined. If it ought to be read in that way, it "cannot in my judgment be treated as a contempt of court."

Applying the language of the judge in that case to this case, where there is in fact no mention at all of the writ, it seems to me that he was by no means directing his mind to a case where no mention whatever of any proceedings was made, and he concluded that if there was a mention of proceedings it would only be contempt on the true construction of the document which suggested that the proceedings had been determined in a particular way. I cannot think that any of the language used by the judge in that case [34] can be relied on in support of the submission that a letter such as the one now before me must be contempt unless there is a reference to the existence of proceedings, and I am bound to say that the general impression I get from that case is that the judge would have found little difficulty in deciding that the letters in the present case were not to be treated as contempt.

The final case to which I was referred which I will mention is *Dunlop Pneumatic Tyre Co. Ltd.* v. *Clifton Rubber Co. Ltd.*[35] That was a case in which Dunlop Pneumatic Tyre Co. Ltd. had begun an action against Clifton Rubber Co. Ltd. to restrain infringement of patent. The plaintiffs in the action issued a circular

[34] 51 R.P.C. 1.

[35] (1902) 19 R.P.C. 527.

in these terms: "Notice. The Dunlop Pneumatic Tyre Co. Ltd. are "advised that the tyre now being sold under the name of the Wap-"share tyre is an infringement of the letters patent held by them. "An action has already been brought against the Clifton Rubber "Co. Ltd. in respect of their sale of such tyres, and the public are "warned that similar actions will be brought against any person "found manufacturing, selling, or using such tyres. Since the "above notice first appeared certain cycle dealers have been dis-"covered selling the said tyres and actions have accordingly been "brought against them." On the basis of that, proceedings were launched based on contempt to restrain the sending out of such circulars. There is no considered judgment of Joyce J., but he finally said [36]: "I do not see why the plaintiffs were not entitled "to say this. I think it has been well considered and well "settled by counsel, and I do not see why they should not say it."

I have listened, I hope, with the closest attention to the arguments which have been developed before me with the authorities in mind, and it is with those authorities in mind that I have come to the conclusion which I have already expressed, that these and similar letters are not to be regarded as contempt of court in relation to the proceedings now pending.

I was exhorted, very properly, by Mr. Aldous, that I must be astute to keep the stream of justice clear and pure; but, for my part, I cannot see in any such letter any likelihood of pollution.

It is at all times an extremely dangerous thing to refer in any judgment to a case which has not been referred to by counsel; but I am going to refer to one such case which I did look at during the adjournment and after I had announced my decision. I only refer to it because I think it right that I should do so, particularly having regard to the argument that Mr. Aldous presented to me as to the absence of any mention in the letters of the existence of proceedings. This case, *Fenner* v. *Wilson & Co. (Barnsley) Ltd.*,[37] was referred to in *Haskell Golf Ball Co.* v. *Hutchinson*,[38] which I have already cited.

It was a case in which the plaintiff began an action for infringement of patent against the defendants, and, pending proceedings, inserted the following circular in the "Manchester Courier" and "Manchester Guardian": "Lake's Patent No. 9855, A.D. 1886. "Japanned shuttles, bobbins, and spools. Notice is hereby given "that proceedings in Chancery will be commenced against all "parties manufacturing, selling, or using japanned shuttles, bob-"bins, or spools not manufactured by the owner of the said "letters patent or his licensees. The public are especially warned "that users of japanned shuttles, bobbins, and spools are liable "to damages and injunction in respect of such user. Sole "licensees in England: Wilson Bros. Ltd., bobbin manufac-"turers, Cornholme, near Todmorden. A. Macdonald Blair, 5,

[36] 19 R.P.C. 527, 528.
[37] 10 R.P.C. 283.
[38] 21 R.P.C. 497, 500.

1960

Carl-Zeiss-Stiftung v. Rayner & Keeler Ltd.

Russell J.

"St. James' Square, Manchester. Solicitor for H. N. Fenner-"New England Butt Company, Providence, Rhode Island, "U.S.A." On the basis of that, proceedings for an injunction to restrain continuance of such publications were launched.

Kekewich J. came to the conclusion that these matters did constitute contempt of court. In the course of his judgment he said[39]: "He," the plaintiff, "states in plain terms that he, and "those claiming through him, are the only persons entitled to "use this invention, and that strangers who use it are liable to "damages; and he also states that proceedings will be commenced "against those who infringe those rights, ignoring altogether the "fact that there is the action pending. These advertisements, "issued after the action commenced, do amount to a statement "by the plaintiff that the action must succeed; that the action "is a mere establishing of a title which really is beyond dispute. "That is really precisely what Kay J. puts in the case of *Goulard "and Gibbs* v. *Lindsay & Co.*[40] 'You can warn as much as you "'like,' he says, 'but can you advertise, "I have brought an "'"action against A.B. which is certain to succeed?"'"

But the matter went to the Court of Appeal. The only relevant passage is the one referred to in *Haskell Golf Ball Co.* v. *Hutchinson*[41] which I have already read (supra, p. 1160), where Lindley L.J. said[42]: "I shall say very little about it. "I am not going through the law of the case, which is in some "respects difficult. I shall content myself with saying that "having considered the case we think we ought to say that we "could not possibly treat these advertisements as a contempt of "court. It would be extravagant to treat them as anything of "the sort."

I mention that case because, having observed it and looked at it, I thought it would be convenient to add it to those to which I had already referred. I am bound to say that it does occur to me that it is a view expressed by the Court of Appeal contrary to the submissions of Mr. Aldous, that these matters are contemptuous in that they lack a reference to the existence of the present current proceedings.

In the result the motions in both cases will be refused.

Both motions dismissed with costs. The costs of the personal respondents to be taxed and paid at once.

Solicitors: *Courts & Co.; Dehn & Lauderdale.*

V. A. M.

[39] 10 R.P.C. 283, 285.
[40] 4 R.P.C. 189.
[41] 21 R.P.C. 497.
[42] 10 R.P.C. 283, 288.

[CHANCERY DIVISION.]

* *In re* THOMPSON'S WILL TRUSTS.

1960
Oct. 5.

Cross J.

[1959 T. No. 1434.]

PRACTICE NOTE.

Trusts—Variation—Act of 1958—*Powers of investment—Application for variation of trustees' power of investment—Form of clause—Variation of Trusts Act,* 1958 (6 *&* 7 *Eliz.* 2, *c.* 53), *s.* 1.

ADJOURNED SUMMONS.

The applicants, Jennifer Ann Thompson and Edward Martin Amphlett Thompson, being beneficially interested under the trusts of the will, dated June 18, 1930, of Albert Edward Thompson, deceased, applied to the court to approve under section 1 of the Variation of Trusts Act, 1958, on behalf of the infant respondent, Cecilia Leila Thompson, and of all persons unborn or unascertained who might become entitled to an interest under the trusts affecting the residuary estate of the above-named testator, an arrangement extending the powers of investment conferred on the trustees for the time being of the will of the testator in respect of his residuary real and personal estate which were "to invest the "same in such securities as the trustees may for the time being "be authorised to invest upon or in the purchase or on mortgage "of real estate or ground rents situate in England or Wales." The estate included a number of ordinary stocks and shares of commercial and industrial companies (including private companies) which had been retained by the trustees since the death of the testator. The summons proposed that the trustees should henceforth have power to invest these moneys "(a) in any invest-"ments which are from time to time authorised by law for the "investment of trust funds or (b) in any investments of whatso-"ever nature which at the date of purchase are or will upon "allotment be dealt in or quoted upon any of the following stock "exchanges that is to say the London, Liverpool, Manchester, "Birmingham, Edinburgh, Glasgow, New York, Montreal, Paris, "Amsterdam, Zurich and Johannesburg stock exchanges includ-"ing the over-the-counter markets in New York and Montreal.

"Provided always as follows: (i) No money shall be invested "in the government securities of any foreign country except the "United States of America or any State thereof or in the securi-"ties of any provincial municipal or other local government or "public board or authority in any foreign country except as "aforesaid; and for this purpose a foreign country means a "country which is neither part of Her Majesty's dominions nor "comprised in the British Commonwealth of Nations. (ii) No

[Reported by Miss PHILIPPA PRICE, Barrister-at-Law.]

1960

THOMPSON'S WILL TRUSTS, *In re.*

"moneys shall be invested in any partly paid shares; but this "prohibition shall not apply to the partly paid shares of any com- "pany incorporated in the United Kingdom carrying on banking "or insurance business in the United Kingdom and shall not "prevent an application for and part payment in respect of shares "offered for subscription to the public if the terms of issue are "such that such shares or the stock representing the same will be "fully paid within nine months from the date of allotment. "(iii) No money shall be invested in the ordinary or deferred "shares or stock of any company unless at the time of investment "such company shall have a paid up capital of £500,000 at least "or its equivalent at the rate of exchange current at the date of "investment and so that in the case of a company having shares "of no par value such paid up capital shall be deemed to include "the capital sum (other than capital surplus) appearing in the "company's published accounts in respect of such shares; but "this prohibition shall not prevent an application for and payment "in respect of shares offered for subscription to the public if the "full subscription for such shares would cause the paid up capital "of the company concerned to amount to £500,000 at least or "such other equivalent as aforesaid."

B. L. Bathurst Q.C. and *Christopher Slade* for the applicants. The investment clause is drafted on certain accepted lines with this difference that it sets out each stock exchange by name instead of using the phrase "any recognised Stock Exchange."

W. J. C. Tonge for the first respondent.

James Cunliffe for the second, third and fourth respondents.

E. F. R. Whitehead for the fifth respondent.

Eric Griffith for the sixth and seventh respondents, the trustees of the will, all supported the application.

CROSS J. said that he was prepared to make an order in the terms asked for.

Order accordingly.

Solicitors: *Payne, Hicks Beach & Co.*

[CHANCERY DIVISION.]

1960 *Oct.* 17.

*PRACTICE DIRECTION (DRAWING UP OF ORDERS).

Practice—Chancery Division—Order, drawing up—Procedural orders.

With effect from Monday, November 7, 1960, the following procedural orders made in chambers will, unless otherwise directed at the time of making the order, be drawn up by the solicitor entitled to the carriage of the order, passed in the chambers of the

master by whom the order was made, and entered by the entry clerk in Room 136:

Order adding defendant (5s.).
Order consolidating actions (5s.).
Order XXX directions (5s.).
Order for examination of judgment debtors (10s.).
Order for examination of witnesses (10s.).
Order giving leave to defend (10s.).
Order to deliver interrogatories (5s.).
Order for particulars (5s.).
Order for substituted service (5s.).
Order for transfer of action to county court or district registry (5s.).
Order for appointment of guardian-ad-litem (5s.).
Order for appointment of new next friend (5s.).
Order to set aside writ or originating summons (10s.).
Order for the withdrawal of a solicitor (10s.).
Order for third party directions (5s.).
Order for time (5s.).
Order to discharge or vary order on application by third party (5s.).
Order to dismiss for want of prosecution (10s.).
Order for further discovery (5s.).
Order directing production of documents and inspection (5s.).
Order giving leave to serve out of the jurisdiction (5s.).
Order for issue of letter of request to take evidence abroad (10s.).
Order for appointment of special examiner to take evidence abroad (where no convention) (10s.).
Order for issue between judgment creditor and garnishee (10s.).
Order dismissing summons generally (10s.).

(NOTE: Where any of the above orders marked with a 5s. fee are made on a summons bearing a 10s. stamp, no fee will be payable on the order.)

When a procedural order is made by a master, the solicitor entitled to the carriage of the order will prepare and lodge with the master's summons clerk two engrossments (original and duplicate) of the order as proposed to be passed and entered together with the summons and the evidence on which the order was made. The engrossments *must be typed* on foolscap paper or on printed copies of Form 2 of Appendix K of the Annual Practice. The summons clerk will give the solicitor an appointment to attend before the master's principal clerk to pass the order.

If on the appointment before him the principal clerk is satisfied that the proposed order gives effect to that made by the master, he will direct the solicitor having the carriage of the order to stamp one of the engrossments (if a fee is payable on the order). The principal clerk will then add his initials to both copies.

The summons on which the order was made will be numbered

1960

PRACTICE DIRECTION (DRAWING UP OF ORDERS).

serially by the summons clerk and filed in chambers. The serial number of the summons will be inserted in the left hand margin of the original and duplicate order by the summons clerk. The summons clerk will then enter details of the order in an order book which he will maintain, setting out the following details:

(a) Title of cause or matter.
(b) Reference number of proceedings.
(c) Date of order.
(d) Date of initialling by principal clerk.
(e) Serial number of summons.
(f) Fee paid (if any).

The necessary statistical entries will also be recorded in the statistical register by the summons clerk.

The summons clerk will transmit any original affidavits lodged in support of the application on which the order was made to the Filing and Record Department of the Central Office.

The order will then be transmitted by the summons clerk to the entry clerk, who will enter the order in the same way as orders drawn up in the registrars' office.

The sealed duplicate order will normally be ready for collection from the entry seat on the day following the appointment before the principal clerk at which the order was passed.

Any party who desires to amend the order as entered shall, within four days after service upon him of the order, take an appointment before the principal clerk for this purpose, and shall serve notice of such appointment on the other parties. Without prejudice to the right of a party to adjourn to the master, the principal clerk may, if he thinks proper so to do, refer the question to the master for his decision.

W. F. S. HAWKINS,
Chief Master,
Chancery Division.

October 17, 1960.

[CHANCERY DIVISION.]

1960
Oct. 17.

* PRACTICE DIRECTION (MINUTES OF ORDER).

Practice—Chancery Division—Order, drawing up—Minutes of order drawn by counsel—Functions of registrar.

The following directions have been given by the judges of the Chancery Division:

1. Where minutes of order have been settled by counsel the registrar should not interfere in any way with the minutes unless it appears to him that they do not carry out the intention of the judge or are defective in form. If the registrar is not satisfied he should refer the minutes back to counsel through the solicitors

1960

PRACTICE DIRECTION (MINUTES OF ORDER).

with his proposed amendments. Should the registrar and counsel be unable to agree the minutes, the matter should be mentioned to the judge.

2. In the case of terms scheduled to a consent order these terms represent an arrangement between the parties, and the registrar is not concerned to approve them, although he may properly offer suggestions upon them if it appears to him that they may cause some difficulty.

W. F. S. HAWKINS,
Chief Master,
Chancery Division.

October 17, 1960.

[COURT OF CRIMINAL APPEAL.]

C. C. A.

1960
Oct. 3, 17.

Lord Parker C.J., Hilbery, Byrne, Ashworth and Elwes JJ.

* REGINA *v.* GOLDER.
REGINA *v.* JONES.
REGINA *v.* PORRITT.

Crime—Evidence—Depositions—Incriminating evidence by prosecution witness on deposition before committing magistrates—Contradictory evidence at trial—Witness treated as hostile—Refusal to admit truth of deposition — Whether jury entitled to rely on original statement.

When a witness is shown to have made previous statements inconsistent with the evidence given by that witness at the trial, the jury should not merely be directed that the evidence given at the trial should be regarded as unreliable; they should also be directed that the previous statements, whether sworn or unsworn, do not constitute evidence on which they can act.

Where, therefore, a witness, whose evidence on deposition before the committing magistrates incriminated the three accused, repudiated her statement at the trial and, although treated as a hostile witness by the prosecution, refused to admit that her deposition was true, and on a direction, in effect, that it was open to them to act upon the evidence contained in her deposition, the jury convicted:—

Held, that the direction to the jury was wrong; that as the evidence, apart from that of the hostile witness, only created a case of grave suspicion, the jury had probably acted on material on which in law they could not act, and therefore the court must quash the convictions.

Rex v. *Harris* (1927) 20 Cr.App.R. 144, C.C.A; *Rex* v. *White* (1922) 17 Cr.App.R. 59, C.C.A., and *Rex* v. *Birch* (1924) 18 Cr.App.R. 26; 40 T.L.R. 365, C.C.A. applied.

Rex v. *Russell,* The Times, May 30, 1935, explained.

APPEALS against conviction.

The appellants, Sydney Elmer Golder, Arthur Patrick Jones and George Anthony Porritt, were convicted on January 7, 1960, at West Suffolk Quarter Sessions (deputy chairman, Judge Southall) of breaking and entering a house at Newmarket in the

C. C. A.
1960
REGINA
v.
GOLDER.

early hours of the morning of April 19, 1959, and stealing a safe and its contents. Golder was also charged with receiving a gold watch, part of the stolen property. Before the committing magistrates a witness, Taylor, said that Golder had given her the gold watch on April 20. At the trial Taylor denied that Golder was the man who gave her the watch. She was treated as a hostile witness but refused to admit that her deposition was true. On a direction by the deputy chairman that the jury might consider whether they thought the witness's evidence on her deposition was the true version of her story, the jury convicted.

The appellants were granted leave to appeal against their convictions on July 19, 1960. The appeals came before the court on July 26, when they were adjourned for a court of five judges.

Robin Simpson for the appellants.
W. M. F. Hudson for the Crown.

The following cases, in addition to those referred to in the judgment, were cited in argument: *Rex* v. *Oldroyd* [1]; *Rex* v. *Dibble* [2]; *Rex* v. *Williams* [3]; *Reg.* v. *Allpress* [4]; *Rex* v. *Christie*.[5]

Cur. adv. vult.

LORD PARKER C.J. These three appellants were tried at West Suffolk Quarter Sessions on an indictment containing two counts. In the first count all three men were charged with burglary and larceny, and in the second count Golder was separately charged with receiving a gold watch, part of the property referred to in the first count. All three appellants were found guilty on the first count and leave to appeal against conviction was granted in July, 1960.

The relevant facts may be summarised as follows: In the early hours of April 19, 1960, a dwelling-house in Newmarket was broken into and a quantity of property was removed, including a safe and a gold watch. At 5.30 a.m. a Standard Vanguard driven by the appellant Porritt, with three passengers, one of whom was the appellant Jones, was stopped by the police near Ely, but after investigation was allowed to proceed. About two hours later the same car was seen by other police officers at Gayherne, still driven by Porritt, but on this occasion with only one passenger, alleged to be the appellant Golder. On the evening of April 19 the safe was discovered in a field near Newmarket where it had been broken open. Tyre marks were seen and careful measurements were taken by a police officer, who formed the opinion that they were made by the rear wheels of the vehicle. When the car driven by the appellant Porritt was

[1] (1805) R. & R. 88, C.C.R.
[2] (1908) 1 Cr.App.R. 155, C.C.A.
[3] (1913) 8 Cr.App.R. 133; 29 T.L.R. 188, C.C.A.
[4] Unreported, July 9, 1955.
[5] [1914] A.C. 545; sub nom. *Public Prosecutions Director* v. *Christie*, 10 Cr.App.R. 141; 30 T.L.R. 471, H.L.

examined some four days later the front tyres were seen to be of a size and type which would have left marks exactly corresponding with those found in the field, but the tyres on the rear wheels were of a different size and type. There was no evidence to show that the tyres on the rear wheels had been changed in the intervening four days. The appellants Porritt and Jones gave an explanation to the police, purporting to account for their movements on the night in question, but that explanation was, to say the least of it, unimpressive. The appellant Golder denied throughout that he was in the Newmarket area, alleging that he was in Manchester.

As counsel for the prosecution frankly admitted, the foregoing evidence was not enough to do more than create a case of grave suspicion, and accordingly he sought to rely on a witness, Taylor. Before the committing magistrates she swore that on April 20 the appellant Golder, whom she knew as Chuck, had brought her a gold watch which was, in fact, part of the property stolen in Newmarket early in April. At the trial she went back on her story and counsel for the prosecution obtained leave to treat her as adverse and cross-examined her. He did not, however, succeed in extracting from her an admission that her deposition was true, still less that it was the appellant Golder who handed her the gold watch.

In the course of his summing-up the deputy chairman dealt with the question of the watch and the conflicting testimony of Taylor in a way which plainly indicated to the jury that it was open to them to act upon the evidence contained in her deposition notwithstanding her repudiation of it. The whole of the deposition was in fact read to them when they returned for further direction. It is only necessary to refer to two passages in the summing-up: "The only evidence which you have that he "gave the gold watch to Mrs. Taylor is the evidence of Mrs. "Taylor herself, and she, you may think, is a stranger to truth. "You heard the evidence before the justices." Later, he said: "If you come to the conclusion that what she said before the "magistrates was accurate then of course it all starts to tie up."

In the judgment of this court the direction to the jury in regard to Mrs. Taylor's deposition was wrong in law and, as was intimated at the end of the hearing of the appeals, all three convictions must be quashed. A long line of authority has laid down the principle that while previous statements may be put to an adverse witness to destroy his credit and thus to render his evidence given at the trial negligible, they are not admissible evidence of the truth of the facts stated therein. It is unnecessary to refer to the cases in detail; the following extract from the judgment of this court in *Rex* v. *Harris* [1] is a sufficient statement of the principle: "It was permissible to cross-examine this "girl upon the assertions she had previously made, not for the

[1] (1927) 20 Cr.App.R. 144, 147, C.C.A.

C. C. A.
1960
REGINA
v.
GOLDER.

"purpose of substituting those unsworn assertions for her sworn "testimony, but for the purpose of showing that her sworn "testimony, in the light of those unsworn assertions, could not be "regarded as being of importance. It is upon that matter that "confusion has sometimes arisen. It has undoubtedly some-"times been thought that where a witness is cross-examined upon "a previous unsworn statement and admits that the statement "was made, but says that the statement was untrue, that "unsworn statement may sometimes be treated as if it could be "accepted by the jury in preference to the sworn statement in "the witness box . . . That of course is all wrong, as has been "pointed out on various occasions by this court, and not least in "the case of *White*.[2]"

In both *Harris*[3] and *White*[4] the previous statement was unsworn and not made in the presence of the accused. It could not, therefore, on any view be evidence against him. The principle, however, is equally applicable to earlier statements made on oath as it is to unsworn statements: cf. *Rex* v. *Birch*.[5]

Our attention was, however, drawn to the decision of this court in *Rex* v. *Russell*,[6] and it was suggested that that case had laid down a qualification to the general principle above stated to the effect that if there was other evidence before the jury tending to show that the previous statement represented the truth they were entitled to rely upon it. This court can see no warrant for any such qualification, which indeed would mean that evidence which was clearly inadmissible would on proof of the other evidence thereupon become admissible. Indeed, as we understand it, the court in *Russell*[6] was not laying down any such proposition.

We were also referred to the unreported case of *Reg.* v. *Frett & Rosa* tried by Donovan J. at the Central Criminal Court in 1956. It was a razor-slashing case in which the victim, a man called Carter, and his wife had unhesitatingly picked out their assailants at an identification parade. At the trial, however, they said that they were not sure and that the defendants merely resembled their assailants. The judge left it to the jury to decide whether they could safely rely upon the original identification, and the jury convicted. That, however, was, as it seems to us, quite a different case from that now under consideration. In particular, it was unnecessary to treat the Carters as adverse witnesses and they were not so treated.

In the judgment of this court, when a witness is shown to have made previous statements inconsistent with the evidence given by that witness at the trial, the jury should not merely be directed that the evidence given at the trial should be regarded as unreliable; they should also be directed that the previous

[2] (1922) 17 Cr.App.R. 59, C.C.A.
[3] 20 Cr.App.R. 144.
[4] 17 Cr.App.R. 59.
[5] (1924) 18 Cr.App.R. 26; 40 T.L.R. 365, C.C.A.
[6] The Times, May 30, 1935.

statements, whether sworn or unsworn, do not constitute evidence upon which they can act.

As already stated, the circumstances of the present case were such as to arouse grave suspicion but, having regard to the fact that the jury were invited to act, and in all probability did act, upon material on which in law they could not act, this court is left with no alternative but to quash the convictions.

Appeals allowed.

Solicitors: *Ludlow, Head & Walter; Registrar, Court of Criminal Appeal; Moodie, Randall, Carr & Miles for Bankes Ashton & Hayward, Stowmarket.*

C. J. E.

[PROBATE, ETC., DIVISION.]

* SOFAER *v.* SOFAER.

1960
July 18, 19, 20, 21, 29.

Collingwood J.

Husband and Wife—Cruelty—Insanity—As defence—Knowledge that acts of cruelty "wrong"—Meaning of "wrong"—Evidence of knowledge—Onus of proof.

At the hearing of a defended suit for divorce the court found that a long course of cruel conduct from at least 1946 until August, 1956, alleged against the wife respondent, including unjustifiable nagging, assaults and other acts of violence, threats made by the wife with a view to obtaining her own ends, accusing the husband of practising black magic and ill-treating the children of the parties, was proved, and that the conduct had injured the husband's health. On behalf of the wife it was alleged that at all material times she suffered from such a defect of reason from disease of the mind as not to know the nature and quality of her acts or, alternatively, not to know that her said acts were wrong.

The wife had been under mental treatment for periods from November, 1954, and, in January, 1958, was certified and had been detained thereafter. All the medical witnesses agreed that she was suffering from paranoid schizophrenia, the onset of which probably dated from 1948, and that she knew the nature and quality of her acts. On the question whether the wife knew that her acts were wrong, the medical evidence was conflicting, three doctors being of the view that, as from various dates, the wife either did not know or probably did not know that her conduct was wrong, while the fourth doctor was of the opinion that, on the balance of probabilities, she was able to distinguish right from wrong.

The wife had, on one occasion in 1954, expressed regret for her past behaviour and promised to behave better in the future. She had had an abortion performed in 1946, and thereafter had been greatly troubled in her mind by what she had done, and had also condemned the conduct of a relative who had made illicit profits on the black market:—

Held, (1) that the word "wrong" in the second limb of the M'Naughten Rules meant not merely that which was punishable

1960

SOFAER
v.
SOFAER.

by law but included that which was culpable or blameworthy (post, p. 1177).

Dicta of Asquith L.J. in *White* v. *White* [1950] P. 39, 53; 65 T.L.R. 524; [1949] 2 All E.R. 339 applied.

(2) That, apart from the accusation of practising "black magic" which, if prompted by delusional ideas, could not be held to amount to cruelty, it was not possible on the whole of the evidence to say that at any given point of time the wife's behaviour must be regarded as having ceased to stem from her abnormal personality, her vicious temper, selfishness and determination to get her own way at whatever cost and, thereafter, must be regarded merely as a manifestation of schizophrenia, and that the probabilities lay in favour of the view that, at all material times, she did know that her conduct was morally unjustified. The husband was, therefore, entitled to a decree.

DEFENDED PETITION for divorce.

The facts, as they appeared from the evidence of the husband, which was accepted by the court, were as follows: The parties were married on January 10, 1937, at the synagogue in Rangoon, both of them then being 22 years of age. There were four children living, Flora, who was 22 years of age at the date of the hearing, Sally, born in December, 1943, Saul in May, 1951, and Esther in July, 1955. From 1937 to 1942 the parties lived in Rangoon. The marriage was an unhappy one from an early stage due to the wife's constant nagging, complaining and outbursts of temper. In 1942 the parties were evacuated to Bombay during the invasion of Burma, and they were there until the end of 1946 when they returned to Burma. In 1948 they went to Bombay again. Throughout this time the same conduct continued. In 1946, the wife went to a doctor who procured an abortion for her. Afterwards she informed the husband of this fact, saying that they could not afford another child. The husband was very upset about this, but she said it had nothing to do with him and was solely her concern.

From 1946 her behaviour became worse. There was constant nagging and complaints (frequently over money), constant abuse, and a number of assaults. The wife flew into a temper if the husband failed to comply with her wishes, however unreasonable those wishes might be. She constantly complained, threw various articles at him and hit him and scratched his face. She ill-treated the children, ignoring the husband's protests in that regard. On a number of occasions she accused the husband (and also his sister) of practising black magic on her and "using an "evil influence on her." The husband's health became affected. his nerves suffered, he suffered from loss of sleep and had to resort to drugs. He told her of this, but she said she did not care and if it did not suit him—well, he could go his own way.

In 1950 the family moved to Israel, where they lived in a camp occupying a canvas hut known as a sreef. On several occasions the wife threatened to burn the sreef down (and everyone in it) in order to compel the husband to do what she wanted.

At first he took these threats seriously. She resented the poor living conditions in Israel and one night woke him up in the middle of the night demanding that he should immediately go to the manager of the camp and make him, the manager, arrange for better accommodation for her. She threatened the husband with a knife which she had in her hand, and he ran out of the sreef. She followed him out, went to the manager's sreef, as she said to teach him a lesson, and aroused him, and when he told her to come to his office next day she cut a hole in his sreef. On another occasion, when the husband was in the adjoining sreef in the evening, she called to him to come immediately and, on his so doing, leapt at him scratching the side of his face with her nails.

In 1953–1954, in order to make the husband do what she wanted, she threatened to commit suicide on several occasions by swallowing acid or throwing herself in the river. On an occasion, when she was complaining of having to live in the sreef, she threw a meat chopping board at him, striking him on the head, as a result of which he was away from work for several days.

Early in 1954 a child Leah was born. In March this child died, being then some 2½ months old. The wife had prevented the husband from even seeing the child for two months prior to the child's death, and it was only after the death that he knew that the child had been ill. She then accused him of being responsible for the death, saying that he had given her no peace so that she could not look after the child properly. Later she accused him of having caused the child's death by black magic. On several occasions she woke him up at night by throwing things at him (such as shoes) and then demanded sexual intercourse, even threatening him with a knife if he did not comply with her demands. She also woke him up violently in order to discuss money matters, continuing to nag him for long periods.

In the summer of 1954 the husband felt that he could not carry on any longer like this and left the camp and went to Haifa, where he remained for two months. He told her why he was going and her reply was, "Do what you want, it doesn't concern "me. All I want is money." During the two months that he was away he visited her at the camp each week giving her half his salary. While he was living with her he says he had always handed over the whole. In August of 1954 she asked him to return to her, promising to try and behave better towards him and to make the children happier, she expressed sorrow for her past behaviour, and said things would be all right in the future. He returned to her, and for a short time things were better, but not for very long. She then started her course of nagging and grumbling again and things got worse. On November 16, 1954, when she was two months pregnant, she entered the Blumenthal Mental Hospital in Haifa, as a voluntary patient, remaining there

1960

SOFAER
v.
SOFAER.

until December 22, 1954, when the husband took her away in consequence of her insistence that she wished to leave, though the physician advised against it. She said that she would continue as an out-patient and she was so treated. After her return home her temper got worse again, and after some weeks she became violent. In March, 1955, she threw a bottle at him, having earlier in the day accused him of planning to get her put back in the hospital. On July 19, 1955, the child Esther was born.

The wife was very dissatisfied with the conditions in which the parties were living in Israel and had often expressed the wish to go to England to join her own people and live there, a course with which the husband agreed. After the birth of Esther the wife abused the husband for the delay in making arrangements for their departure, for which she held him responsible, and, in the course of a violent temper because of this, she smashed a number of articles of furniture. She insisted on keeping the girls away from school, saying girls did not need education and ought to help her in the house, and this also led to several angry scenes when she lost her temper and in which she assaulted the girls.

On April 26, 1956, she was again admitted to the Blumenthal Hospital. On July 4, 1956, she was discharged, and the same day the family left for England, arriving on July 12, 1956. They went to the Jewish temporary shelter in Mansell Street. They did not live together there, the sexes were segregated, but they saw each other and her attitude towards the husband was unchanged. In August, 1956, the husband moved into furnished rooms.

By his petition he sought dissolution of the marriage on the ground of the wife's cruelty. The wife, by the Official Solicitor as her guardian ad litem, filed an answer denying that she was guilty of cruelty, and alleged that if she had committed any of the acts relied upon she was not responsible therefor in that, at all material times, she suffered from such a defect of reason from disease of the mind as not to know the nature and quality of her acts; or, alternatively, if she did know, as not to know that her said acts were wrong.

J. B. Latey Q.C. and *Bruce Campbell* for the husband.

R. A. J. Temple Q.C., *A. B. Hollis* and *Viscount Stormont* for the wife.

The following cases were cited in argument, in addition to those referred to in the judgment: *Brittle* v. *Brittle* [1]; *Sodeman* v. *The King* [2]; *Swan* v. *Swan* [3]; *White* v. *White*.[4]

[1] [1947] 2 All E.R. 383.
[2] [1936] 2 All E.R. 1138, P.C.
[3] [1952] P. 258; [1953] 3 All E.R. 854.
[4] [1950] P. 39; 65 T.L.R. 529; [1949] 2 All E.R. 339.

COLLINGWOOD J. referred to the facts, and holding that the evidence of the husband, which was corroborated both as to the facts alleged and as to the injury to his health, was to be accepted, continued: I find, therefore, that unless the medical evidence shows that the M'Naughten Rules are applicable, the husband has established conduct which amounts to cruelty in law.

This being so, the onus of showing that she is not legally responsible for her actions is upon the wife, who must discharge it by proving, upon a balance of probabilities, that she was labouring under such a defect of reason from disease of the mind as not to know the nature and quality of her acts; or, if she did know, that she did not know what she was doing was wrong. As to the first of these alternatives, "Did she know the nature "and quality of her acts?" there is no question. All the evidence is one way, that she did.

The next question, therefore, is, "Did she know that what "she was doing was wrong?" Although *Rex* v. *Windle* [1] was cited to me on behalf of the wife, I think that, having regard to the judgment of Asquith L.J. in *White* v. *White* [2] in which he quoted with approval from the judgment of the Court of Appeal in *Hanbury* v. *Hanbury*,[3] in this connection the word "wrong" is to be understood as meaning not merely punishable by law but including that which is culpable or blameworthy. As to the wife's present condition, there is no doubt whatever. On January 21, 1958, after having been charged with larceny from one of Woolworth's Stores, she was certified as insane and detained at Long Grove Mental Hospital, Epsom, where she has remained ever since. On January 21, 1959, she was discharged on the lapse of the reception order, but readmitted at once as a voluntary patient, and, on January 21, 1960, she was regraded as an informal patient. All the medical witnesses agree that she was suffering from paranoid schizophrenia.

As I have said, she was admitted to the Blumenthal Mental Hospital, Haifa, on November 16, 1954, and the medical report and case history from Dr. Bental, the specialist for mental diseases at that hospital, were produced in evidence on behalf of the wife. His medical report, dated November 22, 1958, is as follows: "Mrs. Ruby Sofaer is suffering from schizophrenia of a "paranoid type, which has developed gradually over a long time "with increasing severity. The date of onset of the illness cannot "be determined exactly, the only way to form an opinion is by "accepting the husband's statements. However, in view of the "progress of the illness one is justified in surmising that the "oddities in her behaviour were already the symptoms of her "illness. The statements of the husband regarding the bizarre "actions of the patient are perfectly credible since they are in "accordance with the symptomatology of paranoid schizophrenia

[1] [1952] 2 Q.B. 826; [1952] 1 T.L.R. 1344; [1952] 2 All E.R. 1, C.C.A.

[2] [1950] P. 39, 53; 65 T.L.R. 524; [1949] 2 All E.R. 339.

[3] (1892) 8 T.L.R. 868.

"in general, and with the symptoms observed in the patient here "in particular. I arrive at the conclusion that Mrs. Sofaer is "suffering from schizophrenia of the paranoid type and that at "the present state of our psychiatric knowledge there is practic-"ally no hope for her recovery."

With that general report there was a case history. It is a very long document. I do not think it is necessary for present purposes to read the whole of it, but there are certain passages in it to which I think I should refer. In the course of this case history the doctor says: "The onset of the present illness was "insidious, it may be traced back to the death of her child in "April, 1954. At that time she began to be depressive. The "condition became worse when after the death of her child an "aunt came to visit with her and stayed for four months. The "aunt caused considerable disharmony between the patient and "her husband. Finally, the husband left his family for two "months, since he could not stand the nagging of his wife, when "she could not sleep at night. The patient was inclined to "believe in witchcraft, and this superstition was aggravated "under the influence of this aunt. Twelve days prior to her "admission to hospital, the patient became acutely ill. She "suddenly came down with severe anxiety with the idea that "she had been bewitched and the witch was coming for her. She "insisted that the aunt had bewitched her and had driven the "husband from the house." He then refers to her condition on admission. "The patient, who entered the hospital voluntarily "on November 16, 1954, was two months pregnant. She was "whiny, agitated, unkempt, refused to wash and use a comb. "The patient was afraid that something would happen to her "husband, begged fervently to permit the husband to visit her. "He came almost daily and brought sweets to her. However "when they were together, they had nothing to say to each "other." He then goes on to say she had the attitude of the paranoid, and a little lower down he speaks of her hearing voices and sounds without clearly understanding their meaning. She also said she felt her pregnancy was due to the witchcraft of her aunt, and that she was going to die of it. He concludes by saying: "In spite of all this, her husband gave in to her "persuasion and insisted on the patient's discharge," she having insisted herself for some time, and the patient was discharged from hospital on December 22, 1954, unimproved and against the advice of the physician. He then sets out the serious treatment which the patient had undergone, pointing out that it was limited owing to her pregnancy, and that the Largactil treatment had to be interrupted because of her premature departure from the hospital.

She was again admitted to this hospital on April 26, 1956, but for some four months prior to this admission she had been treated by a Dr. Valin, from whom two reports have been admitted. One

of them, sent in December, 1957, from Haifa, reads as follows: "I have been for a short time in medical charge of the family "Sofaer and I will be glad to do my best to assist you in the "aforementioned case. Mrs. Sofaer was suffering from delusions "and obsessions, mainly that the perils to the state of Israel are "caused by lack of piousness of the population and because of "the sexual coolness of her husband towards her. Even during "her quiet period her household was sordidly neglected, her "husband had to care for her and the children. He was during "his stay in Israel a minor customs official, because of his wife's "condition he had to neglect his job and the financial and general "condition of the family was in a pitiful state. Mrs. Sofaer was "sometimes a raving maniac and I remember several occasions "when I had to administer injections of sedatives by force and "with the help of neighbours. She became finally absolutely "demented and violent and had to be admitted to a mental "hospital, where her condition improved after treatment with "shocks and Largactil. I remember that Mr. Sofaer did mention "several times that his wife used physical violence against him. "I can state that during the time of my observation Mrs. Sofaer "never appeared to me as a mentally sane person, at times, "however, she was a raving maniac and entirely irrational. As "far as I know Mr. Sofaer behaved well to his wife and did all "he could to help her."

Then there is a later report, dated January 9, 1958, which is quite short and in these terms: "Only today I was shown by "Dr. Wohlstein a copy of the petition. In addition to my last "letter I would like to state that I witnessed at several occasions "during my professional visits at the flat of Sofaer's, that Mrs. "Sofaer abused her husband in front of her children using the "vilest expressions. I consider all the other allegations of Mr. "Sofaer as likely to be true and I remember him as a soft and "always well behaving man. To judge, how far her character or "her mental deterioration can be made responsible for her "behaviour, I don't feel to be competent."

Dr. Bental's report regarding the wife's second period in the Blumenthal Hospital contains the following passages: he starts off by giving what he calls the interim history, which he says was obtained from the husband. The husband would not accept that in its entirety; he agreed that he did say that she dreamt of her late father and woke up in fear, but he said the information which followed—"She believed everybody was against her and that "people spoke and laughed about her"—was not obtained from him and must have been obtained from the patient herself. Dr. Bental says that after she left the hospital on the previous occasion "she still suffered from fear of death and although she "took good care of the house, she had no interests, did not go "out and never saw company in her home." He then refers to the birth of the child, which was on July 19, 1955, who was placed

1960

SOFAER
v.
SOFAER.

Collingwood J.

in an institution by a welfare worker and the patient did not see the child thereafter. He goes on to say, with regard to the patient, that she knew that her family were prepared to move to England, and she shouted in the irrational fear that they would force her to move to England without the child. She ate very little, occasionally refusing all food, slept very little, the last few nights not at all, and finally refused food entirely. "In "the hospital," he continued, "on admission patient appears "severely neglected. She states that she is very well and that "she came to the hospital only because God promised her that "she could see her youngest child here. Her conversation reveals "that she communicates constantly with God and she asks to see "her baby as God had promised her. She curses the nursing "staff, she shouts, runs to the male ward with the upper part "of her body bare. Patient is confused, at times she shows "pressure of speech and her talk is incoherent. She states that "the physician, together with neighbours and police, talked ill "about her. She asked one of the doctors, whether he was the "one who wanted to kill her and her baby. At times she is "negativistic, has to be fed, hides under her blankets and is out "of contact with her surroundings. She stubbornly refuses to "sign a form for emigration presented to her by her husband, "who needs to obtain her signature on it. She tears the paper "saying that in this house, where people want to poison her, she "is not going to sign anything. When her husband for a few "days is not permitted to visit the patient, she believes that he "has gone abroad and has deserted her. The patient is full of "paranoid ideas—'there is something in the air—a disaster is "'imminent, there was an earthquake because people wanted to "'kill her; she could not sign any papers because that would sign "'her death-warrant; if she were dead her husband and her "'daughter could live together as man and wife and that was "'why she could not sleep at night, in order to prevent this from "'happening.' She also stated that she had heard at night, "that she was the queen of Israel and Dr. Bental was the king "of Israel. Under treatment with Largactil the patient calmed "down, she is not neglecting herself any more, keeps herself and "her things clean and orderly, but her delusions persist and her "thought-processes are limited." Then again he states the treatment which she underwent in that hospital, which was similar to her treatment in her previous stay there.

In addition to this a questionnaire was submitted to Dr. Bental together with a supplementary one, consisting in all of 170 questions, inviting his opinion with regard to every one of the allegations in the petition, and the particulars thereof as to the wife's capacity to appreciate the nature and quality of her acts, and as to whether she would have known that her conduct was wrong. These answers, I think, may be summarised by saying that Dr. Bental thought that while in every case she knew

what she was doing she did not know that what she was doing was wrong.

As to the wife's condition since her reception, Dr. Alan Munro, Physician Superintendent at Long Grove Hospital, said that there had been little change since January, 1958, though her condition had varied, she was suspicious and resentful, and held the belief that she was being persecuted, though she would not say by whom. There had been a number of violent outbursts. He expressed the opinion that the onset of her mental illness was about 1948, though he admitted that estimate was somewhat speculative. In coming to this conclusion he said he attached weight to the time when she expressed the belief that her husband was practising black magic on her as distinguished from her previous general belief in the efficacy of black magic. He considered that since that time she had suffered from disease of the mind and from defect of reason, though again he says this involved a considerable element of speculation. He accepted that she knew what she was doing, but thought it was more likely that in the majority of the incidents she did not know that what she was doing was wrong.

Dr. Denham, who became responsible for her in the hospital in April, 1958, expressed the opinion that she had been schizophrenic for at least 12 years, she had various delusions, he said, for example, that she was losing weight, whereas the contrary was the fact, that her body was diseased, that the food was unclean. He was satisfied that she had disease of the mind and a defect of reason, but he says he found it difficult to say from what date the defect started, though he thought it was probably 1948. He said her capacity to distinguish right from wrong had been severely distorted throughout the time that she had been under his care, certainly since the time she entered the hospital in Haifa in November, 1954, and quite likely, he said, before then. He also said that there was a possibility that from 1948 she did not appreciate that what she did was wrong. His reasons for saying that she could not distinguish right from wrong were (1) she suffered from delusions; and (2) that if she could so distinguish, one would look for some measure of restraint in her behaviour, that being a reasonable criterion of the capacity to distinguish, even in a mental patient.

Dr. Madgwick, psychiatrist, had her under his care from January, 1958, to April, 1958. He said on admission she had no idea that she had done wrong, and in his opinion she was not able to distinguish right from wrong. The reasons he gave for this opinion were (1) she is a schizophrenic; (2) that her mind is distorted to the extent that it was obvious that she could not so distinguish, this distortion being indicated by her delusions of persecution. From the medical history in Israel he thought that by 1954 the schizophrenia had become serious, and before that had been increasing in severity, and he thought it more than

1960

SOFAER
v.
SOFAER.

Collingwood J.

possible—but not certain—that at that time she did not know right from wrong.

Dr. Desmond Curran, the senior psychiatrist at St. George's Hospital, interviewed the wife on February 6, 1960, at Long Grove. He had been provided with the hospital records and also with the medical reports from Israel. He thought her, he said, reasonably co-operative, though apt to be evasive. She was well orientated and not mentally confused, and her memory was good. She expressed vague persecutionary ideas, she thought she might have been poisoned, and he said she was very apathetic. As to her husband's behaviour towards her, she said he had always been nice and she had no grounds for complaint. When asked how she behaved to him she replied, "I do not know."

Dr. Curran agreed with all the other doctors that she was suffering from paranoid schizophrenia, but he said that schizophrenics generally have an intellectual capacity of determining whether an act is something which you should or should not do, and that typically you do not get an impairment of consciousness, nor of intellectual capacity. He agreed that the evidence rather pointed to the onset of schizophrenia as dating from round about April, 1948, and that the schizophrenic illness was developing insidiously over the years. He could see no reason to think that she did not know, when she behaved as she did towards her husband, that she was behaving in a way that was unjustified, and that she ought not to have done it. It was, he said, an inquiry which was largely speculation. In his opinion the probability was that the second limb of the M'Naughten Rules did not apply here.

Certain parts of the evidence, it was urged on behalf of the husband, were quite inconsistent with an inability on the wife's part to distinguish right from wrong. The first of these was the fact that in August, 1954, after the husband had left her and gone to Haifa, she expressed regret for her past behaviour and promised to behave better in the future. Dr. Curran agreed that the only reasonable conclusion to draw from this was that she had the capacity to distinguish right from wrong. Dr. Munro, however, said that he attached little weight to this, saying that an expression of contrition merely indicated that her mental illness had taken a temporary turn for the better. Dr. Denham said that if the patient gives voice to an expression of regret it does follow that she then appreciates the difference between right and wrong, but this does not show any awareness of the impropriety of the act at the time when it took place. Dr. Madgwick said that it would amount merely to a general expression of regret, without reference to any specific acts, showing merely a vague awareness of deterioration in family relationship and an equally vague promise of reform. He then added this: "I do not think she was "able to appreciate what she was promising, as shown by the "fact that she did not keep her promise." I make no comment on that. With all respect to these views, I confess to finding

a difficulty in ascribing an expression of regret to anything other than a realisation that there was something to regret, and, if language means anything, a promise of reform for the future connotes a realisation that what has been done in the past was wrong, and to assume that the expression of contrition is merely the reflection of the person's mind upon a temporary higher plane with respect to a former lower one is to indulge in speculation which I am neither inclined nor entitled to indulge.

In this connection, I would refer to a portion of the judgment of Hodson L.J. in the case of *Palmer* v. *Palmer*.[4] I need not read the headnote, but the circumstances attending were these: the commissioner at the trial dismissed the petition and in the course of his judgment said that he was satisfied that the husband did not realise what he was doing when he committed the acts of violence against his wife, and, further, that when he committed the acts, he did not think that they were wrong. In the course of his judgment Hodson L.J. said[5]: "The real point in this case "is whether, when he committed the acts, he (the husband) did "not know that they were wrong. That contention, which "succeeded before the commissioner, has been supported here, "and it is based, I think, entirely on the evidence of a very "experienced medical man, who is the medical superintendent "at the Knowle Hospital, where the husband has been for many "years. He was obviously familiar with the M'Naghten Rules, "and having been asked the question: 'Would he know that "'those acts were wrong,' he answered: 'No.' Upon that, Mr. "Horner was fully entitled to argue that there was evidence "before the court which would justify the court in saying that "the second branch of the M'Naghten Rules applied and, there-"fore, the husband had a good defence. The doctor, in answering "'No,' gave his reason for making that answer. The Lord Chief "Justice has already read the answer, which indicates that the "doctor was basing himself on the motive for the man acting in "the way in which he did, which was provided by the delusion "from which he suffered. The doctor reasoned from that, that "the husband did not know that the act was wrong. With all "respect to the doctor, I think that that reasoning is unsound. "One must, as Mr. Beldam put it, look at the matter as if the "wife had indeed been unfaithful, as the deluded man thought "she had, but the fact that that was the motive does not mean "that he did not know that what he was doing was wrong. In "fact, the contrary appears from the evidence, because, as was "pointed out in the cross-examination of the doctor, the relieving "officer had seen him in January of the same year, 1952, the "year he was certified, and he then expressed regret for the "assaults which he had committed upon his wife," and Hodson L.J. goes on to say, "which is, surely, the strongest possible "evidence that he knew that what he was doing was wrong. In

[4] [1955] P. 4; [1954] 3 All E.R. 494, C.A.

[5] [1955] P. 9–10.

1960

SOFAER
v.
SOFAER.

Collingwood J.

"that state of the evidence, which was fairly recognised by the "doctor in cross-examination when Mr. Beldam put it to him, "I think that it is quite impossible to come to the conclusion "that this case is covered by either branch of the M'Naghten "Rules. Accordingly, the man being responsible for his acts, "and the cruelty being established against him, the wife is "entitled to a decree."

Another aspect of the wife's conduct which was inconsistent with an inability to distinguish right from wrong was her condemnation of the conduct of a relative who had been found to have been making illicit profits in the black market. This would seem to indicate a capacity to take an objective view of right and wrong, and this was the opinion of Dr. Curran. But here again Dr. Denham's view was that this merely showed that at times she evinced a better awareness than at others, and that her delusions would be centred in one field, so that anything outside that field might be appreciated in its proper perspective. Dr. Madgwick expressed much the same view. Another matter was her threats to commit suicide, to burn down the sreef, to stab the husband, none carried out but all made with a view to obtaining her own ends. Dr. Denham was not prepared to infer from that that she realised that what she threatened to do was wrong. There is also the evidence of Mrs. Soloman, the husband's sister, that the wife confided to her that she had been greatly troubled in her mind about the abortion which she had had performed in Bombay and she urged the witness not to have it done herself because it had troubled her so much.

It was suggested on behalf of the wife that Dr. Curran, having seen the patient on one occasion only and that for a comparatively short time, was not in a position to dispute the opinions of those who had had charge of her over some two years. If the question in issue was as to diagnosis or prognosis there would be considerable weight in this comment, but neither of these matters is in issue, both are common ground. The question is as to the state of mind of this wife years before she was admitted to Long Grove. I agree with the view of Dr. Curran that, on the material before the court, a determination would be nothing more than guesswork. No one is in a position to give a positive answer, and I unhesitatingly prefer the opinion of Dr. Curran that the probabilities lie in favour of the view that at the material times the wife did know that her conduct was morally unjustified.

There is one reservation which I think must be made, and that is in respect of her accusations against the husband of practising black magic towards her. Accepting that these accusations were prompted by delusional ideas, then I do not think that they can be held to amount to cruelty. But these accusations form but a small part of the whole and their exclusion does not affect the issue. Apart from this particular matter I do not think it is possible to say that at any given point of time her behaviour must be regarded as having ceased to stem from her abnormal

personality (her vicious temper, selfishness and a determination to get her own way at whatever cost) and thereafter must be regarded merely as a manifestation of schizophrenia.

One other issue was raised on behalf of the wife, namely, condonation, though it is not pleaded. The evidence is that intercourse took place up to a date some two months prior to the wife entering the Blumenthal Hospital on November 16, 1954. Thereafter, there were no physical assaults apart from the throwing of a bottle at the husband. But condoned cruelty may be revived by acts which taken by themselves are insufficient to amount to legal cruelty, and, in my opinion, the conduct of the wife after her return from hospital was sufficient to revive the previous cruelty.

I find, therefore, that the wife has been guilty of cruelty and that she has not discharged the onus of proof that at the material time she did not know that her conduct was wrong. The husband is therefore entitled to a decree nisi.

Decree nisi.

Solicitors: *Cardew-Smith & Ross; The Official Solicitor.*

E. J.

[HOUSE OF LORDS.]

H. L. (E.)†
1960
Oct. 24.

* CHING GARAGE LTD. . . . . PETITIONER;

AND

CHINGFORD CORPORATION . . . RESPONDENTS.

PETITION for leave to appeal to the House of Lords from a decision of the Court of Appeal.[1]

The APPEAL COMMITTEE granted the petition.

F. C.

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† *Present*: VISCOUNT KILMUIR L.C., LORD KEITH OF AVONHOLM and LORD DENNING.

[1] [1960] 1 W.L.R. 947; [1960] 3 All E.R. 79.

[RESTRICTIVE PRACTICES COURT.]

R. P. Ct.† (E. & W.)

1960 *Oct.* 4, 5, 6, 7, 10, 11, 31.

* *In re* DONCASTER AND RETFORD CO-OPERATIVE SOCIETIES' AGREEMENT.

[1958 No. 18 (E. & W.).]

Restrictive Practice—Restriction—Whether contrary to public interest—Territorial and membership restrictions — Retail co-operative societies in contiguous areas—Boundary agreement delimiting trading areas of societies—Restriction on trading outside delimited area—Restriction on accepting members outside area—Avoidance of overlapping—Whether specific and substantial benefit—Whether benefits or advantages conferred on public by restrictions—Whether membership restriction registrable—Restrictive Trade Practices Act, 1956 (4 *&* 5 *Eliz.* 2, *c.* 68), *ss.* 6 (1) (*b*) (*e*), 21 (1) (*b*).

The Doncaster and Retford Co-operative Societies were two retail co-operative societies trading in contiguous areas. Each society maintained shops and provided regular delivery services for groceries in the towns, villages and rural districts which it regarded as falling within its trading area.

The societies sold goods at current market prices and divided their trading profits, after deductions for fixed interest on their loan and share capital, allocations for reserves, and contributions to charitable, educational and political objects, among their members in the form of a "dividend" proportionate to the amount of the members' respective purchases. The current rate of dividend paid by the Doncaster society was 1s. 3d., and by the Retford society 1s. 1d. Each society belonged to the "National Membership "Scheme," under which a member of one society buying goods from a different society received the same dividend on his purchases as that paid to members of the society from which he bought the goods.

Each society was required by its constitution to belong to the Co-operative Union, to abide by its rules, and to accept its decisions as confirmed by the Co-operative Congress. Under the rules of the Co-operative Union, any dispute between members, which could not be settled by agreement, had to be submitted to arbitration, and the award of the arbitrators had to be accepted as final and binding. The policy of the Co-operative Union was to avoid as far as possible territorial overlapping of services provided by individual societies.

By an agreement made in 1928, the two societies agreed not to trade in the areas outside their respective boundaries as delimited by the agreement, nor to accept members nor solicit customers outside their boundaries. In 1941, the agreement was varied by consent so as to alter the original boundaries. The agreement was terminable by reasonable notice.

The societies contended that the agreement compared specific and substantial benefits on the public under paragraph (*b*) of section 21 (1) of the Restrictive Trade Practices Act, 1956,[1] namely,

† DIPLOCK J., SIR STANFORD COOPER, MR. W. L. HEYWOOD, MR. W. WALLACE and MR. W. G. CAMPBELL.

[1] Restrictive Trade Practices Act, 1956, s. 6: "(1) . . . this Part of "this Act applies to any agreement "between two or more persons carrying on business within the United "Kingdom in the production or "supply of goods, . . . being an "agreement under which restrictions "are accepted by two or more parties "in respect of the following matters,

the avoidance of overlapping of services and the invasion of each other's areas with competing shops, which would cause thereby a reduction in profits and dividends. Alternatively, they contended that the removal of the agreement would deprive the sparsely populated areas of the services they now enjoyed, and that it would deny members the benefit of conducting their purchasing organisation as they wished or as they reasonably wished:—

Held, (1) that, on the evidence, the possibility of overlapping of services or the establishment of competing shops was remote, and such slight overlapping as might occur; if the agreement were abrogated, would not have any appreciable effect upon the pattern of the trade of the two societies, the dividend paid by them or the services available to the generality of their members; and that, therefore, any benefit derived from the agreement could not be substantial (post, p. 1192).

(2) That the restriction on the acceptance of members outside the defined areas was not a registrable restriction within the Act of 1956, because, under the national membership scheme, a member of one society buying goods from the other society was entitled to the same dividend in respect of those purchases as if he were a member, and, therefore, the restriction did not affect the conditions on which or subject to which the goods were sold (post, p. 1194).

Accordingly, there would be a declaration that the restrictions, other than the restriction on the acceptance of members, were contrary to the public interest.

REFERENCE.

On December 5, 1958, the Registrar of Restrictive Trading Agreements, pursuant to section 20 (*a*) of the Restrictive Trade Practices Act, 1956, referred to the court an agreement subsisting between the Doncaster Co-operative Society Ltd. and the Retford Co-operative Society Ltd., numbered 2025 on the register of agreements.

The following statement of facts is taken from the judgment of the court: The respondents, the Doncaster Co-operative Society Ltd. and the Retford Co-operative Society Ltd., are retail co-operative societies registered under the Industrial and Provident Societies Act, 1893, which trade in contiguous areas. Each society has a departmental store in its eponymous town and branch shops in the surrounding urban districts and villages, each operates mobile shops and provides regular delivery services for milk, bakery products and groceries which extend to those rural districts, which it regards as falling within its trading area. The goods which each society sells are comparable in kind and quality, being in the main obtained from the same source, the Co-operative

"that is to say:— . . . (*b*) the "terms or conditions on or subject to "which goods are to be supplied or "acquired . . . (*e*) the persons or "classes of persons to, for or from "whom, or the areas or places in or "from which, goods are to be supplied "or acquired, . . ."

S. 21: "(1) For the purposes of "any proceedings before the Court . . . "a restriction accepted in pursuance "of any agreement shall be deemed "to be contrary to the public interest "unless the Court is satisfied of any "one or more of the following cir-"cumstances, that is to say— . . . "(*b*) that the removal of the restric-"tion would deny to the public as "purchasers, consumers or users of "any goods other specific and sub-"stantial benefits or advantages "enjoyed or likely to be enjoyed by "them as such . . ."

R. P. Ct.
(E. & W.)

1960

DONCASTER AND RETFORD CO-OPERATIVE SOCIETIES' AGREEMENT, *In re.*

Wholesale Society Ltd., of which each society is a member. Each carries on business in the way which is usual with co-operative societies. Membership, subject to a restriction which is referred to below, is in practice open to all persons who wish to purchase goods from the society, and who are prepared to take out at least one share of £1 in the capital of the society. They are admitted to membership on payment of 1s. and can subscribe the balance of the price of their share out of future "dividends." Goods are sold by the society at current market prices, and the balance of the trading profits, after payment of fixed interest at a low rate on share and loan capital, allocation for reserves, and contributions to charitable, educational and political objects, is divided half-yearly among the members in the form of a "dividend" proportionate to the amount of their respective purchases during the previous half-year. The current rate of dividend paid by the Doncaster society is 1s. 3d., and by the Retford society 1s. 1d.

The rules of each society require it to be a member of the Co-operative Union Ltd. As such it is bound to abide by the rules of the Union, to conform to its aims, and to accept the decisions of the central executive of the Union as confirmed by the Co-operative Congress. Rule 10 of the Co-operative Union rules includes the following provision: "Any disagreement that "may arise as to overlapping or any other matter which cannot "be settled in consultation between the parties shall, in failure "of conciliation, be submitted to persons appointed by the Co-"operative Union Limited as arbitrators and their decision shall "be final and binding on all parties."

Each of the societies is also a party to the "National Member-"ship Scheme," under which a member of one co-operative society purchasing goods from a co-operative society, of which he is not a member, is credited with a dividend at the rate paid to its own members by the society from whom the purchase is made. Thus, a member of the Retford society purchasing goods at a shop of the Doncaster society receives in due course the dividend on those purchases at the same rate as if he had been a member of the Doncaster society.

The Doncaster society has a membership of about 60,000, the Retford society of about 10,000. These figures indicate that at least one person in the majority of households in the area served by each society is a member of that society, but the figures of turnover suggest that the majority of households, in which there is a member, buy only a modest proportion of their requirements from the society, and obtain the remainder from private traders who compete with the co-operative societies. All but a trivial proportion of the sales of each society are to its own members.

Both Doncaster and Retford are natural shopping centres for the villages and country areas which surround them. Other co-operative societies centred on other towns operate similarly in

the areas surrounding those served by the two societies The two societies' respective areas adjoin in a sparsely populated rural district lying between Bawtry in the north and Retford in the south, in which there are three fair-sized villages: Ranskill and Mattersey and Mattersey Thorpe.

In 1928, as a result of an unfounded rumour that the Doncaster society proposed to open a shop at Ranskill where the Retford society was already operating a delivery service, the two societies entered into an agreement delimiting the boundaries of their respective trading operations. By that agreement, dated September 14, 1928, the Doncaster society undertook that it would not at any time thereafter, without the previous consent in writing of the Retford society, (a) accept any members residing at any point to the south of the agreed line; (b) canvass or solicit any customers or deal in or supply any goods to the south of the agreed line; or (c) open any shop south of or within half a mile to the north of the agreed line. The Retford society entered into corresponding covenants with respect to the area north of and within half a mile to the south of the agreed line. The agreement was not expressed to be for any fixed period and can be terminated by either party at any time upon reasonable notice, which, it is conceded, would be six or perhaps twelve months.

In 1941, mainly for technical reasons connected with food rationing, the original line of demarcation was varied by agreement so as to transfer to the Retford area the villages of Mattersey Thorpe and Mattersey, in the former of which the Retford society opened a shop with the consent of the Doncaster society, although this was within half a mile of the amended line of demarcation. In the same year, again with the consent of the Doncaster society, the Retford society opened a shop at Ranskill within a quarter-mile to the south of the agreed line. The Doncaster society's consent was given on terms that it should have a similar right to open a shop in the future at a point within one-quarter mile to the north of the demarcation line.

The societies sought to justify the restrictions under paragraph (*b*) of section 21 (1) of the Act of 1956.

Further facts are stated in the judgment.

Sir Frank Soskice Q.C. and *R. A. MacCrindle* for the co-operative societies.

Neville Faulks Q.C. and *J. F. Donaldson* for the registrar.

The following cases were cited in argument: *In re Black Bolt and Nut Association's Agreement*[2]; *Reg.* v. *Barnsley Licensing Justices, Ex parte Barnsley and District Licensed Victuallers' Association.*[3]

Cur. adv. vult.

[2] (1960) L.R. 2 R.P. 50; [1960] 1 W.L.R. 884; [1960] 3 All E.R. 122.

[3] [1960] 3 W.L.R. 305; [1960] 2 All E.R. 703, C.A.

R. P. Ct.
(E. & W.)
1960
DONCASTER AND RETFORD CO-OPERATIVE SOCIETIES' AGREEMENT, *In re.*

October 31. DIPLOCK J. read the following judgment of the court, which stated the facts as set out above, and continued: The restrictions contained in the agreement of September 14, 1928, as amended in 1941 (which we will call "the boundary "agreement"), have been referred by the registrar to this court under section 20 of the Restrictive Trade Practices Act, 1956. These are the only restrictions with which the court has to deal upon this reference. We emphasise this fact, because it became apparent at an early stage in the hearing that the evidence proposed to be adduced by the societies was directed to a much wider question, namely, whether the general policy adopted by retail co-operative societies in relation to territorial overlapping services provided by such societies was a desirable policy, and, in particular, whether it was contrary to the Act of 1956.

The general policy adopted by retail co-operative societies, which are members of the Co-operative Union, as both the Doncaster and Retford societies are required to be by their constitution, is determined by the Co-operative Congress. For over 60 years this policy has been to avoid so far as possible territorial overlapping of services provided by individual co-operative societies, and this policy has been and still is frequently enforced in disputes between members by means of the conciliation and arbitration procedure provided for in rule 10 of the Co-operative Union. Whether the provisions for the enforcement of this policy constitute an agreement to which Part I of the Act of 1956 applies is a matter which quite properly has not been argued before us, and upon which we express no view. What is clear, however, is that the passing of the Act of 1956 of itself has no effect upon the validity of the policy or its enforcement through the conciliation and arbitral procedure of the Co-operative Union. That question could arise only when the relevant provisions had been registered (if, indeed, they are registrable at all), and had been referred by the registrar to the court, and had been the subject of a declaration by the court.

Nevertheless, the existence of this general policy and the procedure for its enforcement is a relevant factor in the present case. There may be differing views among co-operatives as to whether the general policy of avoiding overlapping between the services provided by neighbouring retail co-operative societies is best secured by a written boundary agreement such as that which is before the court, or by tacit understandings, which are common between neighbouring societies as to the territory in which they are respectively entitled to trade and to deliver goods. There may, indeed, be particular cases where overlapping may be thought to be desirable, or a lesser evil than rigid boundaries by individual societies, or by the Co-operative Union itself; but as respects societies such as Doncaster and Retford, where the boundary line of the trading areas is a sparsely inhabited rural district, we see no prospect that the general policy of the Co-operative Union in favour of avoiding overlapping of services

provided by individual retail societies will change in the foreseeable future. If the boundary agreement ceased to exist, substantially the same result would be achieved as respects the trading operations of the two societies, so long as they remained members of the Co-operative Union by the application and enforcement of the Union's general policy on overlapping, even if there were any economic or other inducement to either society to venture into the area in which the other has heretofore habitually traded.

The societies concede that the territorial restrictions contained in the boundary agreement on the opening of shops and the delivery of goods are restrictions within section 6 (1) (*e*) of the Act of 1956 in respect of the areas or places in which goods are to be supplied. Even if considered to be harmless, they are, nevertheless, therefore, deemed to be contrary to the public interest, unless the societies can satisfy the court that one or other of the circumstances set out in paragraphs (*a*) to (*g*) of section 21 (1) of the Act of 1956 exists. The societies rely upon paragraph (*b*), and contend that the removal of these restrictions would deny to the public, as purchasers of the goods sold by the societies, specific and substantial benefits or advantages enjoyed or likely to be enjoyed by them as such by virtue of the restrictions. We will assume in the societies' favour that they are entitled, as they contend, to select as the relevant goods for the purpose of this paragraph the goods sold by them. As the great proportion of these goods are sold to their own members, they further contend that it is sufficient for them to show that the removal of the territorial restrictions contained in the boundary agreement would deny to the members of the two societies as purchasers of such goods specific and substantial benefits or advantages, since the members of the two societies constitute nearly all the public who are purchasers of the goods sold by the societies. We will again assume in the societies' favour, without, however, deciding it, that this argument is sound.

As originally pleaded, the societies' case appeared to be that the removal of the territorial restrictions would result in the invasion of each society's area by the other society in the form of the establishment of competing shops and overlapping of sales and delivery services, that these would be uneconomic, that the trading profits of each society would be reduced, that the dividends paid to members in respect of their purchases would fall, and that the "real price" of the goods (viz., the retail price paid less the dividend returned) would, accordingly, be greater and that the members as purchasers would be denied the substantial and specific advantage of the lower "real prices" which they at present pay.

This case was not made out by the evidence. Independently of the general policy of the Co-operative Union, any suggestion that in the absence of a boundary agreement the Retford society would establish shops in the area now served by the Doncaster

R. P. Ct.
(E. & W.)

1960

DONCASTER AND RETFORD CO-OPERATIVE SOCIETIES' AGREEMENT, *In re.*

society, or that the Doncaster society would establish shops in the area now served by the Retford society seems to us in existing circumstances to be quite unrealistic. Furthermore, if, in the future, the circumstances were to change and either society were disposed to act so foolishly, the boundary agreement, which is terminable by either party on reasonable notice, could only deter them from doing so for such period, say, six months or a year, as would be necessary to bring the agreement to an end. In the absence of the boundary agreement there would exist, no doubt, the possibility of some overlapping of delivery services in the fringe areas, but the sparse population in these areas renders these services among the least profitable of those undertaken by the societies and makes it, in our view, highly unlikely that either society would desire to extend or would make anything more than very minor adjustments in its present delivery area at their common boundary. Such slight overlapping as might occur could have but a minimal effect upon the trading expenses of the society and, consequently, upon the amount of the dividend paid to the members in general on their purchases. Even, therefore, if the two societies were not members of the Co-operative Union and thus compelled, quite apart from the boundary agreement, to refer any disputes as to overlapping to arbitration under rule 10 of the Co-operative Union's rules, we do not think that the abrogation of the boundary agreement would have any appreciable effect upon the pattern of the trade of the two societies, the "dividend" paid by either of them, or the services available to the generality of their members. A fortiori is this the case so long as the two societies remain (as we have no doubt they will) members of the Co-operative Union, and that Union continues to adopt, and to enforce through its conciliation and arbitral procedure, its long-established policy of avoiding so far as possible overlapping in the services provided by individual retail co-operative societies.

By an amendment, the societies put forward an alternative contention that, in the absence of the territorial restrictions contained in the boundary agreement, the societies would be unlikely to continue to provide in the sparsely populated area in the vicinity of the boundary line the services by way of village shops, mobile shops, and delivery services, which they now provide for members who reside in that sparsely populated area, since those services are relatively unprofitable and tend to reduce the dividend payable to members in general. The evidence wholly fails to satisfy us that the abrogation of the boundary agreement would have any such effect on the services provided by these societies in the area in question; but even if it did, the only persons who would be denied any benefits or advantages by the withdrawal of such services would be but a very small proportion of the total membership of the two societies—a proportion far too small to be regarded as the "public" as purchasers of the goods sold by the

two societies. Indeed, if there were any factual basis for the contention, which we do not think there is, it would follow that the majority of members of the two societies were being denied the benefit or advantage of a larger "dividend" by reason of the existence of the territorial restrictions.

Finally, as a tabula in naufragio, it was argued on behalf of the societies, although not pleaded, that even if they have failed to establish any likelihood that if the boundary agreement were abrogated there would, in fact, be any appreciable overlapping or any reduction in the services provided in the vicinity of the boundary line, nevertheless the members would, by the abrogation of the boundary agreement, be denied the benefits or advantages (1) of conducting their purchasing organisation (a) as they wish to, or (b) as they reasonably wish to, and (2) of avoiding the risk, even though it be a slight one, of overlapping, and the consequential increase in the real price of the goods purchased by members of the societies.

As regards the first alleged benefit or advantage, it does not seem to us that the right of the two societies to enter into a boundary agreement containing territorial restrictions upon the areas in which they supply goods is one which is enjoyed by the members of the societies as "purchasers" of the goods which the societies sell; but even if it were, the right to enter into an agreement which, in our view, has no appreciable effect upon the pattern of trading of the two societies, or upon the "real "price" of the goods they sell, if such can be a benefit or advantage at all, is not a substantial benefit.

As regards the second alleged benefit or advantage, it is sufficient to say that the benefit or advantage of being able to take unnecessary steps to avoid what is, so far as the foreseeable future is concerned, a non-existent risk cannot be substantial. Furthermore, if circumstances were to change, and the risk were to become a real one, the boundary agreement, which is terminable upon reasonable notice by either party, would not prevent overlapping.

It follows that the societies have failed to satisfy us that the removal of the territorial restrictions contained in the boundary agreement on the opening of shops and the delivery of goods would deny to the public as purchasers, consumers, or users of any goods, any specific and substantial benefits or advantages enjoyed or likely to be enjoyed by them as such, whether by virtue of the restrictions themselves or of any arrangements or operations resulting therefrom. Consequently, the restrictions must be deemed to be contrary to the public interest. The question whether their existence involves any detriment to the public or anyone else does not arise, and we express no view about it.

There remains to be considered the restrictions upon the societies accepting members to the south and north of the boundary line respectively.

R. P. Ct. (E. & W.)
1960
DONCASTER AND RETFORD CO-OPERATIVE SOCIETIES' AGREEMENT, *In re.*

It does not seem to us that these restrictions fall within section 6 (1) of the Act of 1956 at all. There is nothing in the boundary agreement which prevents members of one society purchasing goods from the other society, and, as both societies are members of the National Membership Scheme, a member of one society purchasing goods from the other society receives the same "dividend" in respect of those purchases as if he were a member of the society from which he purchased the goods. The only disadvantages which he suffers are that he has no voice in the management or right to invest in the share capital of the society of which he is not a member, but this has nothing to do with the terms or conditions on or subject to which the goods are to be supplied. This particular restriction is not, in our view, registrable under Part I of the Act of 1956 and we make no declaration with respect to it.

Declaration accordingly.

Solicitors: *Crofton, Craven & Co., Manchester; Treasury Solicitor.*

N. P.

[CHANCERY DIVISION.]

1960
Oct. 26.

* PRACTICE DIRECTION (REVIEW OF TAXATION).

Costs—Taxation—Application to review—Chancery Division—Supreme Court Costs Rules, 1959 (*S.I.* 1959, *No.* 1958, *Sch.* 2), *s.* 35.

The following directions have been given by the judges of the Chancery Division:

1. An application in the Chancery Division for review of taxation of costs shall be heard by one of the judges taking the non-witness list.

2. The application shall be made by ordinary summons in the proceedings in which the taxation has been ordered, and shall identify the item or items of the bill and the amount allowed in respect of which the application for review is made and shall be served on the parties affected.

3. The summons shall be issued in the chambers of the judge and will be returnable before the appropriate Chancery master in the first instance.

4. After the issue of the summons the party applying shall forthwith give notice thereof to the appropriate taxing master, and on receipt of such notice the taxing master shall cause to be lodged in chambers the bill of costs and the objections and answers made and given by the parties respectively on the review of the taxation of the bill of costs by the taxing master.

5. Each party shall, within four days after service of the

summons, lodge with the master all documents produced in evidence by that party at the hearing before the taxing master relating to the item or items or the amount or amounts under review.

6. When the summons is heard by the master, he will ensure that the application is in order and that all the relevant documents have been lodged, and will then adjourn the summons to the judge in chambers for directions. If the judge thinks fit to exercise the power conferred upon him by section 98 of the Supreme Court of Judicature (Consolidation) Act, 1925, to appoint assessors, a day shall be fixed by him for the hearing of the summons. If not, the summons shall take its ordinary place in the non-witness list.

7. If the judge decides to appoint assessors, the party applying shall within seven days of the judge's directions being given, lodge with the master two or more copies, as the case may be, of the summons, objections and answers mentioned in paragraph 4 for the use of the assessors, and the master shall forthwith advise the assessor or assessors who have been nominated to serve.

8. The party applying shall give notice to the parties affected of the date for the hearing forthwith after this has been fixed by the judge.

9. When each of the assessors has signified his acceptance of his appointment, the master shall send to each of them the notice of his appointment and the date fixed for the hearing of the summons, and a copy of the documents mentioned in paragraph 7.

W. F. S. HAWKINS,
Chief Master,
Chancery Division.

October 26, 1960.

[CHANCERY DIVISION.]

*PRACTICE DIRECTION (POWERS OF MASTERS).

1960
Oct. 26.

Practice—Chancery Division—Master—Powers—Amendment of R.S.C., Ord. 55, *r.* 15.

The following is published by permission of the judges of the Chancery Division for the information of the profession and supersedes their memorandum on this subject dated March 30, 1955.[1]

Under rule 15 of R.S.C., Ord. 55, which came into force in 1955 by virtue of Statutory Instrument 1954, No. 1728 (L.25), the masters of the Chancery Division have all the powers of a judge in chambers except such as the judges of the Division may direct, or as are prescribed by rule to be dealt with by a judge in person.

[1] [1955] 1 W.L.R. 427; [1955] 1 All E.R. 913.

1960

PRACTICE DIRECTION (POWERS OF MASTERS).

The judges of the Division do not propose at present to give any directions under that rule limiting the powers thereby conferred upon masters but issue the following memorandum for their guidance in exercising their powers.

1. Before the present rule came into force the masters were, by virtue of the former rules 15, 15A and 35A of Order 55, unable to make the following orders:
   (a) for service out of the jurisdiction;
   (b) for appointment of a new trustee (except a judicial trustee);
   (c) vesting property or appointing a person to convey land or to make or join in making a transfer of stock or a share in a ship;
   (d) for general administration (except in a creditor's action where there was evidence of insolvency) or for execution of a trust;
   (e) for accounts and inquiries concerning the property of a deceased person;
   (f) to bind persons on whom service of a notice of judgment or order for accounts and inquiries had been dispensed with.
2. In cases falling within paragraph 1, the masters should not make orders:
   (a) for service out of the jurisdiction except in clear cases;
   (b) for the appointment of a trustee or trustees except
      (i) a judicial trustee;
      (ii) in the case of incapacity;
      (iii) where all the former trustees are dead;
      (iv) where there is no power to appoint additional trustees except in the court (e.g., where a trust corporation is a trustee) and such trustees are required;
      (v) by approving the appointment of new trustees in an administration action; or
      (vi) where the fund is small, i.e., not substantially in excess of £500;
   (c) vesting property or directing or authorising some person to assign or convey except
      (i) consequent upon an appointment of new trustees, whether in or out of court;
      (ii) where the transaction giving rise to the application has been previously approved or directed by a judge;
      (iii) where the master has ordered a sale of property or specific performance of a contract; or
      (iv) where a corporation has been dissolved and its property has vested in the Crown and a successor to or purchaser from the corporation is entitled

and the Crown does not claim the property as bona vacantia;

(d) for the administration of an estate or execution of trusts in a beneficiary's action;

(e) for inquiries relating the next-of-kin of a deceased person, including special inquiries for particular persons and their issue, except in clear cases.

3. The power of the masters as deputies for the judge in chambers to make orders in matters other than those falling within paragraph 1 has long been limited by well-settled practice. That practice is, except as hereinafter mentioned, to be maintained. For example, a master should not sanction any compromise, arrangement or transaction.

4. Masters may make summary orders for specific performance under Order 14A by consent or if the following conditions are satisfied:

(i) the agreement sued upon is a formal written contract; and

(ii) the defendant is in default of appearance or does not appear at the hearing or there is clearly no defence.

5. Before the adoption of the present rule 2 of Order 55 it was necessary in certain cases for applications for payment or transfer of funds out of court to be made by petition. Other applications might be made by summons and on such applications masters might in proper cases make the appropriate order, regardless of the amount of the fund and nothing in this memorandum shall be taken to restrict their former powers. In cases where a petition would have been necessary under the previous rules, masters may make orders where the value of the fund, or the share or part thereof the subject of the application, does not significantly exceed £2,000 at the date of the issue of the summons.

6. In future, masters may make orders giving general liberty to wards of court to go out of the jurisdiction on condition that on each occasion

(i) the written consent of all persons concerned, or their solicitors, is obtained; and

(ii) the order provides that proper undertakings for the ward's return shall be lodged with the master.

7. Cases involving difficulties or complications should be referred by the master to the judge, as heretofore, and before exercising his extended powers a master should consider in every case whether it is one in which it would be more appropriate that the judge should make the order.

W. F. S. HAWKINS,
Chief Master,
Chancery Division.

October 26, 1960.

[COURT OF APPEAL.]

C. A.

1960
Oct. 10.

Ormerod, Willmer and Upjohn L.JJ.

* BEST *v.* GLENVILLE.

[Plaint No. PO 9838.]

Contract—Illegality—Landlord and tenant—Agreement—User requiring planning permission—Undertaking by tenant during negotiations for letting to apply for permission—Planning permission refused—Whether agreement to let before permission obtained void for illegality—Town and Country Planning Act, 1947 (10 *&* 11 *Geo.* 6, *c.* 51), *ss.* 12 (1), 23 (1), 24 (3).

Town and Country Planning—Development—Agreement to let premises for user requiring planning permission—Undertaking by proposed tenant to apply for permission—Permission refused—Whether agreement to let illegal—Town and Country Planning Act, 1947, *ss.* 12 (1), 23 (1), 24 (3).

In March, 1959, the plaintiff, the lessor of leasehold premises, agreed with the defendant to let to her a ground floor room at £10 a week for the purposes of a club. Both parties knew that such user was a "development" within section 12 of the Town and Country Planning Act, 1947,[1] for which planning permission was required, and during the negotiations for the letting the defendant undertook to apply for such permission to the local planning authority. The defendant entered into possession, made certain alterations, and opened the premises as a club in April, 1959. She applied for planning permission, which was refused, and that refusal was upheld by the Minister on appeal.

The defendant paid the agreed rent for 16 weeks until July and remained in possession of the premises until October, but refused to pay rent from July to October. On the plaintiff's claim for £140 for rent from July to October, the county court judge gave judgment in his favour. On appeal by the defendant:—

Held, dismissing the appeal, that the agreement between the parties, which involved a user of land, for which development permission was required under the Act of 1947 and had not previously

[1] Town and Country Planning Act, 1947, s. 12 (1): "Subject to the "provisions of this section and to "the following provisions of this Act, "permission shall be required under "this Part of this Act in respect of "any development of land which is "carried out after the appointed day."

S. 23 (1): "If it appears to the "local planning authority that any "development of land has been "carried out after the appointed day "without the grant of permission "required in that behalf under this "Part of this Act, or that any con-"ditions subject to which such per-"mission was granted in respect of "any development have not been "complied with, then, subject to any "directions given by the Minister, "the local planning authority may "within four years of such develop-"ment being carried out, if they "consider it expedient so to do "having regard to the provisions of "the development plan and to any "other material considerations, serve "on the owner and occupier of the "land a notice under this section."

S. 24 (3): "Where, by virtue of "an enforcement notice, any use of "land is required to be discontinued, "or any conditions are required to be "complied with in respect of any use "of land or in respect of the carry-"ing out of any operations thereon, "then if any person, without the "grant of permission in that behalf "under this Part of this Act, uses "the land or causes or permits . . . to "be carried out those operations, in "contravention of the notice, he shall "be guilty of an offence and liable on "summary conviction to a fine not "exceeding fifty pounds; . . ."

been obtained, was not in the circumstances an illegal contract, and, accordingly, the plaintiff was entitled to rent. The letting by the plaintiff of the premises for use as a club, on the understanding that planning permission would be applied for by the defendant, was a letting for a legal purpose.

Dictum of Lord Goddard C.J. in *Attorney-General* v. *Smith* [1958] 2 Q.B. 173, 180–181; [1958] 3 W.L.R. 81; [1958] 2 All E.R. 557 considered.

APPEAL from Judge Andrew, sitting at Marylebone County Court.

The plaintiff, John Henry Benjamin Best, was the lessor of the dwelling-house, 64, West End Lane, Hampstead. He was approached early in 1959 by one Thomas on behalf of the defendant, Mrs. Eileen Glenville, with a view to arranging for a letting of a room on the ground floor for the purpose of a bridge club. It was hoped that intoxicating liquors could be supplied at appropriate times.

Some negotiation went on between Thomas and the plaintiff and at least one conversation took place between the plaintiff and Thomas and the defendant; and it was arranged that the room should be let to the defendant for the sum of £10 a week for the purpose of a bridge club.

On March 25, 1959, the defendant attended at the plaintiff's office and produced a draft underlease, which had been drafted by her solicitors, and produced it for the plaintiff's approval. The lease was one for a period of 10 years from May 4, 1959, at a rent of £10 per week inclusive or rates, and by paragraph 2 (2) the lessee covenanted with the lessor "To use the demised "premises for the purposes of a club for which purposes the "premises are let."

The plaintiff was unable at that time to approve or sign the lease because it was necessary for him to obtain the permission of his head lessor for the premises to be let for this particular purpose. He wrote to the head lessor for that permission, which was eventually refused, but the plaintiff was allowed to let the premises to the defendant for the purpose of a club, on the understanding that if the head lessor objected to the way in which the premises were being used he would give some reasonable notice to the plaintiff that the matter must be brought to an end.

On March 23, 1959, the defendant went into possession of the premises. She paid the sum of £40, either as the first month's rent in advance or as a deposit. She did a certain amount of alteration, and the room was opened as a club on April 13.

Both the plaintiff and the defendant knew during the negotiations that the use of these premises as a club was a development of the property within the meaning of section 12 of the Town and Country Planning Act, 1947, and that accordingly the consent of the local planning authority was required. The

C. A.
1960
BEST
v.
GLENVILLE.

evidence of the plaintiff and of Thomas, which was accepted by the county court judge, was that the matter was discussed during the negotiations, and certainly at the final meeting, and that it was understood that the defendant would apply for the necessary planning permission and also comply with any necessary formalities under the Licensing Acts.

The defendant applied for planning permission which was refused; and her appeal to the Minister from that refusal was dismissed after an inquiry and a report to the Minister.

The defendant, who had paid the rent for a period of 16 weeks until July 3, thereupon refused to pay any further rent, although she remained in possession until October.

The plaintiff brought proceedings in the county court claiming the sum of £140 in respect of rent for the period from July to October.

On February 11, 1960, the county court judge gave judgment for the plaintiff on his claim, holding that a letting of premises for a use contrary to, and for which permission had not been obtained or granted as required by, the provisions of the Act of 1947 did not render the letting of the premises illegal. The defendant appealed.

S. N. Bernstein for the defendant.
Leolin Price for the plaintiff.

The following case, in addition to that referred to in the judgment, was cited in argument: *Edler* v. *Auerbach*.[2]

ORMEROD L.J. stated the facts set out above, said that Mr. Bernstein for the defendant had relied to some extent on the clause in the draft lease which was before the court and by which the lessee covenanted "to use the demised premises for the "purposes of a club for which purposes the premises are let," and said that after the appeal against the refusal of planning permission the local authority could at any time have served on the defendant an enforcement order, and that if she did not comply with that enforcement notice she would have been liable to a penalty under the Town and Country Planning Act, 1947. His Lordship continued:

The contention of Mr. Bernstein on this appeal is that the plaintiff is not entitled to the rent of these premises for the period from July until October because the agreement by the plaintiff to let these premises to the defendant was an illegal contract and therefore a contract which could not be enforced in the courts.

It is necessary to refer to the Town and Country Planning Act, 1947, and the first section to be considered is section 12 (1) which provides: "Subject to the provisions of this section and to "the following provisions of this Act, permission shall be required

[2] [1950] 1 K.B. 359; 65 T.L.R. 645; [1949] 2 All E.R. 692.

"under this Part of this Act in respect of any development of "land which is carried out after the appointed day."

There is no doubt—it is not in dispute between the parties—that this particular user of these premises was a development which was carried out after the appointed day, and that therefore section 12 (1) applied.

Section 23 (1) provides: "If it appears to the local planning "authority that any development of land has been carried out "after the appointed day without the grant of permission required "in that behalf under this Part of this Act, or that any condi-"tions subject to which such permission was granted in respect "of any development have not been complied with, then, "subject to any directions given by the Minister, the local "planning authority may within four years of such development "being carried out, if they consider it expedient so to do having "regard to the provisions of the development plan and to any "other material considerations, serve on the owner and occupier "of the land a notice under this section."

In other words, an enforcement notice could be served by the local authority on the person they considered to be contravening the regulations and using the premises for purposes other than that permitted under the Act; but discretion was in the local authority to do it if they considered it to be expedient, and it is to be noted that if an enforcement notice is not served within four years then apparently the enforcement notice cannot be served at all and the user of the land can continue even though it is a development and therefore a contravention of section 12 (1).

Section 24 (3) provides: "Where, by virtue of an enforcement "notice, any use of land is required to be discontinued, or any "conditions are required to be complied with in respect of any "use of land or in respect of the carrying out of any operations "thereon, then if any person, without the grant of permission "in that behalf under this Part of this Act, uses the land or "causes or permits the land to be used, or carries out or causes "or permits to be carried out those operations, in contravention "of the notice, he shall be guilty of an offence and liable on "summary conviction to a fine not exceeding £50," and so on.

Thus the scheme of the Act appears to be that the local authority may, in a proper case, serve an enforcement notice if in the view of the local authority there has been a development and therefore a contravention of the Act; and if that enforcement notice is not complied with by the occupier of the land then he will be liable to a penalty. But unless an enforcement notice has been served there is no liability for a penalty.

Mr. Bernstein says that when the agreement for this letting was negotiated—and, of course, it was never more than a letting, because the lease was never signed—both parties knew perfectly well that the premises were to be used for the purpose of a club. Further than that, both parties realised at the time when the negotiations were taking place that this user as a club would be

C. A.
1960
BEST
v.
GLENVILLE.
Ormerod L.J.

a development within section 12 (1), and therefore something which required planning permission. Mr. Bernstein then argues that the premises were let to the defendant so that they could be used immediately as a club, and in those circumstances what was contemplated by the parties at the time when this agreement was made was an illegal user of the premises; therefore the contract was illegal in itself and cannot be enforced in a court of law. That, I think, puts fairly the argument which Mr. Bernstein has addressed to us with very considerable persuasiveness.

He has cited, as authority for his proposition, a passage from the judgment of Lord Goddard C.J. in *Attorney-General* v. *Smith*,[1] which was a case concerning land used for the purpose of a caravan site. It was agreed that the use of land for the purpose of caravan sites was a development within the meaning of the Act, and the question was whether and at what time the penalty was incurred. Lord Goddard C.J., after stating what the question was, said[2]: "The machinery of the Act is this. Section 12 (1) "provides that 'Subject to the provisions of this section and to "'the following provisions of this Act, permission shall be "'required under this Part of this Act in respect of any develop-"'ment of land which is carried out after the appointed day.' "The sense of that section is obvious: it is that development of "land carried out without permission is unlawful—it is contrary "to the Act. But is does not follow, because it is contrary to "the Act, that a penalty is incurred at once."

What Mr. Bernstein is saying, in effect, is that Lord Goddard is holding that a contravention of the Act is illegal in the sense that it is unlawful because it is contrary to the Act, and in those circumstances a contract based on such a contravention must be unenforceable. I cannot accept that contention. The facts here, as found by the county court judge, are that the plaintiff let these premises to the defendant, admittedly so that they could be used as a club and admittedly knowing that planning permission was required. The judge found on both the evidence of the plaintiff and of the defendant's own witness, Thomas, that she knew about obtaining planning permission and intended to see to it herself. It was also found by the judge that the proper inference to draw from the evidence of the plaintiff was that he would not have let the premises had he known they were going to be used without planning permission.

In those circumstances I find it very hard to see what there is illegal in the contract so far as the plaintiff is concerned. He let the premises for a perfectly proper purpose, that is, for their use as a club, which is something he was entitled to do. There was no duty on him to obtain planning permission. It was unnecessary, in the circumstances, for him to say, as it was suggested he should have said: "These premises are let only on

[1] [1958] 2 Q.B. 173; [1958] 3 W.L.R. 81; [1958] 2 All E.R. 557.

[2] [1958] 2 Q.B. 173, 180–181.

"the understanding that if they are for the use of a club there "must be planning permission," because that was something which had already come to the knowledge of the defendant, and was something which she was prepared to deal with by applying for planning permission. In those circumstances why should this be an illegal agreement? If neither party took the trouble to take any steps to obtain planning permission, or if each party knew that no steps were to be taken, it might well be the case, if proved, that there was something unlawful in this agreement. But that is not this case and I can see no reason why the plaintiff should be held to have entered into an illegal agreement.

Lord Goddard, in *Attorney-General* v. *Smith*,[3] is not saying in terms, as I read his judgment, that development of land carried out without permission is illegal in the sense that any agreement relating to that land which has that development in view would be illegal. He is saying it is unlawful because it is contrary to the Act. Mr. Bernstein has, quite rightly, pointed out that the fact that no penalty may be inflicted is not necessarily the criterion as to whether a contract is illegal or legal; but it seems to me he is reading too much into the passage which he has cited from Lord Goddard's judgment.

Be that as it may, I am quite satisfied that this contract was entered into by the plaintiff for a perfectly proper and perfectly legal purpose. Further, I think it appears clear from the evidence that it was the intention of the parties that that purpose should be carried out in a legal way and in accordance with the terms of the Town and Country Planning Act, 1947. The fact that permission was not granted—which was something which apparently was not in the contemplation of the parties at the time of the negotiations—makes no difference to the question whether the agreement was a legal one or not.

WILLMER L.J. I have reached the same conclusion, and for the same reasons.

UPJOHN L.J. I agree. I also desire to add this. Mr. Bernstein's argument I think necessarily involves the view that an agreement between two parties which involves a user of land for which development permission is required is necessarily illegal if such permission is not previously obtained. I am quite unable to accept so broad a proposition.

I agree that this appeal should be dismissed.

Appeal dismissed, with costs.

Solicitors: *Beach & Beach; Richardson, Sadler & Co.*

M. M. H.

[3] [1958] 2 Q.B. 173, 180–181.

[COURT OF APPEAL.]

C. A.

1960
Oct. 5.

Ormerod, Willmer and Upjohn L.JJ.

* DREWERY AND DREWERY *v.* WARE-LANE.

Agency — Estate agent — Commission — "Prospective purchaser" — Meaning—Contract by vendor to pay commission if and when prospective purchaser signs estate agents' purchaser's agreement and vendor signs vendor's agreement—Agreements signed by prospective purchaser and vendor—Prospective purchaser unable to purchase without mortgage—Termination of negotiations for sale by vendor—Whether estate agents entitled to commission.

On January 3, 1959, a firm of estate agents, who had been instructed by the owner of a leasehold house to sell the property, informed him of an offer by one S. to purchase the property. He agreed to accept the offer and thereupon read and signed two documents on printed forms prepared by the estate agents.

The first document, described as the "letter of authority," provided by clause 4: "I agree to pay you commission at the rate "laid down by the various professional institutes . . . if and when "(a) a prospective purchaser signs your 'purchaser's agreement' "and (b) I sign your 'vendor's agreement' . . ."

The second document signed by the owner was the estate agents' "vendor's agreement." On the same day S. signed their "pur-"chaser's agreement."

S., who was unable to purchase without a mortgage, delayed applying for a mortgage pending the outcome of negotiations to acquire the freehold of the premises. On January 12, 1959, the owner informed the agents that as no progress had been made with the sale to S. he had disposed of the property to another person.

On the estate agents' claim for their commission under the contract:—

Held, that on the true construction of clause 4 of the letter of authority, which constituted the contract between the parties, the commission was payable, since conditions (a) and (b) had been fulfilled and the contract was in clear and unequivocal terms. A "prospective purchaser," as distinct from a purchaser, did not necessarily connote a person "ready," "willing" and financially "able" to purchase, but was a person who had the question of purchase in bona fide prospect and was prepared to make an offer, though he might never advance to the stage of becoming a purchaser. As on the evidence S. was a "prospective purchaser" the commission became payable on the signing of the relevant agreements.

Dicta in *Luxor (Eastbourne) Ltd.* v. *Cooper* [1941] A.C. 108; 57 T.L.R. 213; [1941] 1 All E.R. 33, H.L. considered.

APPEAL from Judge Wingate Saul sitting at Dartford County Court.

The defendant, Dennis Arthur Ware-Lane, was in 1958 the owner of a leasehold house, 81, Ridgeway West, Sidcup. There were still seventy-eight years of the lease to run and there was a ground rent on the premises of £6 10s. per annum. In December 1958 the owner decided to sell the house and gave instructions, on December 10, to the plaintiffs, Drewery and Drewery, a firm of estate agents. The price which he told them to ask for the premises was £2,250.

The estate agents got into communication with one Sinho who at some time between December 10 and 21 offered £2,100 for the premises. The offer was communicated to the owner, who refused to accept it.

Further negotiations took place between the estate agents and Sinho, with the result that a further offer was made and on January 3, 1959, a meeting took place at the offices of the estate agents, when one Lowman, the manager of the firm's Sidcup office, had a conversation with the owner. Lowman, as the county court judge found, told the owner that Sinho was prepared to pay £2,160 for the premises and the owner indicated that he was willing to accept that offer. In consequence, two documents were signed then and there by the owner in the office of the estate agents. The first document was called a letter of authority which the court found constituted the contract between the estate agents and the owner with regard to the sale of the house. In addition, the owner signed a document called the vendor's agreement whereby he agreed to sell the house to Sinho at the price of £2,160, subject to contract. In addition, on the same day there was signed by Sinho a purchaser's agreement whereby he agreed to purchase the premises for the sum of £2,160, again subject to contract.

The letter of authority signed by the owner and addressed to the estate agents, was a printed form, headed: "*Re* 81, Ridge-"way West, Sidcup, Kent." The first paragraph read: "I "instruct and authorise you to offer the above property for sale "at the price of £2,250." The second and third paragraphs in the printed document were crossed out, and the fourth was as follows: "I agree to pay you commission at the rate laid down "by the various professional institutes, viz., 5 per cent. on the "first £500; 2½ per cent. on the next £4,500, and 1½ per cent. "on the remainder of the purchase price if and when (a) a "prospective purchaser signs your 'purchaser's agreement' and "(b) I sign your 'vendor's agreement' (receipt of a copy of a "form of each of the above agreements is hereby acknowledged)."

The agreements having been signed on January 3, 1959, some discussion arose between the parties about the purchase of the freehold of the premises. The owner was at that time under the impression that it could be purchased for £170. The purchaser understood that the owner of the freehold was asking for a larger sum. The purchaser was not able to complete the purchase unless he had a mortgage on the premises, and he held up the question of applying for a mortgage until he had been able to buy the freehold or had ended the negotiations in connection with his attempt to buy the freehold.

On January 12, nine days after the vendor's and purchaser's agreements had been signed, the owner wrote to the estate agents, telling them that as no further progress had been made with the sale of the property to Sinho, and as no further instructions had been received from Sinho's solicitors, he felt that it was in

C. A.
1960
DREWERY AND DREWERY v. WARE-LANE.

his own interest to make other arrangements, and he had accordingly disposed of the property to another person. Sinho was willing to go on with the purchase and would have gone on with it had the matter not been put an end to on January 12 by the letter from the owner. A short time later Sinho bought another house for a sum rather more than that which he was prepared to pay for the leasehold house.

The estate agents brought an action in the county court claiming their commission. By their particulars of claim they stated that they had found a purchaser Sinho who was ready, willing and able to purchase the house for £2,160, subject to contract and that by the agreement in writing, namely, the letter of authority, the owner had agreed that, they having received the offer from Sinho, they were entitled to commission as agreed, but that the owner, in breach of the agreement, had notified them on January 12 that he had accepted another offer.

By his defence the owner denied inter alia that Sinho was at the material time ready, willing or able to purchase the house for any sum.

The county court judge, on January 25, 1960, gave judgment for the estate agents for the sum claimed, £66 10s. In his judgment he said: "It is to be noted that in clause 4 (a) the "word 'purchaser' is qualified by the epithet 'prospective.' It "seems to me that a 'prospective purchaser' is essentially "different from a purchaser. [He] is one who has purchase "in prospect or contemplation and he may never advance to the "stage of becoming a purchaser. . . . I conclude that the "plaintiffs have succeeded in devising a form of contract which "enables them to avoid the pitfalls created by the cases to "which I have referred and entitles them to their commission "in the events which have happened. If a person is astute "enough to find a loophole in the law, he is entitled to profit by "his own or his legal advisers' ingenuity; but I feel that persons "who in the future are contemplating employing the plaintiffs "to sell their property for them would be well advised to take "legal advice before signing documents which the plaintiffs put "before them."

The owner appealed.

L. K. E. Boreham for the owner.

M. H. Jackson Lipkin for the estate agents.

Graham & Scott (Southgate) Ltd. v. *Oxlade* [1] and *Ackroyd & Sons* v. *Hasan* [2] were referred to in addition to those cases referred to in the judgment.

[1] [1950] 2 K.B. 257; 66 T.L.R. (Pt. 1) 808; [1950] 1 All E.R. 856, C.A.

[2] [1960] 2 W.L.R. 810; [1959] 1 W.L.R. 706; [1959] 2 All E.R. 370.

ORMEROD L.J. stated the facts set out above and said that the case turned on the construction of the letter of authority which constituted the agreement between the estate agents and the owner with regard to the sale of this house. His Lordship continued:

The effect of that agreement is that the vendor contracts to pay to the plaintiffs the estate agents' commission based on the purchase price at the rates which are set out in that letter, if two things happen: first, if a prospective purchaser signs the plaintiffs' purchaser's agreement, that is to say, the purchaser's agreement which has been drawn up in a form settled by the plaintiffs, and, secondly, if the vendor signs the plaintiffs' vendor's agreement—and that, it was submitted in this case by the plaintiffs, is exactly what had happened. The vendor had signed the vendor's agreement, and the prospective purchaser, on the same day, had signed a purchaser's agreement in the form prescribed by the plaintiffs, the agreement which was referred to in each case in the letter of authority, and in those circumstances the commission at the prescribed rate was payable on the sum of £2,160, which was the purchase price set out in the two agreements. [His Lordship stated the facts as to negotiations for the purchase of the freehold by Sinho, and the circumstances in which the owner broke off negotiations and continued:]

The estate agents have contended, and they still contend, that in those circumstances the commission became payable: the conditions laid down in the letter of authority had been complied with and the owner was liable to pay the sum of £66 10s. to the estate agents for commission.

The matter came before the county court judge, and I think there is little in the evidence which is controversial which requires me to deal at any length with it. But the facts were quite plain, I think, that Sinho wished to purchase this property and offered the sum of £2,160 for it, and he was willing to go on with the purchase and would have gone on with it had the matter not been put an end to on January 12 by the letter from the owner.

The short issue in the case is this: The estate agents, on the one hand, say that the conditions in the letter of authority have been complied with and that as soon as the two agreements were signed by the vendor and the prospective purchaser respectively the commission became payable, and there is no reason why the commission should not be paid. The owner, on the other hand, says that that cannot be right, that that cannot be the proper construction of the letter of authority because there was nothing to satisfy the court that Sinho was, in fact, a prospective purchaser in the sense that he was a man who was ready, able and willing to complete the contract if, in fact, a contract was entered into, and, therefore, the whole of this case depends on the construction of the relevant paragraph of the letter of authority.

We are not helped very much in this case by the previous

C. A.
1960
DREWERY AND DREWERY v. WARE-LANE.
Ormerod L.J.

decisions on estate agents' agreements. The county court judge came to the conclusion, having given the matter very careful consideration, and having considered the authorities which were cited to him, that this was a case where, in clear and unequivocal terms, it was laid down in the contract that commission was payable when events had happened which, in fact, did happen in this case, and that, in those circumstances, he could do no other than give judgment for the estate agents.

The passage, of course, which the county court judge no doubt had clearly in mind, and which has been cited to us in this case, is from the speech of Lord Russell of Killowen, in *Luxor (Eastbourne) Ltd.* v. *Cooper*[1]: "It is possible that an owner may be "willing to bind himself to pay a commission for the mere "introduction of one who offers to purchase at the specified or "minimum price; but such a construction of the contract would "in my opinion require clear and unequivocal language." The submission of Mr. Boreham really comes to this, that in this case the language is not clear and unequivocal, that it is capable of more than one construction, and, in those circumstances, cannot be regarded as an agreement which entitles the estate agents to their commission before an actual purchase has taken place. Mr. Boreham bases his argument on the fact that the words in the condition in paragraph 4 (a) of the letter of authority are that "a prospective purchaser signs your 'purchaser's agree-"'ment'"; and he submits that "prospective purchaser" must mean something more than that a person "signs your 'pur-"'chaser's agreement'"; it must mean, as submitted by Mr. Boreham, a man who is ready to purchase, who is willing to purchase, subject to contract, and who has the necessary financial means to carry the purchase into effect.

As far as I know, there is no authority on what is meant by "a prospective purchaser." Had the word "prospective" not been put in there it might very well be that, in view of the authorities, the estate agents might have been in some difficulty. But it appears to me that the word "prospective" does not connote necessarily either the term "ready" or "willing" or "able"; it means a man who has the question of buying this property in prospect or in contemplation and is prepared to make an offer with regard to it. This, of course, does, I think, mean that it must be a bona fide prospect and that, in the ordinary way, it would be accepted that such an offer, made in those circumstances, would be bona fide, and it would be for the defendant to prove, if he sought to set it up, that the offer was not a bona fide offer.

I think that the county court judge put the matter clearly in his judgment when he said: "Returning to the letter of authority, "it is to be noted that in clause 4 (a) the word 'purchaser' is "qualified by the epithet 'prospective.' In *Dennis Reed Ltd.* v.

[1] [1941] A.C. 108, 129; 57 T.L.R. 213; [1941] 1 All E.R. 33, H.L.

"*Goody*,[2] it was held that the word 'purchaser,' when used "without any qualifying adjective, connotes one who completes "the purchase, but Hodson J. said[3] 'the word may be qualified "'by other words used in connection with it.' It seems to me "that a 'prospective purchaser' is essentially different from 'a "'purchaser.' A 'prospective purchaser' is one who has pur-"chase in prospect or contemplation, and he may never advance "to the stage of becoming a purchaser." That, I think, sets out clearly the position of a prospective purchaser.

In this case the evidence is not disputed that Sinho made an offer to purchase this property for £2,160; he signed an agreement to purchase for that sum, subject to contract; he stated in evidence that he was prepared to go on and would have gone on had the owner not put an end to negotiations by his letter of January 12, and, indeed, he showed that he wished to be a purchaser of a house because the evidence is that a very short time later he bought another house for a sum rather more than the sum that he was prepared to pay for this house. It seems to me, in those circumstances, and having regard to that evidence, that it would be extremely difficult to describe this man as anything other than a prospective purchaser and, if in fact he is a prospective purchaser, I find it difficult to see how any different construction can be put on this paragraph of the letter of authority. The evidence was that the defendant, before he signed the letter of authority, read it, that he read also the vendor's agreement, and he knew, therefore, that he was agreeing to sell the property for £2,160, subject to contract. The evidence of Lowman was that the owner also saw and read the agreement which was later in the day signed by the purchaser. That was not accepted by the county court judge, but it is clear that he had the opportunity of reading it had he so wished to do.

The question in this case is a short one; it is purely a question of construction of clause 4 of the letter of authority and, as I see it, the clause does not admit of anything other than that if two things happen—that is, if the vendor signs the vendor's agreement as put forward to him by the estate agents, and if a prospective purchaser signs their purchaser's agreement—the commission is payable. That, I think, happened in this case, and, in those circumstances, it appears to me that the appeal must be dismissed.

It may very well be that it is undesirable that agreements of this kind should be signed by prospective vendors, and it may be wise for a prospective vendor to examine with very great care an agreement which he signs in these circumstances. That is not a matter for this court. We have to consider the agreement which

[2] [1950] 2 K.B. 277; 66 T.L.R. (Pt. 1) 918; [1950] 1 All E.R. 919, C.A.

[3] [1950] 2 K.B. 277, 292.

C. A.
1960
DREWERY AND DREWERY v. WARE-LANE.

is put before us and consider what is the proper construction to be put on its terms.

WILLMER L.J. I agree, and there is nothing I desire to add.

UPJOHN L.J. I agree also.

Appeal dismissed with costs.
Leave to appeal to the House of Lords refused.

Solicitors: *Kinch & Richardson for T. G. Baynes & Sons, Dartford; E. Edwards, Son & Noice.*

M. M. H.

[CHANCERY DIVISION.]

1960
Oct. 6, 7, 20.
Cross J.

* *In re* MORRIS'S WILL TRUSTS. PUBLIC TRUSTEE *v.* MORRIS AND OTHERS.

[1959 M. No. 961.]

Capital or Income — Administration or trust — Debentures — Scheme of arrangement—Statement by company that principal secured and interest accrued should be satisfied by payment of cash and securities —Whether binding as between tenant for life and remainderman— Whether payment apportionable.

By his will, a testator, who died on December 28, 1907, empowered his trustees to allow any part of his estate to remain in its then state of investment. At the date of his death the testator's estate included £11,400 first mortgage debentures of a company.

In 1933 the court approved a scheme of arrangement entered into between the company and the holders of its first mortgage debentures whereby the half-yearly instalments of interest on the debentures falling for payment during the period January 1, 1933, to a prescribed date not earlier than December 31, 1933, nor later than December 31, 1935, were to be paid only to the extent thereby provided and all instalments of interest, if not paid at the due date, were to carry interest at 6 per cent. per annum from that date until the date of payment, and interest on interest was to be payable and should be secured in the same way as the interest. By a series of further schemes of arrangement the period of postponement of interest was extended to December 31, 1955. By another scheme of arrangement, "the 1955 scheme," entered into in that month and approved by the court on February 21, 1956, it was provided that against delivery of the debentures, including all unpaid interest coupons, the company should procure the allotment and payment to the holders by a company formed in Canada for the purpose of taking over the assets of the company, of U.S.$100 of the 6 per cent. debenture stock of the Canadian company, U.S.$70 5 per cent. convertible debenture

stock of that company and £40 sterling in respect of each £100 of the debentures held by them. It was further provided by clause 5 that on the scheme becoming operative all the obligations of the company in respect of interest accrued on the debentures and interest accrued on the interest secured and not paid on the due dates should be cancelled and thereafter cease to accrue, and that the principal secured by the debentures should be satisfied by the allotments and payments by the Canadian company.

From time to time the testator's trustees sold part of his holding, and immediately before the 1955 scheme came into operation only £4,300 of the debentures remained unsold. Pursuant to the order approving the 1955 scheme, £1,720 cash, U.S.$4,300 6 per cent. debenture stock and U.S.$3,010 5 per cent. convertible debenture stock of the Canadian company were paid to the trustee of the will, the stock together totalling an amount equivalent to £2,580, the total amount paid thus amounting to £4,300, and the £1,720 cash bearing approximately the same proportion to £4,300 as the interest and interest on interest bore to the principal, namely, 40 per cent. The amounts due to the trustee at this date were £4,300 in respect of principal, £1,526 less tax for unpaid instalments and £1,733 less tax for interest accrued on interest.

On a summons by the trustee to determine whether the whole of the cash and securities received by him should be treated as capital, or whether some, and if so what, part should be treated as income:—

Held that, although binding as between the company and its debenture holders, clause 5 of the 1955 scheme, which was obviously inserted with tax considerations in mind and would operate unfairly as between tenant for life and remainderman, did not exclude the general equitable principle of apportionment between income and capital and that that principle was not precluded by the omission of a proviso in the scheme that the nature of the payments was not to be conclusive where the debenture holder was a trustee; and that, therefore, a fraction of the cash and securities bearing the same proportion to the whole as the amount of the arrears of interest on the debentures and of the unpaid interest on interest not paid on the due date bore to the total sum must be treated as income and the rest as capital.

In re Atkinson [1904] 2 Ch. 160, C.A.; *Smith* v. *Law Guarantee and Trust Society Ltd.* [1904] 2 Ch. 569; 20 T.L.R. 789, C.A. followed.

In re Pennington [1914] 1 Ch. 203; 109 L.T. 814, C.A., distinguished.

Adjourned summons.

By his will the testator, Robert Morris, who died on December 28, 1907, conferred on his trustees "power to allow any part "of my said estate to remain in its then state of investment." At the date of his death his estate included £11,400 first mortgage debentures of the Peruvian Corporation Ltd. ("the company"), a company incorporated in this country. In 1932 the company, which had been for many years in financial difficulties, put forward a scheme of arrangement between itself and the holders of its first mortgage debentures which scheme was approved by the court on February 24, 1933. The scheme provided that the half-yearly instalments of interest on the debentures falling for payment between January 1, 1933, and a date not earlier than

1960

MORRIS'S WILL TRUSTS, *In re.*

December 31, 1933, nor later than December 31, 1935, to be prescribed by the committee thereby constituted, should be paid only to the extent thereby provided, and that all instalments of interest, if not paid on the due date, should carry interest at the rate of 6 per cent. per annum from that date until the date of payment. Such interest on interest was to be paid with and upon and subject to the same terms and conditions and to stand secured in the same manner as the instalment of interest in respect of which it was payable, and was to be treated as forming part of the instalment for all purposes.

The company subsequently put forward seven further schemes of arrangement between itself and the holders of its debentures, each of which was approved by orders of the court. Each of those schemes extended the period of postponement of interest provided for by the 1933 scheme, and the last, dated December 17, 1952, extended the period to December 31, 1955. On June 30, 1955, the sums owing on the security of the debentures were: for principal, £3,946,900; for interest, £1,361,681; and for interest on interest, £1,434,965.

In December, 1955, the company put forward a final scheme of arrangement between itself, the holders of its first mortgage debentures, the holders of its preference stock and the holders of its ordinary stock ("the 1955 scheme"). The 1955 scheme provided, inter alia, by clause 6 (b) that against delivery of the debentures, including all unpaid interest coupons, the company should procure the allotment and payment to the holders thereof by the Peruvian Transport Corporation Ltd., which had been formed in Canada for the purpose in effect of taking over the assets of the company ("the Canadian company"), of (a) U.S. $100 of the 6 per cent. debenture stock of the Canadian Company, (b) U.S.$70 5 per cent. convertible debenture stock of the Canadian company, and (c) £40 sterling in respect of each £100 of the debentures held by them respectively.

It was further provided by clause 5 that upon the scheme becoming operative (i) all the obligations of the company in respect of interest accrued on the debentures and interest accrued on the interest thereby secured and not paid on the due dates should be cancelled and that such interest should cease to accrue thereafter; and (ii) that the principal moneys secured by the debentures should be satisfied by the allotments and payments by the Canadian company.

The 1955 scheme was approved by an order of the court under section 206 of the Companies Act, 1948, made on February 21, 1956.

The testator's trustees had retained the debentures under the power in the will, but parts of the holding had been sold from time to time and immediately before the 1955 scheme came into operation only £4,300 of the debentures remained unsold. Pursuant to the order of the court approving the 1955 scheme, £1,720 cash,

U.S.$4,300 6 per cent. debenture stock and U.S.$3,010 5 per cent. convertible stock of the Canadian company were paid to the Public Trustee, then the sole trustee of the will. There was in fact then due to the trustee £4,300 in respect of principal, £1,526 10s. less tax in respect of unpaid instalments of interest for the period April 1, 1950, to March 1, 1956, and £1,733 0s. 8d. less tax, in respect of interest accrued on interest not paid on the due date. It appeared from an explanatory statement in connection with the 1955 scheme, circulated by the company under section 207 of the Companies Act, 1948, that the aggregate value of the two holdings of debenture stock in the Canadian company allotted to the trustee was equivalent to approximately £2,580. If the £1,720 cash received by the trustee were added to this sum, the total of £4,300 was the same as the nominal amount of the debentures held by the trustee. Further, the sum of £1,720 bore approximately the same proportion to the total sum of £4,300 as the interest and interest on interest due under the debentures bore to the principal sum then due, namely, approximately 40 per cent.

The trustee took out a summons to determine (1) whether the whole of the cash and securities received by him under the 1955 scheme in respect of the £4,300 first mortgage debentures should be treated as capital, or (2) whether some part should be treated as income, and if so, whether such part should be (i) a fraction bearing the same proportion to the whole as the amount of the arrears of interest on the debentures when the scheme was approved bore to the total sum of principal, interest and interest on interest then secured, or (ii) a fraction bearing the same proportion to the whole as the amount of such arrears of interest on the debentures and of the unpaid interest on such interest not paid on the due date bore to the said total sum, or (iii) a fraction bearing the same proportion to the whole as the amount of such arrears of interest bore to the aggregate sum of principal and interest (but not interest on interest) then secured, or (iv) a fraction bearing the same proportion to the whole as the amount of such arrears of interest and the unpaid interest on such interest not paid on the due date bore to the aggregate sum of principal and interest (but not interest on interest) then secured.

It was common ground between the parties that no provision in the will threw any light on the question.

The first and second defendants represented those interested in income, and third and fourth defendants represented those interested in capital.

J. A. Wolfe for the plaintiff trustee.

L. H. L. Cohen for the first and second defendants.

J. P. Brookes for the third and fourth defendants.

The following cases, in addition to those referred to in the

1960

MORRIS'S WILL TRUSTS, *In re.*

judgment, were cited in argument: *In re Hubbuck* *; *Bouch* v. *Sproule* †; *In re Doughty* ‡; *In re Alston* §; *In re Alamaba, New Orleans, Texas and Pacific Junction Railway Co.*‖

Cur. adv. vult.

Oct. 20. CROSS J. read the following judgment which stated the facts as set out above and continued: Where trust funds are properly invested on a mortgage and the interest falls into arrear, if the security realises less than the principal and arrears of interest, the proceeds are normally divisible between income and capital in shares bearing the same proportion to each other as the arrears of interest and the principal. (See *In re Atkinson.*[1])

Where the mortgage makes no provision for payment of interest on arrears of interest, those interested in income cannot claim against those interested in capital to have the sum payable to them increased by allowing any interest on interest in the calculations. (See *In re Moore.*[2])

But in this case the 1933 scheme provided that interest on interest should be payable and should be secured in the same manner as the interest in respect of which it became payable. If, therefore, the 1955 scheme had simply provided that the debenture stock and cash to be received from the Canadian company should be accepted in full satisfaction of everything owing by the company under its debentures in respect either of principal or interest or interest on interest, there would, I think, have been no doubt that the debenture stock and cash received by the Public Trustee would have been apportioned between capital and income in the proportions which the sum owing to him for principal bore to the sums due to him for interest and interest on interest.

The 1955 scheme, however, expressly provided that all the obligations of the English company in respect of arrears of interest and of interest on interest should be cancelled, and that the debenture stock and cash provided by the Canadian company should be accepted in satisfaction of the principal owing under the debentures.

The reason for the insertion of this provision was no doubt a wish to avoid payment of income tax on any part of what was to be provided by the Canadian company; but the question which I have to decide is whether this express term of the scheme precludes the application of the general principle of apportionment between income and capital established by *In re Atkinson.*[3]

It was suggested in argument that some help in the solution of this question could be derived from the cases dealing with

* [1896] 1 Ch. 754, C.A.
† (1887) 12 App.Cas. 385, H.L.
‡ [1947] Ch. 263; 63 T.L.R. 257; [1947] 1 All E.R. 207, C.A.
§ [1901] 2 Ch. 584.
‖ [1891] 1 Ch. 213; 7 T.L.R. 171, C.A.
[1] [1904] 2 Ch. 160, C.A.
[2] [1885] W.N. 17.
[3] [1904] 2 Ch. 160, C.A.

capital profits distributed by limited companies. In such cases the company often states in a circular letter to the shareholders that the payment which they are to receive is a distribution of capital (see, e.g., *In re Bates*[4]), and sometimes a provision to that effect is contained in the articles (see, e.g., *In re Harrison's Will Trusts*[5]), but it is now well settled that the court will pay no attention to such statements when considering whether the payment is income or capital under the relevant trust instrument. Counsel for those interested in income in this case suggested that in the same way I ought to pay no attention to the provisions in clause 5 of the 1955 scheme. But I think that counsel for those interested in capital was right in saying that there is really no analogy between the two cases.

The reason why the court takes no notice of statements made by the company as to the nature of the payment to be received from it by the shareholders is that a limited company which is not in liquidation has no power to make any payment to its shareholders by way of return of capital otherwise than by way of a reduction of capital sanctioned by the court. Any other payment, even though made out of capital profits and not liable to income tax, must necessarily be a dividend. No statement by the company or provision in the articles can alter the legal position. (See *Hill* v. *Permanent Trustee Company of New South Wales.*[6]) But there is nothing to prevent a mortgagee agreeing to accept a sum paid by the mortgagor, at all events if it does not exceed the amount owing in respect of principal, in discharge of the principal and to treat the arrears of interest as cancelled.

Clause 5 of the 1955 scheme is undoubtedly binding as between the company and its debenture holders. The question is whether, being so binding, it excludes the application of the principle in *In re Atkinson*[7] between the beneficiaries under trust instruments where the debenture holders are trustees.

Before leaving the capital profits cases, I would observe that it has been suggested in some of them that the court may have jurisdiction to apportion some part of the dividend to capital in cases where the trustees in question have committed a breach of trust. (See *In re Rudd.*[8]) If, for example, the trust shareholding is large enough to control the situation, it could be argued that it was the duty of the trustees, in order to hold an even hand between capital and income, to see to it that the company, instead of distributing the whole of the capital profit by way of dividend, capitalised part of it and issued bonus shares which would be capital under the settlement. If they failed in their duty, the court, it might be said, should put the matter right.

Here, however, there can be no case for exercising any jurisdiction founded on breach of trust. The trust holding was

[4] [1928] Ch. 682.
[5] [1949] Ch. 678; 65 T.L.R. 573.
[6] [1930] A.C. 720, 731, H.L.
[7] [1904] 2 Ch. 160.
[8] [1952] W.N. 49; [1952] 1 T.L.R. 44; [1952] 1 All E.R. 254.

far too small to have influenced the voting at the meetings of debenture holders which approved the scheme by the requisite majorities. The most that the Public Trustee could have done would have been to have asked the judge who approved the scheme for some modification of its terms in the interests of his income beneficiaries, and no argument based on his failure to take this course has been developed before me.

In those circumstances, counsel for those interested in capital submitted that the express terms of the scheme govern the position and exclude any apportionment. In support of this submission he referred me to *In re Pennington.*[9] The estate of the testator, who died on July 13, 1910, included debentures in several companies which were secured by trust deeds, of which the Law Guarantee Trust and Accident Society Ltd. were trustees, and the society had guaranteed payment of both capital and interest by the mortgagor companies. The trust deeds, all of which were in the same form, contained in clause 7 a power to the society to sell and convert the mortgaged property on the security becoming enforceable, and provided by clause 12 [10] "that "the society were to hold the moneys to arise from any sale or "conversion under the primary trust for conversion upon trust, "in the first place, to pay or retain all moneys owing to them "for remuneration, premiums, and other expenses therein men-"tioned, and to apply the residue first in or towards payment "to the debenture holders pari passu in proportion to the amounts "due to them respectively, and without any preference or priority "whatever of all arrears of interest remaining unpaid on the "debentures; secondly in or towards payment to the debenture "holders in like manner of all principal money due on the "debentures, whether the same should or should not then be "payable according to the tenour of the debentures; and, thirdly, "to pay the surplus, if any, to the company."

All the companies made default in payment of principal and all but one made default in payment of interest. On December 14, 1909, an order was made for the winding up of the society under the supervision of the court, and on July 28, 1910, a scheme of arrangement in the winding up of the society was made under section 120 of the Companies Act, 1908 (which was the predecessor of section 206 of the 1948 Act), which was sanctioned by the court.

The effect of the scheme, so far as it affected the rights of the debenture holders against the society, was substantially (1) to postpone payment of principal until December 31, 1918; (2) to postpone payment of the full contractual interest until the same date and even then to place it behind the payment of principal; but (3) to provide meanwhile for the payment, or where the companies concerned had paid some interest, for the making up

[9] [1914] 1 Ch. 203; 109 L.T. 814, C.A.

[10] 109 L.T. 814, 816.

of interest at 3 per cent. on the principal moneys secured by the debentures, credit being given for any interest so paid when the full contractual interest became payable.

The trustees of the testator's will received various payments from time to time from the liquidator of the society, partly out of the proceeds of sale of properties belonging to the various companies which were charged by the debentures and which the liquidators had sold as trustees for the debenture holders, and partly out of the assets of the society in respect of the 3 per cent. interest payable under the scheme down to December 31, 1918.

The trustees of the testator's will took out a summons asking how these various sums should be dealt with as between income and capital. At the date when the case came before the court, it was expected that the amount which would eventually be received, whether from the proceeds of the sale of the securities or by way of dividend in the liquidation of the society, would be insufficient to pay in full the total of the principal and interest secured by the debentures. Joyce J.[11] held that, in those circumstances, all the moneys received after the date of default by the company concerned, whether from proceeds of sale of the property charged or out of the assets of the society, ought to be apportioned under the principle laid down in *In re Atkinson*,[12] but the Court of Appeal[13] held that while the proceeds of sale of the properties charged were apportionable between income and capital, the 3 per cent. interim interest payable under the scheme was payable to the tenant for life. The argument, so far as concerned the proceeds of sale of the properties charged, turned on the effect of clause 12 of the debenture trust deeds under which such proceeds were stated to be applicable in the first place towards payment of interest. This provision was obviously inserted in the interests of the mortgagees. If on a partial realisation of a security the moneys received are not applied in discharge of arrears of interest before anything goes towards the reduction of principal, the mortgagor gains by having part of an interest-bearing debt extinguished while a debt not bearing interest remains unpaid. But such a clause ceases to have any real meaning when the mortgagor is insolvent and the proceeds of the whole security prove insufficient to discharge both principal and arrears of interest. Then it does not matter to the mortgagee how the money available is dealt with, and it would be unreasonable to hold that such a clause forced the mortgagee to apply the proceeds in payment of arrears of interest before anything went in reduction of principal even though that might lead to the payment of more tax than would otherwise be payable.

It is not, therefore, surprising that the Court of Appeal upheld the decision of Joyce J. that such a clause could not affect the rights of the mortgagees or the respective rights of the tenant for

[11] Unreported.
[12] [1904] 2 Ch. 160.
[13] [1914] 1 Ch. 203; 109 L.T. 814, C.A.

life and remaindermen under settlements made by the mortgagees when there was a deficiency. The same view of such a clause had already been taken by the court in *Smith* v. *Law Guarantee and Trust Society Limited*,[14] to which I shall refer later.

But why did the Court of Appeal, having decided that the proceeds of sale of the securities were divisible between capital and income under the principles of *In re Atkinson*[15] notwithstanding clause 12 of the trust deeds, go on to hold that the sums paid by the society by way of interest under the scheme sanctioned by the court were not so divisible, but went exclusively to the tenant for life? Counsel for those interested in capital in this case submitted that it was because the court treated the wording of the scheme as conclusive not only between mortgagor and mortgagee, but between those claiming under the mortgagees, and as necessarily excluding the application of the principle generally applicable between capital and income in a case of deficiency. There are certainly some expressions in the judgment of Cozens-Hardy M.R.[16] which lend colour to this view, but taking the judgment as a whole, I think that the court treated the case as a very special one and did not intend to lay down any rule applicable to all schemes sanctioned by the court as such.

It will be remembered that the scheme in *In re Pennington*[17] postponed the time for final realisation of the securities and distribution of the society's assets for a number of years after default had been made, and further provided that when distributed, they would be applied first in payment of capital. Capital would, therefore, gain if the delay in realisation enabled better prices to be obtained or intermediate profits to be accumulated, and so it was only fair that some intermediate interest should be payable to compensate income for the delay. Swinfen Eady L.J. pointed out[18] that the terms of this complicated scheme were themselves fair as between capital and income, and that, therefore, there was no reason for depriving the life tenants of some part of the interest payable under it by applying the rule in *In re Atkinson*.[19]

In the scheme before me, on the other hand, the provision cancelling all arrears of interest would, if conclusive, operate most unfairly as between capital and income. It was obviously inserted with tax considerations in mind and without any thought of the position as between tenant for life and the remaindermen under settlements made by debenture holders. In those circumstances, I see no reason why I should hold that the terms of this scheme exclude the rule in *In re Atkinson*,[19] and I find support for this conclusion in the decision of the Court of Appeal in *Smith* v. *Law Guarantee and Trust Society Ltd.*,[20] which I have already mentioned.

[14] [1904] 2 Ch. 569.
[15] [1904] 2 Ch. 160.
[16] [1914] 1 Ch. 203, 210.
[17] [1914] 1 Ch. 203.
[18] Ibid. 212.
[19] [1904] 2 Ch. 160.
[20] [1904] 2 Ch. 569.

There a debenture trust deed executed by a company contained a clause to the same effect as clause 12 of the trust deeds in the *Pennington* case,[21] namely, that the trustees should apply the proceeds of realisation of the securities first towards payment of arrears of interest and afterwards towards payment of principal. The company having made default and a debenture holders' action having been brought, it appeared when the order on further consideration was made that the securities would prove insufficient to pay principal and arrears of interest in full. Thereafter, various orders were made from time to time directing payments to the debenture holders on account generally of what was due for principal and interest. When the time came for the proceeds of the final realisation to be paid over, the Crown claimed, in reliance on the clause in the trust deed, that all the payments made ought to be attributed to interest, in the first place, and that the tax payable on that footing should be paid. The Court of Appeal, after holding that the clause in question did not apply after it had become clear that there was not enough to pay both principal and interest, directed that as it was clearly for the benefit of the debenture holders for tax reasons that the payments made on account generally should be appropriated to capital, they should be so appropriated; but as the court had had its attention directed to the possibility that some debenture holders might be trustees, the order expressly stated that it was without prejudice to the question whether the payment or any parts thereof ought in the hands of the recipients to be treated as principal or interest.

If an order of the court directing that payments to be made to debenture holders are to be appropriated to capital need not be conclusive as between tenant for life and remaindermen where the debenture holder is a trustee, there can be no reason why a scheme sanctioned by the court under section 206, which contains a similar provision, should necessarily exclude the rule in *In re Atkinson.*[22] It is true that the scheme in this case does not contain any proviso such as that which appeared in the order of the court in the *Law Guarantee* case,[23] but I have no doubt that the court would have inserted such a provision on the authority of that case if its attention had been called to the point, and I am not prepared to hold that the omission of such a proviso precludes the application of a well-established rule of equity which will do justice between the parties.

Counsel for those interested in capital submitted that if I went behind the 1955 scheme by applying the rule in *In re Atkinson,*[24] I ought also to neglect the provisions of the 1933 scheme securing payment of interest upon interest and that the apportionment ought to be on the basis that arrears of interest on interest are left out of account; but I am not striking anything out of the

[21] [1914] 1 Ch. 203.
[22] [1904] 2 Ch. 160.
[23] [1904] 2 Ch. 569.
[24] [1904] 2 Ch. 160.

1960

MORRIS'S WILL TRUSTS, *In re.*

Cross J.

1955 scheme, I am simply holding that clause 5, while binding as between mortgagor and mortgagee, does not affect the position as between tenant for life and remaindermen. I think, therefore, that the apportionment must be made having regard to the provisions of the 1933 scheme as to interest on interest.

I will, therefore, make a declaration in the terms of paragraph 2 (ii) of the originating summons. I would add that this decision is entirely without prejudice to the question whether or not tax will be payable on the part of the sum received by the Public Trustee which is attributable to income. The Crown is not a party to this summons and I have heard no argument on this aspect of the matter.

Declaration accordingly.

Costs of plaintiff to be taxed on a trustee basis and of defendants on a common fund basis and to be paid out of the cash and securities before apportionment.

Solicitors: *Clement G. Lawrence; Leslie P. D. Small; Foyer, White & Prescott.*

M. G. T.

[COURT OF APPEAL.]

C. A.

1960 *Oct.* 6.

Ormerod, Willmer and Upjohn L.JJ.

* MORGAN *v.* JONES.

[P. 689.]

Landlord and Tenant—Business premises (security of tenure)—Notice of opposition to new tenancy—Form—Application for new tenancy on terms proposed by tenants—Failure of landlord to state in his notice of opposition whether or not he objected to proposed new terms—No agreement in writing as to terms of new tenancy—Landlord appearing with evidence as to valuation at hearing—Duty of court to determine on evidence reasonability of new terms as to duration and rent—Whether parties' documents on application for new tenancy to be treated as pleadings—Landlord and Tenant Act, 1954 (2 *&* 3 *Eliz.* 2, *c.* 56), *ss.* 29 (1), 33, 34.

The tenants of business premises let on a weekly tenancy at £1 a week applied under the provisions of the Landlord and Tenant Act, 1954,[1] for a new tenancy, setting out in their originating summons

[1] Landlord and Tenant Act, 1954, s. 29: "(1) Subject to the provisions "of this Act, on an application . . . "for a new tenancy the court shall "make an order for the grant of a "tenancy comprising such property, "at such rent and on such other "terms, as are hereinafter provided."

S. 33: "Where on an application "under this Part of this Act the "court makes an order for the grant "of a new tenancy, the new tenancy "shall be such tenancy as may be "agreed between the landlord and "the tenant, or, in default of such an "agreement, shall be such a tenancy "as may be determined by the court "to be reasonable in all the circum-"stances, being, if it is a tenancy for "a term of years certain, a tenancy

their proposed terms, namely, a 10-year tenancy at £52 a year. The landlord put in an answer on the lines of Form 336, as prescribed by Order 40, rule 8 (2) of the County Court Rules, 1936, as amended, stating that he opposed the grant of a new tenancy because of the tenants' persistent delay in paying the rent; but he left blank paragraph (2) of Form 336, which gives to a landlord the alternative of objecting or not objecting to the applicant's proposed terms for a new tenancy.

When the application came on for hearing in the county court the landlord had available evidence as to valuation in order to oppose the terms proposed by the tenants; but the county court judge declined to allow that evidence to be called, holding that he was bound by what he described as the "pleadings" as they stood, and that he had no discretion to consider terms other than those proposed by the tenants. No leave to amend the answer was sought on behalf of the landlord; and the judge granted a new tenancy on the terms proposed by the tenants. On the landlord's appeal against that part of the decision, he was given leave to amend his answer to comply with the rules by stating that he objected to the proposed terms:—

Held, that the judge was wrong in holding that he was bound to grant the new tenancy on the terms proposed by the tenants, for in the absence of an agreement in writing as to the new tenancy between landlord and tenant, it was the duty of the judge, under sections 29 (1), 33 and 34 of the Act of 1954 to decide, in the exercise of his judicial discretion, whether the terms proposed were reasonable in all the circumstances. That discretion could only be exercised on proper evidence as to valuation, and must be so exercised even in the absence of a party: a fortiori where the landlord was present and desirous of adducing such evidence. No agreement such as was required by the Act could be inferred merely from the landlord's failure to state whether or not he objected to the proposed terms; nor were the documents of the parties prepared pursuant to the Act of 1954 correctly described as pleadings by which the parties and the court were thereafter bound. The matter should be remitted to the county court in order that the judge might determine on evidence the terms on which the new tenancy should be granted.

APPEAL from Judge Trevor Morgan, sitting at Ammanford County Court.

In 1959, the landlord of business premises at Castle Garage, Ammanford, gave notice under the Landlord and Tenant Act, 1954, to determine the tenancy of land which was let to tenants, David Rees Morgan and Thomas Lewis Morgan, on a weekly tenancy at a rent of £1. The tenants thereupon applied for a new tenancy in accordance with the Act, the terms proposed by them and set out in their originating summons being for a 10-year tenancy at a rent of £52 a year.

"for a term not exceeding fourteen "years, and shall begin on the com- "ing to an end of the current "tenancy."

S. 34: "The rent payable under a "tenancy granted by order of the "court under this Part of this Act "shall be such as may be agreed be- "tween the landlord and the tenant "or as, in default of such agree- "ment, may be determined by the "court to be that at which, having "regard to the terms of the tenancy "(other than those relating to rent), "the holding might reasonably be "expected to be let in the open "market by a willing lessor. . . ."

C. A.
1960
MORGAN
v.
JONES.

The landlord put in an answer on the lines of the form prescribed by Order 40, rule 8 (2) of the County Court Rules, 1936, as amended—Form 336. He stated that he opposed the grant of a new tenancy in view of the tenants' persistent delay in paying rent. He did not incorporate in his answer anything under paragraph (2) of Form 336, which is in the following terms: If a new tenancy is granted "I do not object to its being granted on "the terms proposed by the applicant *or* I object to its being "granted on the following terms proposed by the applicant, "namely:—"

When the application came before the county court judge on January 22, 1960, the landlord had available in court, evidence as to valuation which he desired to call in order to oppose the terms proposed by the tenants. Counsel for the tenants submitted that on the "pleadings" as they stood the only matter to be decided by the court was whether or not a new tenancy should be granted, in view of the alleged persistent delay of the tenants in paying the rent, that if the landlord failed to establish that ground of objection, a new tenancy must be granted on the terms set out in the tenants' originating application, and that no question as to valuation arose or could arise. No application was made on behalf of the landlord to amend his answer to object to the proposed terms.

The county court judge thereupon ruled that the landlord was bound by his answer and could not be permitted to call evidence as to the reasonability of the proposed terms, and that, accordingly, if a new tenancy were granted it must be on the terms proposed by the tenants. In his judgment on February 5, 1960, the judge considered the question whether a new tenancy should be granted, and decided that the tenants were entitled to a new tenancy on their proposed terms—10 years at £52 a year. He concluded his judgment as follows: "It therefore follows that the "applicants are entitled to the grant of a new tenancy, and as "the only terms proposed on the pleadings are those contained "in the applicants' originating application I am bound to grant "them a new tenancy on those terms. I think it right to add, "however, that if I had a discretion I doubt if I should have "granted it for so long a term without the option of a break or "at so low a figure for the rent."

The landlord appealed on the ground that the judge had misdirected himself in law in holding that because the landlord had not in his answer specifically opposed the terms of the proposed new tenancy he could not be allowed to call evidence either as to the duration or as to the rent. During the hearing of the appeal an application to amend the answer was granted.

David Sullivan (who did not appear in the county court) for the landlord.

Breuan Rees for the tenants.

ORMEROD L.J. I will ask Upjohn L.J. to deliver the first judgment.

UPJOHN L.J. stated the facts set out above and continued: The matter came before the county court judge on January 22, 1960, when Mr. Breuan Rees, for the applicants, took the point that, on the pleadings as they stood, the only matter to be decided was whether or not a new tenancy should be granted.

The judge dealt with the matter at the beginning of his judgment in this way: "Mr. Breuan Rees took the point that on the "formal pleadings as they stood when the case came on for "hearing, the only matter to be decided was whether or not a "new tenancy ought to be granted in view of the alleged "persistent delay in paying the rent, and that if the respondents "failed to establish that ground then a new tenancy must be "granted on the terms set out in the application and that no "question of valuation arose.

"In answer to this point Mr. Devonald James argued that "even though it had not been specifically stated in the reply that "the landlords opposed the terms of the proposed new tenancy, "they were still entitled to call evidence at the proper time to "establish that the proposed terms were not fair or reasonable, and "that the tenancy was worth far more than the applicants "proposed. He argued that as it had been pleaded that the "landlords opposed any grant of a new tenancy such opposition "implied a right to oppose and question the terms proposed by "the applicants. No application was made for leave to amend "the landlords' answer. I ruled that the case must proceed "on the pleadings as they stood, and that although evidence as to "valuation was available it could not be called. It followed "that apart from any submission on the construction of section 23 "the only point for argument and decision was the question of the "alleged persistent delay in the payment of rent."

The judge then went on to deal with the question of whether or not a new tenancy should be granted. He came to the conclusion that a new tenancy should be granted, and there is no appeal from that part of his decision. Nor is this court concerned with section 23.

He concluded his judgment in these terms: "It therefore "follows that the applicants are entitled to the grant of a new "tenancy and as the only terms proposed on the pleadings are "those contained in the applicants' original application, I am "bound to grant the applicants a new tenancy on the terms "which are set out in their application. I think it right to add, "however, that if I had a discretion in the matter I doubt if I "should have granted it for so long a term without the option of "a break or at so low a figure for the rent."

The judge therefore came to the conclusion that the pleadings, as he called them, being in the state they were, he had no right

C. A.
1960
MORGAN v. JONES.
Upjohn L.J.

to try the question whether or not the terms proposed by the applicants were or were not reasonable. The question as to whether he was right in that must depend, of course, on the terms of the Act giving the court jurisdiction to grant new tenancies.

The relevant sections are sections 29 (1), 33 and 34 of the Landlord and Tenant Act, 1954. [His Lordship read those sections and continued:] That is the task of the judge, and it seems to me clear that, that being his duty, he can only determine whether the terms of the tenancy are reasonable in all the circumstances, or whether the rent is one which might reasonably be expected to be obtained by a willing lessor, if he hears evidence on that matter. In my judgment, mere proposals put forward by applicants for a new tenancy are quite insufficient to enable the judge, on those proposals alone, to come to any conclusion on the matter at all. There must be evidence before him to support the reasonableness of those proposals.

If a landlord using Form 336 likes to state in his answer that he does not object to a tenancy being granted on the terms proposed by the applicant, that, coming from the landlord himself, is the best possible evidence that the terms proposed by the tenant are in fact reasonable. But in the absence of agreement, or in the absence of such a statement, it seems to me that the judge must exercise his judicial discretion, and that can only be exercised on evidence. It is, in my judgment, wrong to regard the documents required in these applications as pleadings in the strict sense. If the respondent does not put in an answer or appear, the judge is still bound to exercise his discretion under the Act, which he can only do on evidence; he cannot regard the matter as concluded by the tenant's proposals.

It is clear in this case that there was no evidence of any sort and, indeed, in fairness to the judge, he himself expressly pointed out that he was not exercising any judicial discretion in the matter, and he seems to have thought that in some respects the terms proposed might be considered indeed to be unreasonable.

Mr. Breuan Rees, however, sought to submit that there was in fact, on the true inference to be drawn from the facts of this case, an agreement which would satisfy the provisions of sections 33 and 34 of the Act. Now, an agreement, to satisfy those provisions, must be an agreement in writing: that is plain from section 69 (2) of the Act. Mr. Breuan Rees submits that the true inference to be drawn from the fact that the landlord in this case did not state in his answer whether he did object or whether he did not object to the grant of a tenancy in the terms proposed must lead to the inference that he did agree to the terms proposed. Speaking for myself, I am quite unable to accept that submission. Paragraph 2 of Form 336 is optional in its terms and, if the landlord—although in breach, no doubt, of

his duty under the rules—fails to state one way or the other whether he does or does not object to the terms proposed, it does not seem to me that this court can draw any inference from that omission on the part of the landlord. In this case the submission becomes quite unreal when in fact counsel appeared before the judge and said that he did desire to oppose the terms proposed by the applicant.

In my judgment, therefore, on this short point, the judgment of the judge on this part of the case cannot be supported, and it must be remitted to him to consider the terms proposed by the applicants and to determine whether they are reasonable in all the circumstances, and whether the rent is one which could be reasonably expected to be obtained by a willing lessor and, if they are not, on the evidence, then it is his duty to grant a new tenancy on such terms as will accord with sections 33 and 34.

Mr. Sullivan, for the landlord, has asked during the course of argument that he formally be allowed to amend his answer so as to bring him into a compliance with the rules: that must be granted and, indeed, it was not strenuously opposed by Mr. Breuan Rees. Accordingly, the matter must go back to the judge, the answer being amended to permit the point to be raised, and then he will determine the whole matter on the evidence which will, no doubt, be adduced before him by both parties.

With regard to costs, the position is this. In the court below the matter was determined against the landlord solely on the question of a new tenancy, and the county court judge, exercising his discretion, ordered the landlord to pay the costs in that court and, as that part of his judgment is not sought to be disturbed, that order as to costs must stand.

In this court the matter is a little more difficult. On the one hand the judge was led into error by a submission made on behalf of the tenants that the matter was concluded on the pleadings. To that extent it seems that the tenants ought not to have any costs of this appeal. On the other hand the landlord was plainly in breach of the rules in failing to state whether or not he objected to the terms of the proposed tenancy. Secondly, counsel then appearing for the landlord failed to ask for leave to amend his answer when he found the judge was taking the view that the pleadings concluded the matter. That was a most unfortunate omission for, as Mr. Rees admitted, he could hardly have resisted such an amendment, subject possibly to an adjournment. In all the circumstances of this case the proper order, in my judgment, would be that there should be no order as to costs of this appeal.

ORMEROD L.J. I agree and, although we are differing from the judge on this part of the case, there is nothing I wish to add. In my view the case should be sent back for determination by the county court judge on the lines indicated by my brother.

C. A.

1960

MORGAN v. JONES.

WILLMER L.J. I also agree.

Answer amended.
Case remitted to the county court judge to determine the reasonableness of the terms of the tenancy proposed by the applicants.
No order for costs.

Solicitors: *Walker, Charlesworth & Jefferson for G. Tracy Phillips, Ammanford; Samuel Griffith & Co., Ammanford.*

M. M. H.

[QUEEN'S BENCH DIVISION.]

1960 *Oct.* 10.

* PRACTICE DIRECTION (REVIEW OF TAXATION).

Costs—Taxation—Application to review—Queen's Bench Division—Supreme Court Costs Rules, 1959 (*S.I.* 1959, *No.* 1958, *Sch.* 2), *r.* 35.

The following directions for applications for the review of a taxing officer's certificate under rule 35 of the Supreme Court Costs Rules, 1959, is given by the Lord Chief Justice:

1. Every application in the Queen's Bench Division under rule 35 of the Supreme Court Costs Rules, 1959, to review a taxing officer's decision in respect of the taxation of a bill of costs shall be made to a judge nominated by the Lord Chief Justice each term.

2. Every application shall be made by summons to be served within three days after issue and returnable on a day to be appointed by the judge.

3. Every summons must contain full particulars of the item or items or the amount allowed in respect of which the application to review is made.

4. After the issue of the summons the party applying shall forthwith give notice thereof to the taxing officer and on receipt of such notice the taxing officer shall lodge with the chief clerk of the Summons and Order Department of the Central Office the bill of costs, and the objections and answers made and given by the parties respectively at the review of the taxation of the bill of costs by the taxing officer.

5. Each party shall within four days after service of the summons lodge with the chief clerk of the Summons and Order Department the documents produced in evidence by that party at the hearing before the taxing officer relating to the item or items or the amount allowed under review; and the chief clerk shall then deliver these documents and the summons, objections and answers mentioned in paragraph 4 to the judge.

6. When appointing a day for the hearing of the summons the judge may decide to exercise his power to appoint two or more assessors to sit with him at the hearing, and if the judge does so decide, the chief clerk of the Summons and Order Department shall give notice of the decision to each of the parties and will, in any case, give to each of them notice of the day appointed by the judge for the hearing of the summons.

7. If the judge decides to appoint assessors the party applying shall within four days after the receipt of notice thereof lodge with the chief clerk of the Summons and Order Department two or more copies, as the case may be, of the summons, objections and answers mentioned in paragraph 4 for the use of the assessors.

8. When each of the assessors has signified his acceptance of his appointment the chief clerk of the Summons and Order Department shall send to each of them the notice of his appointment including the day appointed for the hearing of the summons, and a copy of the documents mentioned in paragraph 7.

PARKER OF WADDINGTON, C.J.

October 10, 1960.

[COURT OF APPEAL.]

* *In re* SCREMBY CORN RENTS. *Ex parte* CHURCH COMMISSIONERS FOR ENGLAND.

C. A.

1960 *Oct.* 5.

Lord Morris of Borth-y-Gest, Pearce L.J. and Pilcher J.

Tithe—Corn rents—Rents payable based on "average price" of wheat—Deficiency payments—No relation between amount of payments and value of wheat sold—Whether "price" includes deficiency payments—Inclosure Act, 1801 (*Scremby*) (41 *Geo.* 3, *c. cxxiv*)—*Cereals* (*Deficiency Payments*) *Order,* 1955 (*S.I.* 1955, *No.* 962), *arts.* 3, 4.

Agriculture—Deficiency payments—Nature—Whether part of "price" of wheat for purposes of tithe corn rents—Cereals (*Deficiency Payments*) *Order,* 1955, *arts.* 3, 4.

By an Inclosure Act of 1801, and an award made under it, certain corn rents were vested in the rector of Scremby and his successors, now, by virtue of the Tithe Act, 1925, and the Church Commissioners Measure, 1947, the Church Commissioners. The Act provided that the amount of the rents, inter alia, should be determined by reference to the "average price of good marketable "wheat in the County of Lincoln during the term of 21 years "ending at Michaelmas, 1799," which price was ascertained by the award to be 5 7/10ths shillings per Winchester bushel. The Act further provided that the amount of the rents payable should be varied at intervals of 21 years as declared by an order of quarter sessions if from the report of three arbitrators it appeared that the "average price" of a Winchester bushel of good marketable wheat in the County of Lincoln for the 21 years then last past was more or less by threepence than the average price set out in the award.

[Reported by A. H. BRAY, Esq., Barrister-at-Law.]

C. A.

1960

SCREMBY CORN RENTS, *In re.*

The corn rents payable were last varied in July, 1896, when the average price was found to be 4s. 3½d. On March 5, 1959, on the application of the Church Commissioners, quarter sessions appointed three arbitrators to inquire into and ascertain the average price of a Winchester bushel of good marketable wheat for the last 21 years. The arbitrators found that such average price was 10s. 1d., and that, in addition to the sum received from the purchaser, the grower received deficiency payments under the Cereals (Deficiency of Payments) Order, 1955,[1] which for the 21 years ending March 5, 1959, averaged 11d. a Winchester bushel, and they awarded the average price for the 21 years to be 11s. Quarter sessions were of the opinion that the deficiency payments should not be included in the average price, and ordered that the rents be increased in the proportion that 10s. 1d. bears to 5 7/10ths shillings. On a case stated by quarter sessions in which the question for the opinion of the court was whether the deficiency payments ought to have been included as part of the average price and which set out alternative orders, the decision of quarter sessions was upheld.

The commissioners appealed.

Held, that the meaning of the word "price" in the Act of 1801 was unambiguous and denoted what a grower or seller could obtain for his wheat when he sold it independent of any additional benefit or subsidy; accordingly, the deficiency payments should not be included in the average price.

Decision of Divisional Court [1960] 1 W.L.R. 648; [1960] 2 All E.R. 650 affirmed.

APPEAL from the Divisional Court[2] (Lord Parker C.J., Byrne and Donovan JJ.).

On hearing, on July 2 and September 15, 1959, an application by the appellants, the Church Commissioners for England, for an order and declaration that the Scremby Corn Rents, yearly corn rents payable to the Church Commissioners by virtue of an award made pursuant to Act of Parliament, be increased in the proportion that 11s. bears to 5 7/10ths shillings, the General Quarter Sessions for the County of Lincoln, Parts of Lindsey, refused to make the order and declaration, but ordered and declared that the Scremby Corn Rents payable be increased in the proportion that 10s. 1d. bears to 5 7/10ths shillings, subject to the opinion of the Queen's Bench Division of the High Court of Justice on the case stated by them.

[1] Cereals (Deficiency Payments) Order, 1955, art. 3: "In respect of "each year and in respect of . . . "millable wheat . . . the Ministers "shall—(*a*) in the light of their "conclusions from a review held "under section 2 of the Agriculture "Act, 1947, and with the approval of "the Treasury, specify a standard "price; and (*b*) determine, in such "manner as appears to them proper "in the respective circumstances, an "average realised price. . . ."

Art. 4 (1): "If in the case of "any year the average realised price "of millable wheat . . . is less than "the standard price thereof . . . the "appropriate Minister may, if he "thinks fit, and subject to such conditions as he may from time to time "with the approval of the Treasury "prescribe, make a payment of an "amount equal to the difference in "respect of every hundredweight of "millable wheat . . . which is shown "to his satisfaction to have been "dispatched or delivered during that "year to, or in accordance with the "instructions of, a purchaser thereof."

[2] [1960] 1 W.L.R. 648; [1960] 2 All E.R. 650.

By an Act of Parliament passed in 1801 (41 Geo. 3, c. cxxiv), entitled "An Act for dividing, allotting and inclosing the open "common fields, meadows, pastures and other commonable "lands and waste grounds within the parish of Scremby in the "County of Lincoln," and by virtue of the award made under that Act, the Scremby corn rents were vested in the rector of Scremby and his successors for the time being, and by virtue of the provisions of the Tithe Act, 1925, and the Church Commissioners Measure, 1947, were now vested in the Church Commissioners. By the Act of 1801 it was provided that tithes were to be abolished and the "corn rents" were to be payable instead.

It was provided by the Act of 1801 that the amount of the Scremby Corn Rents should, inter alia, be ascertained by reference to the average price of good marketable wheat in the County of Lincoln during the term of 21 years ending at Michaelmas, 1799, and by the award such price was so ascertained to be 5 7/10ths shillings per Winchester bushel. It was further provided by the Act that the amount of Scremby corn rent payable by virtue of such award should be varied at intervals of 21 years as declared by an order of the court at the appropriate general quarter sessions of the peace if from the report of three arbitrators or referees appointed by the court pursuant to the Act, it appeared that the average price of a Winchester bushel of good marketable wheat in the County of Lincoln for the 21 years then last past was more or less by threepence than the average price thereof set out in the award. The Scremby corn rents payable by virtue of the award were previously last varied by an order and declaration of quarter sessions made on July 3, 1896, when the average price of a Winchester bushel of good marketable wheat in the County of Lincoln for the 21 years then last past was found to be 4s. 3½d.

On an application, made on March 5, 1959, to quarter sessions, and on proof that notice had duly been given as required by the Act in the "London Gazette" and in a newspaper usually circulated in the County of Lincoln of the intention to make the application, an order was made appointing three arbitrators or referees to inquire into and ascertain in accordance with the provision of the Act the average price of a Winchester bushel of good marketable wheat in the County of Lincoln for the 21 years then last past. In their report [attached to and forming part of the case] the arbitrators found: "1. The "average price of a Winchester bushel of good marketable wheat "in the County of Lincoln during the 21 years ended on March "5, 1959 (excluding payments referred to in the next succeeding "paragraph) to be the sum of 10s. 1d. 2. That in addition to "the sum that the grower receives from the purchaser, the "grower receives deficiency payments under the Cereals De-"ficiency Payments Scheme, and that in the 21 years ended "March 5, 1959, these deficiency payments averaged 11d. per

C. A.
1960
SCREMBY CORN RENTS, *In re.*

"Winchester bushel," and they awarded and determined "that "the average price of a Winchester bushel of good marketable "wheat in the County of Lincoln for the 21 years now last "past . . . to be the sum of 11s."

It was contended on behalf of the Church Commissioners before quarter sessions that the report of the arbitrators was binding on the court, and the court was bound to accept their purported award and determination, and that, on the true construction of the Act of 1801, the payments made to the growers of wheat under or by virtue of the Cereals (Deficiency Payments) Order were properly included by the arbitrators when ascertaining the average price of a Winchester bushel of good marketable wheat in the County of Lincoln during the 21 years ending on March 5, 1959. The first part of these contentions was abandoned before the Divisional Court.

Quarter sessions were of the opinion that they were bound to examine the report of the arbitrators and to decide any questions of law which arose on its face; that the deficiency payments did not form part of the price in that (1) they were made at the discretion of the Minister; (2) they bore no direct relation to the price of wheat in the County of Lincoln; (3) they were a subsidy or bonus; (4) by virtue of regulation 5 (4) of the order the Minister could withhold deficiency payments, and (5) the word "price" in the Act referred to the price at which wheat was in fact sold in the County of Lincoln during the 21 year period, namely, the average realised price and not the standard price fixed by the Minister. They therefore ordered and declared that the Scremby corn rents be increased in the proportion that 10s. 1d. bears to 5 7/10ths shillings.

On the hearing on May 27, 1960, of the case stated by quarter sessions, the Divisional Court dismissed the Church Commissioners' appeal.

G. D. Squibb, Q.C., Edwin Jowitt and *Desmond Fennell* for the Church Commissioners.

LORD MORRIS OF BORTH-Y-GEST. This is an appeal from the judgment of the Divisional Court on a case stated by the General Quarter Sessions of the Peace for the County of Lincoln, Parts of Lindsey. The appeal is brought by the Church Commissioners in circumstances which I will recount.

In the Divisional Court, Lord Parker C.J., in giving judgment, dealt with the question whether quarter sessions in a case of this kind were entitled to state a case. He said [1]: ". . . I have come "to the conclusion on the whole that they were [entitled] and "that Parliament, by giving the duty to the court of quarter "sessions, showed clearly that they were giving the decision not "to an administrative tribunal but to a court, and a court which

[1] [1960] 1 W.L.R. 648, 652.

"then, as was well known, had powers of consulting the judges. "Accordingly, I assume for the purposes of this judgment that "quarter sessions had power to state the case which they have "done."

The case was stated in reference to an application made by the Church Commissioners concerning certain rents payable to the Church Commissioners as the result of an award which was made pursuant to an Act of Parliament of 1801. One of the principal questions that arises for our decision is as to the meaning of the word "price" in the relevant part of the provisions of that Act.

[His Lordship stated the facts and continued:] It is not submitted by Mr. Squibb who has appeared for the Church Commissioners that the report of the arbitrators was binding upon the court of quarter sessions in the sense that they merely had to adopt the figure of 11s.: for the Act, provides that if by the report it appears that the average price of a bushel of wheat was more or less than the average price set forth in the award by the value of three pence "the said respective "yearly tithe rents shall be increased or diminished as shall be "declared by the order of the court." It was for the court to accept the facts as found, but then to do what was correct according to law.

The point that arises for our decision is whether on the report of the arbitrators there should be a variation on the basis that the price of wheat was 10s. 1d. or on the basis that it was 11s. The effect of the variation would be to increase the corn rents payable and the corn rents would have to be increased either in the proportion that 10s. 1d. bears to 5 7/10ths shillings or in the proportion that 11s. bears to 5 7/10ths shillings. It will be seen, therefore, that ultimately this case has to be decided by considering what is the meaning, in its context, of the word "price" in reference to the price of wheat.

The report referred to the deficiency payments under the Cereals Deficiency Payments Scheme. That was a scheme made pursuant to statute, the effect of which may be deduced by considering the Cereals (Deficiency Payments) Order, 1955. It is to be observed that these deficiency payments were not paid throughout the period of 21 years prior to March 5, 1959. But we have been told that the average sum of 11d. mentioned in the arbitrators' report is the average covering a period of 21 years taking the actual payments that have been made during the last few years during which alone there have been such payments.

Under article 2 (1) of the order to which I have referred millable wheat is defined as "wheat which is sweet and in fair "merchantable condition. . . ." Mr. Squibb has said that "millable wheat" can be regarded as being the same as "good "merchantable wheat," which is the phrase used in the Act. The order refers to a "registered grower," and the registered grower "in relation to any cereals means the person for the time

C. A.
1960
SCREMBY CORN RENTS, *In re.*
Lord Morris of Borth-y-Gest.

"being registered by the appropriate Minister in such manner "and subject to such conditions as that Minister may from time "to time prescribe as the grower of those cereals for the purposes "of this order." The order goes on to lay down the procedure for ascertaining standard prices and average realised prices for cereals and then to prescribe certain payments which may be made in respect of wheat or rye and further certain payments which may be made in respect of oats, barley or mixed cereals. We are concerned here with wheat.

Article 3 of the order provides: "In respect of each year and "in respect of each of the following cereals, that is to say, "millable wheat, millable rye, oats and barley, the Ministers "shall (*a*) in the light of their conclusions from a review held "under section two of the Agriculture Act, 1947, and with the "approval of the Treasury, specify a standard price; and (*b*) "determine, in such manner as appears to them proper in the "respective circumstances, an average realised price, being in "each case a price per hundredweight." There is a proviso to which we have been referred, but I do not think it necessary to read its terms. So a standard price is specified and there is a determination of what is called the "average realised price." Then, in regard to possible payments, article 4 (1) of the order provides: "If in the case of any year the average realised price "of millable wheat or, as the case may be, millable rye is less "than the standard price thereof, the appropriate Minister may, "if he thinks fit, and subject to such conditions as he may from "time to time with the approval of the Treasury prescribe, make "a payment of an amount equal to the difference in respect of "every hundredweight of millable wheat or, as the case may be, "millable rye which is shown to his satisfaction to have been "dispatched or delivered during that year to, or in accordance "with the instructions of, a purchaser thereof." Under article 6 the payments are to be made to the registered grower of the cereals in question or "if the appropriate Minister is satisfied "that the interest of the registered grower in that payment has "passed to some other person to that other person."

The position, therefore, in the present case is that there was originally an award by the commissioners as prescribed by the Act; that in 1896 there was an ascertainment of the average price of wheat in Lincolnshire; and that now, pursuant to the report of the arbitrators, it has been found, first, that the average price of a Winchester bushel of marketable wheat in the County of Lincoln during the relevant period was 10s. 1d. and further it has been found that in addition to any sum that the grower receives from the purchasers the grower receives a deficiency payment under the Cereals Deficiency Payments Scheme. The Church Commissioners, therefore, say that the corn rents should now be varied by reference to the figure of 11s. and not the figure of 10s. 1d. The corn rents should be varied, they say, to the extent of the proportion that 11s. rather than

10s. 1d. bears to the previously ascertained figure of 5 7/10ths shillings.

In the case stated by quarter sessions, the court declared that the Scremby corn rents should be increased in the proportion that 10s. 1d. bears to 5 7/10ths shillings.

The question stated for the opinion of the court was whether that order and declaration was right or whether the sum of 11d. received by the grower ought to have been added to the 10s. 1d. The Divisional Court agreed with the findings of the court of quarter sessions and dismissed the appeal. Appeal is now brought to this court.

I will read again what seem to me to be the material words of the Act of 1801 which we have to consider. Three persons named or appointed by the justices are arbitrators or referees "for inquiring into and ascertaining by or from or by means of "the 'London Gazette' or by such other ways or means as they "shall think equitable or proper, the average price of a Win-"chester bushel of good marketable wheat within the said "County of Lincoln for the 21 years then last past." That they must report. It is to be observed that the price they must ascertain is the price of wheat within the County of Lincoln. The deficiency payments under the Cereals Deficiency Payments Order are based upon what the Minister specifies to be "a "standard price," which I understand means a standard price for the whole country, and what the Minister determines (also for the whole country) to be an average realised price. The scheme, therefore, seems to provide some benefit or subsidy for the grower.

Mr. Squibb, in the course of his argument, submitted in the first place that the Act of 1801 must be construed as it would have been construed when the statute was passed, and, so far as he needed any authority for that proposition, he found it in *Sharp* v. *Wakefield*,[2] in which case Lord Esher M.R. said[3]: "We have to construe several Acts, the first of which is the "Licensing Act, 1828, under which the case is stated. The "justices stated the grounds on which they went, and the court "of quarter sessions upheld their decision. The question asked "is, whether the justices or the court of quarter sessions had "jurisdiction in respect of either of the objections, because if "they had jurisdiction as to one of them that is sufficient to "support their decision. Now what is the rule of construction "to be applied? It is that the words of a statute must be "construed as they would have been the day after the statute "was passed, unless some subsequent statute has declared that "some other construction is to be adopted or has altered the "previous statute." There has been no further statute, but Mr. Squibb submits that in the circumstances brought about by the

[2] (1888) 22 Q.B.D. 239; 4 T.L.R. 496, C.A.

[3] 22 Q.B.D. 239, 241.

C. A.
1960
SCREMBY CORN RENTS, *In re.*
Lord Morris of Borth-y-Gest.

provisions of recent legislation there is now an ambiguity in the meaning of the word "price." He submits that the word "price" could now either mean the amount paid by a purchaser or could mean the amount received by the grower. He submits that the latter view should be adopted and that the amount received by the grower in this case was 11s. It has to be pointed out, however, that the subsidy given by the order of 1955 is a subsidy based upon the ascertained standard price and the ascertained average realised price. If a particular grower has done very well himself and got more than the average realised price, he still may get the same amount of subsidy as would be received by others who have obtained less advantageous prices.

Mr. Squibb went on to submit that, in deciding between those two contentions, it should be borne in mind that the Act of 1801 was abolishing tithes, and he submitted that in the case of tithes which were personal tithes there was legislative support for the view that they were based upon clear gains from personal work after all charges had been deducted.

I find myself in agreement with the Divisional Court and I am quite unable to accept the submissions so clearly put forward by Mr. Squibb. In the first place, it does not seem to me that there is any ambiguity, and I do not feel able to agree with Mr. Squibb when he submits that some ambiguity has now developed. The words, as it seems to me, are quite clear. I think that what Parliament was doing was to arrange for future possible revisions of the corn rents based upon alterations in the price of wheat, namely, the price of a Winchester bushel of good marketable wheat in the County of Lincoln. It seems to me that the word "price" was a word which denoted what a grower or seller would obtain for his wheat when he sold it. I cannot think that if by some later legislation he was to get from some other source than from his purchaser some additional benefit, that such benefit could properly be comprehended within the word "price." I think, furthermore, that there is nothing in this Act which suggests that the corn rents were to be related to net profits made by owners of land. There is no such notion introduced by the words in question.

I think, therefore, that the word "price" simply denotes what a grower of good marketable wheat would, on its sale within the County of Lincoln, realise for his wheat. There is, I think, no ambiguity, and, therefore, in agreement with the court of quarter sessions, and with the Divisional Court, I think that the figure upon which to proceed should be that of 10s. 1d. and not 11s. For these reasons, I think the appeal fails.

PEARCE L.J. I agree. This Act was intended, as a matter of convenience, to change the payment of tithes from payment in kind to payment in money, and to tie the amount of the tithes to the market price of wheat. It is conceded that, at the time of the passing of the Act, the words "average price of good

"marketable wheat in the County of Lincoln" could only mean the price under a contract between buyer and seller. But it is contended that the introduction of the Cereals Deficiency Payments Scheme has produced an ambiguity since now the seller may, if he fulfils the necessary requirements, receive a subsidy (unrelated to the price of wheat in the County of Lincoln) in respect of each contract of sale, and may thereby receive something additional to the price in the contract of sale. Price, it is said, may now mean the contract price augmented by the subsidy. But in my view no such ambiguity has been introduced into the words of the Act or into their application. It is still possible to ascertain the average price of good marketable wheat. That price is independent of the subsidy. The fact that the subsidy will probably follow the sale does not alter the price at which the wheat was in fact sold or make the subsidy part of that price. Whether Parliament in 1801, had it foreseen subsidies, would have provided that the amount of the subsidy should be added to the market price is uncertain. It is always open to Parliament to do so now if it thinks fit. But it has not taken that course, and we must follow the clear words of the Act as they stand.

PILCHER J. I agree, for the same reasons which have been given by my Lords.

Appeal dismissed.
Leave to appeal to the House of Lords refused.

Solicitors: *Taylor, Jelf & Co. for Danby, Eptons & Griffith, Lincoln.*

[PROBATE, ETC., DIVISION.]

* JACOBS *v.* JACOBS.

1960
Oct. 6.
Karminski J.

Husband and Wife—Desertion—Three years from presentation of answer—Amendment of answer to allege desertion by way of cross-petition—Three years completed at date of amendment but not at date of answer—Leave at hearing to amend answer further by striking out prayer for divorce—Leave to file a fresh petition seeking divorce and to consolidate the two suits.

A wife by her petition prayed for divorce on the ground of cruelty and by a supplemental petition alleged adultery. The husband by his original answer cross-prayed for divorce on the ground of cruelty, and while alleging desertion did not seek a divorce on that ground as three years had not then expired since his wife admittedly left him. At the date, however, of his answer to the supplemental petition the three years had been completed, and he prayed for divorce on that ground "by way of cross-petition" in that answer. Application was made at the hearing on behalf of the husband to

1960

JACOBS
v.
JACOBS.

have the prayer of the two answers for divorce struck out, to file a cross-petition on the ground of desertion, and to consolidate the suits:—

Held, that the court had power to grant the applications and this was a proper case, having regard, inter alia, to the delays in reaching the hearing, in which the court might in its discretion do so.

Dicta in *Blacker* v. *Blacker* [1960] 2 W.L.R. 800, 807; [1960] 2 All E.R. 291, C.A. applied.

DEFENDED PETITION for divorce.

The wife by her petition dated December 11, 1958, prayed for a decree of divorce on the grounds of her husband's alleged cruelty. The husband by his answer dated February 23, 1959, denied the alleged cruelty, and prayed for a decree of divorce in the exercise of the court's discretion on the ground of the wife's alleged cruelty. He further alleged that she had deserted him on November 2, 1956, although unable in view of the time factor to seek relief on that ground. Both asked for custody and costs, and the wife further prayed for ancillary relief. A formal reply denying the cruelty alleged by the husband was filed in March 1959.

On September 15, 1959, the wife filed a supplemental petition alleging specific adultery in June, July and August, 1959, with a woman whose surname and identity were unknown to her. By his supplemental answer thereto dated December 10, 1959, the husband admitted adultery from September 1958 but made no admission in relation to the specific allegations of adultery. He added to his answer the words: "And by way of cross-"petition the [husband] says: That the [wife] has deserted the "[husband] without cause for a period of three years immediately "preceding the presentation of this answer [sic]," and set out particulars of desertion since November 2, 1956, when the wife had left him. By her reply dated January 6, 1960, to the answer and cross-petition the wife admitted that she had left the husband on the date alleged but pleaded just cause.

At the hearing counsel for the husband applied, in view of the decision of the Court of Appeal in *Blacker* v. *Blacker*[1] to strike out the prayer of his answer and supplemental answer except insofar as they merely asked for the prayer of the petition to be rejected with the usual consequences as to costs. He also asked for leave to file forthwith a new petition in which the husband would repeat his former allegations of cruelty and desertion with a prayer in substantially the same form as that in the original pleadings. He further asked that the two suits should then be forthwith consolidated.

Dudley Collard for the wife.

Roger Ormrod, *Q.C.* and *L. I. Halpern* for the husband.

The cases cited in argument are referred to in the judgment.

[1] [1960] 2 W.L.R. 800; [1960] 2 All E.R. 291, C.A.

KARMINSKI J.: I have no doubts as to the course I ought to pursue here. The present application to amend the respondent husband's pleadings comes as a result of the supplemental answer being filed on his behalf on December 14, 1959, at a time when practitioners were probably following two decisions of my own, namely, *Swiszczowski* v. *Swiszczowski and Jewasinski*[1] and *Thatcher* v. *Thatcher and Gill* (*Wheeler intervening*).[2] These decisions were held by the Court of Appeal in April of this year to have been wrongly decided. See *Blacker* v. *Blacker*.[3]

The difficulty, however, in this case is this: the draftsman who settled the supplemental answer in December, 1959, was misled by my now admitted errors, and alleged desertion in that answer. The answer to the supplemental petition in December, 1959, alleged by way of cross-petition desertion for three years immediately preceding the presentation of that answer, namely, December 9, 1959. [His Lordship referred to the terms of the application on behalf of the husband and continued:] Mr. Ormerod founds his application on the decision of *Blacker* v. *Blacker*,[3] and in particular on some observations of Willmer L.J.[4] in which he said that the objection taken in *Blacker* v. *Blacker*[3] possibly would not have been taken if in that case the commissioner had been invited first to dispose of the prayer and cross-prayer for relief in the original petition and answer, before leave was asked to amend the answer, by adding a cross-petition, and the reply by adding an answer to cross-petition. Willmer L.J. suggested that had that course been followed and the parties then asked leave to institute their fresh proceedings by adding a cross-petition and an answer thereto, it might be that the commissioner could properly have acceded to the request, and with the consent of the parties could then have given the necessary directions for abridgement of time, dispensing with the registrar's certificate, and so forth, so as to enable him to dispose of the issue of desertion while he was yet seised of the case, and thus avoid the necessity for the parties to incur the additional costs of a fresh trial before another judge.

Mr. Collard said that in this case it would not be right to follow that line, although he at once agreed that I have power, having regard to the decision of *Blacker* v. *Blacker*,[3] to make the order suggested by Mr. Ormrod. Mr. Collard rightly emphasised the fact that all three lord justices in *Blacker* v. *Blacker*[3] had warned of the danger of the form used in the pleading of this case as being merely a device to expedite the hearing of a suit. I am very conscious that such a danger may arise in certain cases, but I do not think that it has, or is likely to arise here. This suit was originally started in December 1958: the supplemental petition was filed in 1959: the respondent's answer is dated

[1] [1959] 1 W.L.R. 187; [1959] 1 All E.R. 495n.
[2] [1959] 1 W.L.R. 730; [1959] 2 All E.R. 649.
[3] [1960] 2 W.L.R. 800.
[4] [1960] 2 W.L.R. 800, 807.

1960

JACOBS
v.
JACOBS.

Karminski J.

December 9, 1959, and the petitioner replied to it on January 6, 1960. There was apparently indeed some delay in getting the renewal of the registrar's certificate, and this was not obtained until June 1960.

In the result, therefore, it seems to me that so far as any improper acceleration of the trial of this suit having been obtained, on the contrary it has slipped back rather a long way in the queue of cases awaiting trial. While I pay full attention to the danger of improper acceleration, I do not think that it is a matter which arises in this case.

Mr. Collard also said an application of this kind could have been made some months ago, and that I think is, up to a point, a justifiable criticism. The Law Reports dealing with *Blacker* v. *Blacker* [3] were published on May 6, 1960, but it does not seem to have occurred in this case to either side to get the pleadings into order until today. It was open, of course, to Mr. Ormrod to make an application at the registry to correct the position some months ago. Equally it was open to Mr. Collard to move to strike out the offending parts of Mr. Ormrod's pleadings if he thought it desirable. It may be, perhaps, because the matter was not appreciated until recently, that nothing was done and the application was made today at the beginning of the trial.

I cannot help feeling in matters of this kind that it is always desirable to make the necessary application to correct or to strike out pleadings at the earliest possible moment. I have to deal with the situation as it is before me today and I think that I must accede, in the exercise of the discretion which I have in this matter, to the application of Mr. Ormrod. I shall make the order accordingly, and I also make an order consolidating the two cases, the wife's case to be the leading case.

Applications granted.

Solicitors: *Alexander Fine & Co.; Julius Simpson.*

[NOTE: Leave to amend the answers, to file and serve the cross-petition in court, to abridge time for appearance thereto until after the adjournment, to dispense with the registrar's certificate, and to consolidate were given. The wife no longer pursued her prayer for divorce, and the husband was granted a decree nisi on the ground of desertion in the exercise of the court's discretion, and the wife's petition dismissed, that afternoon. There was no order as to costs except as to legal aid taxation.]

J. B. G.

[3] [1960] 2 W.L.R. 800.

[QUEEN'S BENCH DIVISION.]

* CRACKNELL v. SMITH.

1960
Oct. 28.

Lord Parker C.J., Ashworth and Elwes JJ.

Bastardy — Corroboration — Opportunity — Evidence given in support of complainant's evidence — Mere evidence of opportunity — No evidence given by defendant—Whether defendant's silence can amount to corroboration—Whether statute satisfied—Affiliation Proceedings Act, 1957 (5 *&* 6 *Eliz.* 2, *c.* 55), *s.* 4 (2).

Upon the hearing of a complaint under section 1 of the Affiliation Proceedings Act, 1957,[1] the complainant, to whom a bastard child had been born on December 26, 1958, gave evidence that she had had intercourse with the defendant in March, 1958, and alleged that he was the father of the child. She admitted having had intercourse with the defendant's brother the previous February. Her mother testified to meetings which had taken place between the complainant and the defendant in January and February prior to the birth of the child. The defendant did not give evidence but his brother testified to having had intercourse with the complainant on a number of occasions prior to and during March, 1958. The justices disbelieved the brother's evidence. They were of opinion that the evidence of the mother was sufficient corroboration of the complainant's evidence and that the defendant's silence was a corroborative factor. They accordingly adjudged the defendant the putative father of the child and made a maintenance order against him.

On appeal, on the ground that there was no corroboration as required by section 4 (2) of the Act of 1957:—

Held, (1) that the evidence of the mother as to the vague association between the complainant and the defendant in January and February, 1958, was mere evidence of opportunity which could not alone amount to corroboration.

Moore v. *Hewitt* [1947] K.B. 831; 63 T.L.R. 476; [1947] 2 All E.R. 270, D.C. and *Harvey* v. *Anning* (1902) 87 L.T. 687, D.C. distinguished.

(2) That a defendant in such a case was fully entitled not to go into the witness-box, and, as there was no corroboration at all, the fact that the defendant did not give evidence could not of itself afford corroboration. Moreover, there was nothing in the defendant's conduct which could amount to corroboration and, accordingly, the appeal would be allowed.

Mash v. *Darley* [1914] 3 K.B. 1226; 30 T.L.R. 585, C.A. considered.

CASE STATED by Brentford justices.

On October 27, 1959, a complaint was preferred by Gwendoline May Smith against the defendant, Colin Cracknell, alleging that

[1] Affiliation Proceedings Act, 1957, s. 1: "A single woman who . . . has "been delivered of an illegitimate "child, may apply by complaint to a "justice of the peace for a summons "to be served on the man alleged by "her to be the father of the child."

S. 4: "(1) On the hearing of a "complaint under section 1 of this Act "the court shall hear the evidence of "the mother . . . and such other evi-"dence as she may produce, and shall "also hear any evidence tendered by "or on behalf of the defendant. "(2) If the evidence of the mother is "corroborated in some material par-"ticular by other evidence to the "court's satisfaction, the court may "adjudge the defendant to be the "putative father of the child . . ."

1960

CRACKNELL
v.
SMITH.

he was the father of a bastard male child of which she had been delivered at Parkstone, Dorset, on December 26, 1958.

The justices heard the complaint on December 8, 1959, and found that the child had been born on December 26, 1958, and that the defendant was the father.

Before the justices the complainant testified that she had met the defendant in December, 1957; that thereafter she went out with him frequently in the evenings and had had sexual intercourse with him on four occasions in January and February, 1958, and on a further occasion in March, 1958, and that no contraceptives were used. She had an abnormal period in March and no period at all in April, 1958. On two occasions in April, 1958, she told the defendant that she believed she was pregnant but he would not believe her. Early in May she went for a walk with him to discuss the question of maintenance for the child. After the birth of the child she wrote to the defendant about the child but received no reply from him. In January she took the child to the defendant's house and asked him what he was going to do about it but he merely said that she had been out with somebody else the Friday before. The complainant admitted that she had had sexual intercourse with the defendant's brother, Byron Cracknell, on two occasions, the latter being on February 14, 1958, but that at the end of that month her period had been normal. She said that she had not had sexual intercourse with any man apart from the defendant and Byron Cracknell except on one occasion with another man some 12 months before she met the defendant. She further stated that she had not had sexual intercourse with Byron Cracknell in March, 1958, or subsequently; that she had been out with him only twice and had never told him that she had had sexual intercourse with another brother, Tony Cracknell. She identified the defendant and also identified one Neville Dean as being the man she knew as Byron Cracknell.

The complainant's mother testified that the defendant had on three occasions visited her house where the complainant also lived about January and February, 1958, and that he had seen the complainant there; that at that time the complainant and the defendant went out together from time to time, and that sometimes the complainant would go to meet the defendant at the corner of the street.

The defendant gave no evidence.

Neville Dean testified that he was the defendant's brother and used to be known as Byron Cracknell; that he had first met the complainant in May, 1958, or earlier, but not at Christmas, 1957, and had had sexual intercourse with her about eight or nine times in the course of one month; that the complainant had told him that she had been out with Tony Cracknell (a brother of his and of the defendant) on numerous occasions and had had sexual intercourse with him. He later said that he had first

had sexual intercourse with the complainant in March, 1958, and not in December, 1957, and February, 1958, and that the complainant had never told him that she had had sexual intercourse with the defendant or that she was pregnant. He also said that he did not know how old the complainant's child was or when it was born, and that it was nothing to do with him.

It was contended on behalf of the defendant (a) that the evidence of the complainant had not been corroborated in a material particular as required by section 4 (2) of the Affiliation Proceedings Act, 1957; (b) that the evidence of the witness Neville Dean (otherwise Byron Cracknell) that he had had intercourse with the complainant in March, 1958, should be accepted, and that he might therefore be the father of the child, and (c) that the complainant's case was not proved.

It was contended on behalf of the complainant (a) that the evidence of the complainant's mother was sufficient corroboration, and (b) that the silence of the defendant was a corroborative factor.

The justices were of the opinion that the complainant's evidence had been sufficiently corroborated; that her evidence was to be preferred to that of Neville Dean; and that the defendant was the father of the child. They accordingly adjudged the defendant to be the putative father of the child and made an order against him for the payment of £1 5s. a week for the maintenance of the child until it attained the age of 16.

The defendant appealed, on the ground that neither the evidence of the complainant's mother nor the silence of the defendant could be corroboration as required by the Act.

Michael Sherrard for the defendant.
Quentin T. Edwards for the complainant.

The cases cited in argument are referred to in the judgment.

LORD PARKER C.J. stated the facts, referred to the evidence of the complainant and her mother, and continued: The defendant gave no evidence and he, in fact, called as a witness his brother Byron. It is enough to say that Byron's evidence was thoroughly unsatisfactory. He spoke to frequent sexual intercourse with the complainant, and particularly to intercourse in March, 1958, but he was clearly a very unsatisfactory witness and, as I understand it, the justices thought that he was a liar and that his evidence was of no account. The question immediately arises, in those circumstances, whether there was any sufficient corroboration within the statute. Two matters were said to amount to corroboration, first, that the mother's evidence was sufficient corroboration; secondly, that the silence of the defendant was said to be a corroborative factor, the silence referred to being that he had not gone into the witness-box. The justices found that the complainant's evidence was sufficiently

1960

CRACKNELL v. SMITH.

Lord Parker C.J.

corroborated without saying by what. For my part, I am perfectly satisfied that the evidence of the mother was not sufficient corroboration or, perhaps more accurately, any corroboration, because the weight to be attached to the evidence is a matter for the justices. Quite apart from the fact that she was only speaking in regard to January and February, 1958, and not in regard to March, it is quite clear that her evidence was as to mere opportunity. Mere evidence of opportunity and nothing more can be no corroboration. There are, of course, cases, of which *Moore* v. *Hewitt* [1] is an example, and also *Harvey* v. *Anning*,[2] in both of which there was something more than mere opportunity. In both cases, unlike the present case, there was evidence that the complainant was not being intimate with or associating with anybody else. Secondly, in *Harvey* v. *Anning* [2] there was, as an additional factor, the great difference in the social position of the parties, and in both cases there was real evidence of courtship and association together, and not the very vague association spoken to by the mother in the present case.

It is then said, and this has been put forward as the main ground in this court, that the failure of the defendant to go into the witness-box, coupled with the fact that he called as a witness his brother who, as it turned out, was thought to be a liar, was of itself corroboration. For my part, I am perfectly clear that a defendant to a complaint of this sort is fully entitled not to go into the witness-box. Of course, if there is evidence against him, and some corroborative evidence, it may be that the justices are entitled to take into consideration the fact that he gave no evidence in considering the weight to be attached to the corroboration. But here, if I am right, there was no corroboration at all, and, in those circumstances, I am quite clear that the failure of the defendant to go into the witness-box cannot of itself afford corroboration; nor, in my view, does the fact that he called his brother to give untrue evidence that this girl had been carrying on with him, the brother, and, indeed, with yet another brother at the material time. I do not think that that, again, can possibly amount to corroboration.

The court was referred to *Mash* v. *Darley*.[3] It is enough to say that the facts there were very different. That case has always been looked upon rather as the high-water mark of what can amount to corroboration and, for my part, I am quite satisfied that in the present case nothing in the way of the conduct of the defendant, whether or not it be strictly evidence within the statute, not being spoken to by anybody in the witness-box, could

[1] [1947] K.B. 831; 63 T.L.R. 476; [1947] 2 All E.R. 270, D.C.

[2] (1902) 87 L.T. 687, D.C.

[3] [1914] 3 K.B. 1226; 30 T.L.R. 585, C.A.

in this case amount to corroboration. Accordingly, I would allow this appeal.

1960

CRACKNELL v. SMITH.

ASHWORTH J. I agree.

ELWES J. I agree.

Appeal allowed.
No order as to costs.

Solicitors: *L. O. Glenister & Sons; Wilfrid Firth, Johnstone & Co., Brentford.*

E. M. W.

[QUEEN'S BENCH DIVISION.]

* WESSANEN'S KONINKLIJKE FABRIKIEN *v.* ISAAC MODIANO BROTHER & SONS LTD.

1960 *Oct.* 31; *Nov.* 1.

Diplock J.

Arbitration — Arbitrator — Misconduct — Waiver — Two arbitrators appointed under rules of trade association—Disagreement—Appointment of umpire—Status of arbitrators before umpire—Extent of authority.

A dispute arose between the buyers and sellers following a breach of condition in a contract for the sale of rapeseed cake expellers which incorporated the arbitration clause contained in the Rules and Regulations of the London Cattle Food Trade Association (Incorporated). In accordance with those rules the buyers and the sellers each appointed an arbitrator but the arbitrators failed to agree and duly appointed an umpire before whom each appeared to present the case of the party appointing him. In presenting the case for the sellers, the sellers' arbitrator read an opinion of counsel which had been obtained by the sellers and which related to the question for decision by the umpire. The buyers' arbitrator did not object and, when asked by the umpire whether he wished to obtain counsel's opinion on behalf of the buyers, said he did not wish to do so. At the end of the hearing each arbitrator handed in his file of documents to the umpire without the other arbitrator seeing them, that of the sellers' arbitrator containing the opinion of counsel which he had read. The umpire later made his award in favour of the sellers. On a motion by the buyers to set aside the award on the ground of misconduct by the umpire:—

Held, (1) that in a commercial arbitration of this kind, once the arbitrators had disagreed they were functus officio as arbitrators, and if they attended before the umpire they did so as advocates for the parties who had appointed them, for, unless they attended in that capacity, they had no right to discuss the matter with the umpire at all; that it was a necessary implication that a person appointed to act as advocate for a party must have all the necessary powers to agree to the form of procedure followed, and it could not be outside the implied authority of an arbitrator acting as advocate to waive or agree to any irregularity in procedure which occurred.

(2) That whether or not there was any impropriety or irregularity in the reading by the sellers' arbitrator of the opinion of

1960

WESSANEN'S KONINKLIJKE FABRIKIEN v. ISAAC MODIANO BROTHER & SONS LTD.

counsel obtained by the sellers, it was an impropriety or irregularity which could be, and plainly had been, waived by the buyers' arbitrator in his capacity as advocate of the buyers. Moreover, any irregularity which occurred by reason of the files of documents being handed in to the umpire had clearly been waived as both arbitrators had consented to that course being followed. Accordingly, the motion failed.

MOTION to set aside umpire's award.

The applicants, Wessanen's Koninklijke Fabrikien N.V., were the buyers and the respondents, Isaac Modiano Brother and Sons Ltd., the sellers of certain rapeseed cake expellers to be shipped from Pakistan to Rotterdam under a contract in writing dated November 25, 1959. The contract was in the ordinary form of the London Cattle Food Association (Incorporated) and it included an arbitration clause which provided: "Any dispute on this "contract to be settled by arbitration in London in accordance "with the rules and regulations of the London Cattle Food Trade "Association (Inc.), which are indorsed hereon and are deemed to "form part of this contract." By rule 1 of those Rules and Regulations "Any dispute arising out of a contract embodying "these rules shall be referred to arbitration in London, each party "appointing one arbitrator who shall be a member of the Associa-"tion, and not interested in the transaction, and such arbitrators "shall have the power, if and when they disagree, to appoint an "umpire, who shall be a member of the Association, whose "decision is to be final. . . ."

The following statement of facts is taken from the judgment.

A dispute arose between the buyers and the sellers as to the right of the buyers to reject the goods for an admitted breach of condition. Each of the parties appointed an arbitrator under the provisions of the arbitration clause, and the buyers and the sellers respectively provided their arbitrator with documents relating to the dispute. The two arbitrators did not in fact meet but had a conversation over the telephone. They disagreed and appointed an umpire and arranged with him for a hearing at the umpire's office at some date in June, 1960. All three were, as the arbitration rules required, members of the London Cattle Food Trade Association (Inc.), and the sellers' arbitrator and the umpire were men of great experience in London Cattle Food Trade Association arbitration. The buyers' arbitrator was probably also a man of experience although the extent of his experience did not appear from his affidavit.

At the hearing before the umpire, the buyers' arbitrator presented the arguments in favour of the buyers. For that purpose he outlined the facts, which were not in dispute, and addressed to the umpire his arguments as to the effect of the law upon those facts. When he had finished, the sellers' arbitrator put forward his conflicting arguments, in the course of which he referred to an opinion of counsel which had been obtained by the sellers, a copy of which had been furnished to him. He read out to the umpire all the

paragraphs of the opinion which dealt with the particular point he was advocating. It was apparent from his notes that he stressed the importance of the opinion (the author of which he incorrectly described as "a Queen's counsel") and suggested to the umpire that the opinion strongly confirmed, and was indeed conclusive in favour of, the contentions which he was advancing. That was done without protest by the buyers' arbitrator. At the end of the sellers' arbitrator's contentions, the umpire asked the buyers' arbitrator whether he wished to reply or whether he desired to obtain and submit a legal opinion such as the sellers' arbitrator had done. The buyers' arbitrator said he did not. Both arbitrators then handed to the umpire, without any objection from one or the other, their files of documents, which it was now known contained the relevant correspondence in the case of both arbitrators and in the case of the sellers' arbitrator, the copy of counsel's opinion from which he had read and also his own notes from which he had advanced his argument.

The umpire awarded in favour of the sellers. The buyers moved to set aside the award on the ground that the umpire had misconducted himself by receiving in evidence (a) the file of correspondence and other documents held by each respective arbitrator without the other arbitrator in each case seeing the contents of such file; and (b) counsel's written opinion obtained by the sellers and by taking it away for consideration together with the file of the sellers' arbitrator and without seeing the case on which such opinion was obtained.

Philip Goodenday for the buyers.
B. B. Stenham for the sellers.

The following cases were cited in argument: *Harvey* v. *Shelton* [1]; *In re Enoch Zaretzky, Bock & Co.* [2]; *Naumann* v. *Nathan & Co. Ltd.* [3]; *Walford Baker & Co.* v. *Macfie & Sons* [4]; *Walker* v. *Frobisher* [5]; *Royal Commission on Sugar Supply* v. *Kwik-Hoo-Tong Trading Society* [6]; *In re Hodson (Hodgson) and Drewery* [7]; *In re Greenwood and Titterington* [8]; *Backhouse* v. *Taylor* [9]; *In re an Arbitration between Fuerst Bros. & Co. Ltd. and R. S. Stephenson (Cater, Collings & Co. Ltd. intervening)* [10]; *In re Hopper* [11]; *In re Hare, Milne and Haswell* [12]; *Bourgeois* v. *Weddel & Co.* [13]; *French Government* v. *Tsurushima Maru (Owners)* [14]; *Barker* v. *Thomas Orford & Son.* [15]

1 (1844) 7 Beav. 455.
2 [1910] 1 K.B. 327, C.A.
3 (1930) 37 Ll.L.Rep. 249, C.A.
4 (1915) 84 L.J.K.B. 2221.
5 (1801) 6 Ves. 70.
6 (1922) 38 T.L.R. 684, D.C.
7 (1839) 7 Dow. 569.
8 (1839) 9 A. & E. 699.
9 (1851) 20 L.J.Q.B.N.S. 233.
10 [1951] 1 Lloyd's Rep. 429.
11 (1867) L.R. 2 Q.B. 367.
12 (1839) 6 Bing.N.C. 158.
13 [1924] 1 K.B. 539; 40 T.L.R. 261, D.C.
14 (1921) 37 T.L.R. 961, C.A.
15 [1955] 1 Lloyd's Rep. 196.

1960

WESSANEN'S KONINKLIJKE FABRIKIEN v. ISAAC MODIANO BROTHER & SONS LTD.

DIPLOCK J. This is a motion to set aside an award made in a commercial arbitration because of the misconduct of the umpire. It was made plain at the outset by Mr. Goodenday on behalf of the applicants that the misconduct which he alleges is technical misconduct and involves no reflection on the probity of the umpire. [His Lordship stated the facts and continued:] In the notice of motion it was contended that the umpire had misconducted himself in three respects: first, that he had not held a proper judicial investigation of the matter in dispute in the presence of the parties; secondly, that he had received as evidence the files of correspondence held by each arbitrator without the other arbitrator seeing the contents of the file; and, thirdly, that he took away counsel's written opinion without seeing the case on which such opinion was obtained. The first two grounds have not been persisted in in the argument before me.

It is, I think, plain and fully time that the court should take judicial notice of the fact that, in commercial arbitrations of this kind, under the rules of the London Cattle Food Trade Association, where arbitrators are appointed who, upon disagreeing, appoint an umpire whose decision is final, the arbitrators, once they have disagreed and have agreed upon an umpire, are functus officio as arbitrators and act at the hearing before the umpire as advocates for their respective appointors. That is a practice which two of the witnesses in the affidavits say has been going on for 25 years. A glance at the cases decided in these courts 30 and 40 years ago shows that the practice has been going on since the beginning of this century. It is also clear that the practice, when arbitrators have been appointed in this way, is that the parties themselves are represented at the hearing before the umpire by the arbitrators and by no one else unless they express a desire to be otherwise represented.

As regards the second ground, namely, the reception of the file of correspondence held by the respective arbitrators without the other arbitrator seeing the contents of the file, that again has not been proceeded with before me. It is plain that the two arbitrators trusted one another and that this was done by each with the consent of the other. Now that the files have been seen, since they are exhibited to the affidavits, it is obvious that the trust which each had in the other was justified. But, even if it had not been, I apprehend that the consent of each of the arbitrators to that course being adopted would waive any irregularity in the procedure which was involved.

Mr. Goodenday has really limited his argument here to the contention that the reading of counsels' opinion, with or without the case, was an irregularity, that the handing of it in to the umpire was a further irregularity (but, I apprehend, of the same kind), and that it was an irregularity which the buyers' arbitrator had no authority to waive. Mr. Goodenday, I think, concedes (as he must) that if his arbitrator had authority to waive the irregularity, then he cannot succeed in setting the award

aside, for it is clear law that a party to an arbitration can waive an irregularity.

It therefore becomes necessary for me to consider what is the extent of the authority of an arbitrator when appearing before the umpire in a commercial arbitration of this kind. There is no authority directly on the point, but it seems to me that the position is fairly clear. Once the arbitrators have disagreed and appointed an umpire they are functus officio as arbitrators. If they attend, as they do, the hearing before the umpire, it is as advocates for the parties who appointed them, for unless they attend in that capacity as representatives of the parties, they have no right to discuss the matter with the umpire at all. And as advocates for the parties they present the evidence and conduct the argument, as in this case the buyers' arbitrator presented the evidence and conducted the argument for the buyers, and the sellers' arbitrator presented the evidence and conducted the argument for the sellers.

It seems to me a necessary implication that a person appointed, as the arbitrators are at this stage of the proceeding, to act as advocate for the parties, must have all the necessary powers to agree to the form of the procedure; to admit, for instance, facts, and to agree to the method of proof of fact. And it does not seem to me that it can possibly be said to be outside the implied authority of an arbitrator acting in those circumstances to waive or agree to any irregularity in procedure which occurs.

Therefore, whether or not it was improper, strictly speaking, for the sellers' arbitrator to read the opinion of counsel without making it plain that he was adopting it as part of his argument, it seems to me that it was such an impropriety or irregularity as could be waived by the advocate of the other side, and was plainly waived by the buyers' arbitrator.

This decision makes it unnecessary for me to consider whether the course adopted by the sellers' arbitrator was an improper course or not. He says in his affidavit that he read the opinion as a convenient way of putting his argument in support of the sellers' contention that the rejection was invalid. I doubt very much whether that course would have amounted to an irregularity, even if it had not been waived. It has, however, been waived and the question does not arise.

In my view there was no misconduct, however technical, on the part of the umpire in following a procedure in which, even if irregular, the irregularity was waived by the representative on each side, who, in my view, had implied authority from the parties so to waive those irregularities.

The motion accordingly fails.

Motion dismissed with costs.

Solicitors: *Alexander Fine & Co.; Coward, Chance & Co.*

E. M. W.

[CHANCERY DIVISION.]

1960
Oct. 21.

Cross J.

* *In re* PRENN'S SETTLEMENT.
TRUVOX ENGINEERING CO. LTD. *v.* BOARD OF TRADE.

[1960 T. 1005.]

Company—Exempt private company—Settlement of sum of money by principal shareholder—Settlor's shares in company subsequently brought into settlement by purchase with part of settled sum—Whether "will or family settlement disposing of the shares . . ."—Companies Act, 1948 (11 *&* 12 *Geo.* 6, *c.* 38), *ss.* 127, 129 (1), (2) (*a*); *Sch.* 7, *para.* 3 (1) (*b*); *para.* 3 (2) (*b*).

On March 19, 1951, the principal shareholder in a private company executed two settlements whereby, in the case of each settlement, £200 was settled on trusts for certain members of his family. On the same day the company resolved that £50,000, being part of its undivided profits, should be capitalised and applied in paying up in full 10,000 first preference shares, 10,000 second preference shares and 30,000 "B" ordinary shares, which should, on March 19, 1951, be distributed among the ordinary shareholders in the proportion of one first preference share and three "B" ordinary shares for each ordinary share. The settlor thereby became entitled to a large number of shares, and, on the same day, immediately after the passing of the resolution, he allotted to the trustees of the first settlement 10,000 second preference shares and to the trustees of the second settlement 30,000 "B" ordinary shares, in consideration, in each case, of the sum of £150 to be paid to him out of the settled sum of £200, so that the shares were held on the trusts of the settlements together, in each case, with the remaining balance of £50.

On a summons by the company to determine, in effect, whether on the assumption that the settlements were "family" settlements within paragraph 3 (2) (*b*) of Schedule 7 to the Companies Act, 1948, each was a settlement "disposing of the shares" within paragraph 3 (1) (*b*) of the Schedule or whether, as a result of the transactions the company had lost its status as an exempt private company under section 129 [1] of the Act:—

[1] Companies Act, 1948, s. 129: "(1) A private company shall be "excepted from the requirements "imposed by section 127 of this Act "if, but only if—(*a*) the conditions "mentioned in the next following "subsection are satisfied at the date "of the return and have been satis-"fied at all times since the commence-"ment of this Act. . . . (2) The "said conditions are—(*a*) that the "conditions contained in the Seventh "Schedule to this Act are satisfied "as to the persons interested in the "company's shares and debentures. ". . . ."

Sch. 7: "1. The basic conditions "as to the shares or debentures of "the company whose exemption is in "question are—(*a*) that no body cor-"porate is the holder of any of the "shares or debentures. . . . (*b*) that "no person other than the holder has "any interest in any of the shares "or debentures. . . . 3.—(1) The "basic conditions shall be subject "to exceptions for— . . . (*b*) any "shares or debentures held by trus-"tees on the trusts of a will or "family settlement disposing of the "shares or debentures. . . . (2) for "the purposes of this paragraph— . . . "(*b*) the expression 'family settle-"'ment' means a settlement made "either—(i) in consideration or con-"templation of an intended marriage "of the settlors' issue or . . . (ii) "otherwise in favour of any of the "following persons, that is to say the "settlor, his parents and grand-

Held, that, on their true construction, the words "the trusts "of a will or family settlement disposing of the shares" in paragraph 3 (1) (*b*) of Schedule 7 to the Companies Act, 1948, meant the trusts of a will or settlement where the shares formed part of the estate of the testator or were settled by the settlement, and did not include the case where shares came to form part of the will fund or settlement by a change of investment; the settlements, therefore, were not settlements disposing of the shares within paragraph 3 (1) (*b*) and, accordingly, the conditions for exemption were not satisfied, and the company had lost its status as an exempt private company.

Seddon v. *Lord Advocate* [1954] A.C. 257; [1954] 1 All E.R. 255, H.L. applied.

ADJOURNED SUMMONS.

On March 19, 1951, a settlor, Prenn, the principal shareholder in a private company, the Truvox Engineering Co. Ltd., the plaintiff in the present summons, settled £200 on trust for his sisters and his issue, and the issue and spouses of any of them, who were described as the "specified class." Clause 1 of the settlement provided that the trustees should from and after the date of the settlement stand possessed of the £200 on trust "to invest or to apply the same in any of the investments "or for any of the purposes hereinafter authorised with power "at any time and from time to time to vary any such investments "or purposes for others of a like nature." Clause 2 provided: "The trustees shall stand possessed of the said cash and the in-"vestments and the property for the time being representing the "same (all of which are hereinafter collectively referred to as "the 'trust fund') on the following trusts. . . ." Then followed a number of trusts in favour of the members of the specified class. Clause 6 contained an investment clause in the widest possible terms enabling the trustees to invest the trust fund as they liked as though they were absolutely entitled thereto beneficially.

On the same day, March 19, 1951, the plaintiff company resolved that a sum of £50,000 being part of its undivided profits should be capitalised and applied in paying up in full 10,000 first preference shares, 10,000 second preference shares and 30,000 "B" ordinary shares, and that the shares should be distributed among the ordinary shareholders on March 19, 1951, in the proportion of one first preference share and three "B" ordinary shares for each ordinary share. Under that resolution the settlor became entitled on that day to have a large number of these preference and ordinary shares allotted to him. On the same day, immediately after the passing of the resolution, the settlor allotted to the trustees of the settlement 10,000 second preference

"parents and any other individual "who at the date of the settlement is "a member of the company or, in the "case of a settlement of debentures, a "member or debenture holder of the "company, and the wife or husband "and issue, and the wife or husband "of any of the issue, of the settlor, "his parents, or any such other indi-"vidual, and persons taking in the "event of a failure of the issue or "any class of the issue of any person "taking under the settlement. . . ."

1960

PRENN'S SETTLEMENT, *In re.*

shares in consideration of the sum of £150 to be paid by the trustees to him out of the sum of £200, so that, 10,000 second preference shares became held on the trusts of the settlement together with the balance of £50.

On the same day, March 19, 1951, the settlor also executed a second settlement of £200 on similar trusts for his wife, sisters and issue and the spouses (other than the settlor) of any of them, to the trustees of which, who were the same as the trustees of the first settlement, there were allotted 30,000 "B" ordinary shares in the company in consideration for £150 paid out of the settled sum of £200.

On July 8, 1960, the company took out this summons, to which the Board of Trade was defendant, asking, inter alia, (1) whether, assuming that both settlements were "family settlements" within the definition in paragraph 3 (2) (*b*) of Schedule 7 to the Companies Act, 1948, each of them was a family settlement "disposing of the shares in the company" at the date of the summons subject to the trusts thereof respectively within paragraph 3 (1) (*b*) of that Schedule, notwithstanding that those shares were not expressly settled by the settlements or either of them (a) by virtue of the fact that the shares were for the time being subject to the trusts of those settlements and each of them; (b) by virtue of the fact that the settlor by implication settled those shares in that the shares were in the case of each settlement within the definition of the trust fund the trusts whereof were declared by the settlor.

R. A. K. Wright for the company.
E. Blanshard Stamp for the Board of Trade.

The case cited in argument is referred to in the judgment.

CROSS J. stated the facts substantially as set out above and continued: The question raised by this summons, is whether the result of that transaction was to cause the company to lose its status as an exempt private company. Under section 127 of the Companies Act, 1948, there are various requirements with which companies, generally speaking, have to comply: for example, they have to make a return of their balance sheets and so on. Section 129 (1) of the Act provides: "A "private company shall be excepted from the requirements "imposed by section 127 of this Act if, but only if—(*a*) the "conditions mentioned in the next following subsection are "satisfied at the date of the return and have been satisfied at "all times since the commencement of this Act . . . ," and subsection (2) provides "the said conditions are—(*a*) that the condi- "tions contained in the Seventh Schedule to this Act are satisfied "as to the persons interested in the company's shares and deben- "tures. . . ."

Paragraph 1 of the Seventh Schedule provides: "The basic

"conditions as to the shares or debentures of the company whose "exemption is in question are—(*a*) that no body corporate is the "holder of any of the shares or debentures." Nothing turns on that in this case. "(*b*) that no person other than the holder has "any interest in any of the shares or debentures. . . ." If that paragraph stood alone, of course, the existence of any trust holding would prevent a company being an exempt private company, but one finds in paragraph 3 what are described as "exceptions for cases of death and for family settlements." Paragraph 3 (1) provides: "The basic conditions shall be subject to "exceptions for (*a*) any shares or debentures forming part of the "estate of a deceased holder thereof, so long as administration "of his estate has not been completed . . ."; so when a holder of shares dies, so long as his executors are administering the estate, although they are not beneficially entitled to the shares, the exemption is not lost. I am not, however, concerned with that sub-paragraph in this case. I am concerned with the next sub-paragraph (*b*) "any shares or debentures held by "trustees on the trusts of a will or family settlement disposing "of the shares or debentures . . ." Those are the words which I have to construe in this case "a will or family settlement dis-"posing of the shares or debentures."

To complete the picture I should refer to two other passages in the Seventh Schedule which have been relied on in the argument. Paragraph 3 (2) reads: "For the purposes "of this paragraph—(*a*) shares or debentures held by trustees on "trusts arising on an intestacy shall, if the shares or debentures "or an interest therein formed part of the intestate's estate at "the time of his death, be treated as if the trusts arose under a "will disposing of the shares or debentures." and (*b*): "The "expression 'family settlement' means a settlement made "either (i) in consideration or contemplation of an intended "marriage of the settlor"—that does not arise here—or: "(ii) "otherwise in favour of any of the following persons, that "is to say the settlor, his parents and grandparents, and "any other individual who at the date of the settlement "is a member of the company or, in the case of a settle-"ment of debentures, a member or debenture holder of the "company, and the wife or husband and issue, and the wife "or husband of any of the issue, of the settlor, his parents, or "any such other individual, and persons taking in the event of a "failure of the issue or any class of the issue of any person "taking under the settlement. . . ." It is to be observed that, although there is no limitation as to the nature of the beneficiaries under the trusts of a will, the beneficiaries under a family settlement must be members of a comparatively limited class of persons closely connected with the settlor.

The problem which arises is whether the words "the "trusts of a will or family settlement disposing of the "shares" mean that the shares must have been owned by

1960

PRENN'S SETTLEMENT, *In re.*

CROSS J.

the settlor at the date of the settlement and settled by him, or whether the words are satisfied by a settlement such as this which was not a settlement of the shares but was a settlement of cash where the shares come to form part of the trust fund subsequently as a result of a purchase by the trustees.

Counsel for the company admitted that the fact that in this case the £150 was applied in the purchase of the shares on the same day as the settlement was executed is irrelevant. If his argument is right, the result would be just the same if the shares had been bought many years after the execution of the settlement on the occasion of some change of investment.

It is argued on behalf of the company that if the words in question are construed as referring only to shares originally settled by the settlement, inconveniences may arise which the legislature can hardly be thought to have contemplated. It is pointed out, for example, that if a settlor settled some shares in a private company by a family settlement, and then subsequently the company made a bonus issue of further shares, it might be argued, if the Board of Trade is right, that those bonus shares were not shares disposed of by the settlement, and that, therefore, the exemption would be lost. Whether or not in that particular case it would be possible to say that the bonus shares should be treated as included in the original shares it is not for me to say. But granted that on the Board of Trade's construction there may be cases which would lead to inconvenience I am clearly of opinion that as a matter of construction of paragraph 3 (1) (*b*) the Board of Trade is right. To begin with, if the company's construction is right, the words "disposing of the shares" add nothing to the words "shares held on the trusts of a will or family settlement." They might just as well have been left out. Then I think that the words "the trusts of a will or family settlement "disposing "of the shares" refer naturally to the trusts of a will or settlement where the shares formed part of the estate of the testator or were settled by the settlement and do not, prima facie, include cases where the shares came to form part of the will fund or the settlement fund by a change of investment.

Finally, I think that other parts of this Schedule contain evidence supporting that construction. First, for paragraph 3 (2) (*a*) to apply, the shares in question have to form part of the intestate's estate at the time of his death. It is only in that case that the trusts are to be treated as if they arose under a will disposing of the shares. It clear that if an administrator, where there were trusts arising under an intestacy, acquired shares in a private company by an investment of trust money, they would not fall within the paragraph and the exemption of the company would then be lost. So far as I can see, there is no reason for drawing a distinction between the case of an intestacy and the case of a will. So, in my judgment, that paragraph supports the view that I have formed as to the meaning of the words "dispos-"ing of the shares." The matter seems to me to be made even

plainer by the definition of "a family settlement." If the intention was that the trustees of a settlement made by a settlor who did not own the shares at the time when he made the settlement could acquire shares in a private company under a wide investment clause, without causing the company to lose its exemption, I cannot see any reason why the settlement should have to be a settlement made on the family of the settlor. On the other hand, if the requirement is, as the Board of Trade argues, that the settlor must own the shares at the time when he makes the settlement, then it is natural that this settlement should have to be a settlement on his immediate family as opposed to a settlement on other persons.

I should add that I am confirmed in the view I take as to the meaning of the words "disposing of the shares or debentures" by the decision of the House of Lords in *Sneddon* v. *Lord Advoate*,[1] to which counsel for the Board of Trade called my attention. The words there construed were the words "any property taken under a disposition made by the deceased" in section 38 (2) (*a*) of the Customs and Inland Revenue Act, 1881. In that case there had been a settlement of a sum in cash, and the cash had been applied in the purchase of investments. The question was whether the investments which constituted the trust fund when the settlor died could be said to be property taken under the settlement. The House of Lords said not, but that the property taken under the settlement was simply the sum of cash. Although the words are different, I think that that case does support the conclusion at which I have arrived.

I will declare that neither settlement is a settlement within the definition in paragraph 3 (1) (*b*) of Schedule 7 disposing of the shares, and that the company is, accordingly, disentitled to the status of an exempt private company. The company will pay the costs.

Declaration and order accordingly.

Solicitors: *Kenneth Brown, Baker, Baker; Solicitor, Board of Trade.*

K. R. A. H.

[1] [1954] A.C. 257; [1954] 1 All E.R. 255, H.L.

[COURT OF PROTECTION.]

* PRACTICE DIRECTION (COURT OF PROTECTION).

1960
Oct. 13.

Mental Deficiency—Court of Protection—Jurisdiction—Patient's property—Settlement or gift of patient's property for benefit of patient's family—Mental Health Act, 1959 (7 & 8 *Eliz.* 2, *c.* 72), *s.* 103 (1) (*d*).

Pursuant to paragraph (*d*) of section 103 (1) of the Mental

1960

PRACTICE DIRECTION (COURT OF PROTECTION).

Health Act, 1959,[1] I direct that the powers conferred by the said paragraph shall not be exercisable except by the Lord Chancellor or a nominated judge unless by reason of the amount involved or the circumstances generally of the case unreasonable expense or delay would be caused.

HAROLD DANCKWERTS.

October 13, 1960.

[1] Mental Health Act, 1959, s. 103 (1): "Without prejudice to the generality of the foregoing section, the judge shall have power to make such orders and give such directions and authorities as he thinks fit for the purposes of that section, and in particular may for those purposes make orders or give directions or authorities for— . . . (*d*) the settlement of any property of the patient, or the gift of any property of the patient to any such persons or for any such purposes as are mentioned in paragraphs (*b*) and (*c*) of subsection (1) of the foregoing section, so however that in such cases as a nominated judge may direct the powers conferred by this paragraph shall not be exercisable except by the Lord Chancellor or a nominated judge."

[PRIVY COUNCIL.]

J. C.†

1960 *July* 5, 6, 27.

* ZALIHE VELI . . . . . APPELLANT;

AND

SEVIM ISMAIL AND OTHERS . . . . RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF CYPRUS.

Cyprus—Hotchpot—Undisposed residue—Surviving children of predeceased son—Whether advance by deceased to son to be brought into hotchpot by son's children—"Share"—Cyprus Wills and Succession Law (*c.* 220), 1942, *ss.* 49, 51.

I. died domiciled in Cyprus, survived by his wife and four of his children, predeceased by another child, N., and survived by two of N.'s children. During N.'s lifetime I. had advanced him £1,650. In a contest between N.'s children of the one part and their aforesaid grandmother, aunts and uncles of the other in calculating their respective shares in the statutory and undisposed portions of I.'s estate under the Cyprus Wills and Succession Law, 1942[1]:—

Held, that N.'s children must bring the £1,650 into hotchpot.

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† *Present*: LORD COHEN, LORD KEITH OF AVONHOLM and MR. L. M. D. DE SILVA.

[Reported by GROVE HULL, Esq., Barrister-at-Law.]

[1] Cyprus Wills and Succession Law, 1942, s. 2: "In this Law . . . "'statutory portion' means that part of the movable property and immovable property of a person which he cannot dispose of by will . . . "'undisposed portion' means the whole or the part, as the case may be, of the disposable portion which has not been disposed of by will . . ."

S. 44: "Where a person dies leaving a wife or husband, such wife or husband shall, after the debts and liabilities of the estate have been discharged, be entitled to a share in the statutory portion, and in the undisposed portion if

APPEAL (No. 32 of 1959) from a judgment of the Supreme Court of Cyprus dated January 14, 1959, allowing an appeal from a judgment of the District Court of Paphos dated June 27, 1958.

Ismail Katri Bey (hereinafter referred to as "the deceased") died domiciled in Cyprus in 1954. He was survived by his wife, two daughters and two sons and predeceased by another son, Nevzat Ismail. During his lifetime Nevzat Ismail had received from the deceased £1,650 worth of movable and immovable property by way of advancement or under marriage contract. Two of Nevzat Ismail's children, Ismail Nevzat Ismail Eff and Zahite Nevzat Ismail Eff, and his wife, Zalihe Veli, survived the deceased.

Ismail Nevzat Ismail Eff and Zahite Nevzat Ismail Eff, the appellants before the Board, suing by their mother as next friend, brought an action against their grandmother, uncles and aunts aforesaid, claiming relief in connection with the deceased's estate under the Cyprus Wills and Succession Law. The defendants counterclaimed that the plaintiffs must bring into hotchpot, in

"any, as follows, that is to say—"If the deceased has left besides "such wife or husband—(*a*) any "child or descendant thereof, such "share shall be the one-sixth of the "statutory portion and of the undis-"posed portion, but if there be more "children than five (whether they be "living or represented by descendants) "then it shall be a share equal to "the share of one of such chil-"dren . . . Provided that where the "deceased has left more than one "lawful wife, the share given to the "wife under the provisions of this "section shall be divided equally "between such wives."

S. 46: "Subject to the provisions "of this Law as to the incapacity of "persons to succeed to an estate and "subject to the share of a surviving "wife or husband of the deceased, the "class of person or persons who on "the death of the deceased shall be-"come entitled to the statutory por-"tion, and the undisposed portion if "any, and the shares in which they "shall be so entitled, if more than "one, shall be as set out in the "several columns of the First "Schedule to this Law: Provided "that persons of one class shall ex-"clude persons of a subsequent class."

S. 49: "Where in this Law it is "provided that any class of persons "shall become entitled to the statu-"tory portion and the undisposed "portion *per stirpes*, it means that "the child of any person of the "defined class who shall have died in "the lifetime of the deceased and who, "if he had survived the deceased, "would have become entitled on the "death of the deceased to a share in "the statutory portion, and the undis-"posed portion if any, shall become "entitled only to the share which the "parent would have taken if he had "survived the deceased."

S. 51: "Any child or other descen-"dant of the deceased who becomes "entitled to succeed to the statutory "portion, and to the undisposed por-"tion if any, shall in reckoning his "share bring into account all mov-"able property and immovable "property that he has at any time "received from the deceased—(*a*) by "way of advancement; or (*b*) under "a marriage contract; or (*c*) as "dower; or (*d*) by way of gift made "in contemplation of death: Provided "that no such movable property or "immovable property shall be brought "into account if the deceased has left "a will and has made therein specific "provision that such movable pro-"perty or immovable property shall "not be brought into account."

Sch. 1: "Succession of the Kin-"dred." [First column—"Class"] "First Class." [Second column—"Persons Entitled"] "(*a*) Legiti-"mate children of the deceased living "at his death; and (*b*) descendants, "living at the death of the deceased, "of any of the deceased's legitimate "children who died in his lifetime." [Third column—"Shares"] "(*a*) In "equal shares. (*b*) In equal shares "per stirpes."

J. C.
1960
Zalihe Veli v. Sevim Ismail.

calculating their share in the statutory portion and undisposed portion (if any) of the estate, the sum of £1,650 advanced to Nevzat Ismail. At the trial before the District Court of Paphos it was agreed between the parties that the question whether the plaintiffs were liable to bring the £1,650 into hotchpot was the only issue remaining between the parties. The District Court (Zenon P.D.C. and Attalides D.J.) gave judgment for the plaintiffs with costs of both parties to be paid out of the estate of the deceased. The defendants appealed to the Supreme Court (Zekia and Zannetides JJ.) who allowed the appeal with costs of the appeal but directed that the order for costs in the District Court should stand. Pursuant to leave granted by the Supreme Court the plaintiffs appealed to the Judicial Committee.

John Monckton for the appellants.
Jeremiah Harman for the respondents.

The following cases, which were not referred to in the judgment, were cited in argument: *In re Natt* [2]; *Proud* v. *Turner* [3]; *Lloyd* v. *Tench* [4]; *In re Young* [5]; *In re Morton.* [6]

July 27. The following judgment of their Lordships was read by Lord Keith of Avonholm. [His Lordship stated the facts, read sections 44 (*a*), 46, 49 and 51, and the relevant part of the First Schedule of the Cyprus Wills and Succession Law, 1942, and continued:] In their Lordships' view the Supreme Court has reached the right conclusion. The question is void of authority and turns wholly upon a construction of the relevant sections. "Share" in one context may mean a fraction or proportion of a whole. In another context it may mean the amount taken as a share, or the portion. The two meanings may be found in section 44. Under (*a*) "share" indicates the fraction to which a widow is entitled. In the proviso, however, the word "share" would seem to refer more naturally to the amount taken as the widow's portion. In section 46 and the First Schedule "share" would seem naturally to refer to the proportion to which the beneficiaries are entitled. For present purposes sections 49 and 51 are the more material sections. Their Lordships would read "share" in section 49 as referring to the amount taken under the statutory distribution, so that a child (or children) of a person who has died in the lifetime of the deceased is entitled only to the amount that his father would have taken if he had survived the deceased. If matters had stood there, no difficulty would arise, for the child's portion would merely be calculated on the fractional basis which applied to his father. But section 51 comes into play. Under that section a child of the deceased who

[2] (1888) 37 Ch.D. 517.
[3] (1729) 2 P.Wms. 560.
[4] (1751) 2 Ves.Sen. 213.
[5] [1951] Ch. 185; [1951] 1 T.L.R. 262; [1950] 2 All E.R. 1245.
[6] [1956] Ch. 644; [1956] 3 W.L.R. 663; [1956] 3 All E.R. 259.

survived his parent would have to bring into account "in reckon-"ing his share" any property received from the deceased in the matters specified. "Share" here clearly refers to the amount taken as a share and not to any fraction which may form the basis of calculation. It is contended, however, for the appellants that they take not as representing their father but in their own right, and that it is only sums that they receive from the deceased that have to be brought into account in computing their share. As they received no property from the deceased they are entitled to the fraction of the estate to which their father was entitled without any deduction. This contention has great force and attractiveness if section 51 is construed in isolation. But in their Lordships' view that is not the proper approach. The sections must be read as a whole. It is not possible to know what the appellants' father would have taken as a share without assuming that he had survived his father and applying the rule laid down by section 51. Under section 49 the appellants are entitled "only "to the share which their parent would have taken if he had survived the deceased." As has already been said "share" cannot be read here as meaning merely a fractional part. Therefore the appellants must bring into account what their father received from the deceased.

This is substantially the view taken by the Supreme Court, and in their Lordships' view they were right. It is supported also by the fact that in section 44 (*a*) a child of the deceased is treated as represented by his descendants.

In the course of the argument some references were made to English law, but in their Lordships' view English law has no application to this case.

Appeal dismissed with costs.

Solicitors: *Bower, Cotton & Bower; Bischoff & Co.*

[CHANCERY DIVISION.]

* BRAITHWAITE *v.* WINWOOD.

[1960 B. No. 1132.]

1960
Oct. 24, 27.
Cross J.

Mortgage—Practice—Summons for possession—Adjournment—Mortgage not repayable by instalments—Mortgagee's power of sale exercisable—Discretion of court to adjourn summons—R.S.C., Ord. 55, *r.* 5A.
Estoppel—Mortgage—Assignment of policy of assurance to mortgagee—Covenant by mortgagor to pay premiums—Premiums in arrears—Mortgagee's agreement to reinstatement of policy—Whether mortgagee estopped from exercising power of sale.

By a legal charge, dated December 5, 1955, the defendant covenanted to pay to the plaintiff the sum of £500 without interest provided that if the defendant performed all the covenants other

1960

Braithwaite
v.
Winwood.

than the covenant to pay, and the power of sale had not arisen, the plaintiff would not require payment of the principal sum until December 5, 1965, and charged a certain dwelling-house by way of legal mortgage with the payment of the money due under the mortgage. The defendant by the same deed assigned to the plaintiff a policy of assurance securing the payment to him of the sum of £500 in August, 1965, covenanting that he would punctually pay all premiums for keeping the policy on foot. In 1958, negotiations took place with a view to the purchase of the property by the plaintiff from the defendant who, thinking he was going to sell the property to the plaintiff, stopped paying the premiums on the policy. The negotiations broke down and, in March, 1960, the plaintiff issued a summons under R.S.C., Ord. 55, r. 5A,[1] for possession of the property. On May 26, 1960, the defendant went to see the plaintiff and asked him to sign a letter agreeing to the reinstatement of the policy, and, on the following day, the plaintiff wrote to the defendant saying that he had consulted his solicitor and they agreed that he ought to agree to the defendant paying the overdue premiums on the policy, and that he had signed the letter which the defendant had asked him to sign. The defendant thereupon paid the arrears of the premiums. In June, 1960, the defendant's solicitors wrote to the plaintiff's solicitors asking them to confirm that no further action was being taken in the proceedings, to which the plaintiff's solicitors replied that the proceedings would certainly go on. At the date of the hearing the defendant was no longer living at the property:—

Held, (1) that, on the construction of the legal charge, the mortgagee's power of sale was exercisable at the date of the issue of the summons and that, since the defendant had not established that what was said by the plaintiff at the interview on May 26, or in the subsequent letter, was intended to affect the legal relationships between the parties, or that the plaintiff had so conducted himself that he could not be heard to say that he did not intend to affect those legal relationships, the plaintiff was not estopped from saying that the power of sale was still exercisable.

Dictum of Denning L.J. in *Combe* v. *Combe* [1951] 2 K.B. 215, 220; [1951] 1 T.L.R. 811; [1951] 1 All E.R. 767, C.A. applied.

(2) That, since the defendant had done nothing towards making any arrangements to pay off the mortgage during the four months since June, 1960, and he was not living in the property, it was not a case in which the court should exercise any discretion in his favour; and that, therefore, the plaintiff was entitled to an order for possession within 28 days.

Quaere whether the the power of the court, in its discretion, to adjourn a mortgagee's summons for possession under R.S.C., Ord. 55, r. 5A, does not extend to the case of a mortgage which is not payable by instalments.

[1] R.S.C., Ord. 55, r. 5A: "Any "mortgagee or mortgagor, whether "legal or equitable . . . may take "out as of course an originating "summons, returnable in the "chambers of a judge of the Chan-"cery Division, for such relief of the "nature or kind following as may ". . . be specified . . . that is to "say . . . Delivery of possession "(whether before or after foreclosure) "to the mortgagee . . ."

"Practice Directions. By the "judges of the Chancery Division in "respect of applications by originat-"ing summons for payment or for "possession under Ord. 55, r. 5A . . . "*Relief Claimed* . . . When posses-"sion is sought and the defendant is "in arrear with any instalments due "under the mortgage . . . and the "master is of opinion that the defen-"dant ought to be given an oppor-"tunity to pay off the arrears, the "master may adjourn the summons "on such terms as he thinks fit . . ."

Hinckley and South Leicester Permanent Building Society v. *Freeman* [1941] Ch. 32; 57 T.L.R. 71; [1940] 4 All E.R. 212 and *Robertson* v. *Cilia* [1956] 1 W.L.R. 1502; [1956] 3 All E.R. 651 applied.

Four-Maids Ltd. v. *Dudley Marshall (Properties) Ltd.* [1957] Ch. 317; [1957] 2 W.L.R. 931; [1957] 2 All E.R. 35 doubted.

ADJOURNED SUMMONS.

On December 5, 1955, the plaintiff, Jonathan Frederick Braithwaite, sold a cottage known as No. 4, The Avenue, Spittalbrook, Hoddesdon, Hertfordshire, one of four adjoining cottages, to the defendant, Arthur Lewis Winwood, for £650. On the same day the defendant executed a legal charge on the property in favour of the plaintiff for the sum of £500 without interest. Clause 1 of the legal charge provided: "In consideration of £500 now "paid by the mortgagee to the mortgagor (the receipt whereof the "mortgagor hereby acknowledges) the mortgagor hereby cove-"nants with the mortgagee that he will pay to the mortgagee "on the 5th day of March next the sum of £500 without interest "provided always and it is hereby agreed and declared that if the "mortgagor shall duly and punctually observe and perform all "the covenants by him (other than the covenant for payment "of the principal sum) and the agreement and provisions herein "contained and if the power of sale applicable hereto shall not "have arisen the mortgagee will not call in or require payment "of the principal sum before the 5th day of December 1965." By clause 2 the defendant charged the property by way of legal mortgage with the payment of the principal sum and all other moneys payable under the legal charge. By clause 3 the defendant assigned to the plaintiff a policy of assurance with the Royal Liver Friendly Society securing the payment to him of £500 at the end of 10 years from August 26, 1955, at an annual premium therein mentioned. Clause 4 contained the usual proviso for redemption, and clauses 5 and 6 various covenants by the defendant including, in clause 6 (iv), a covenant that the defendant would during the continuance of the legal charge punctually pay all premiums for keeping the policy on foot. The mortgage did not contain an attornment clause.

In 1958 the local authority served notices of their intention to obtain a clearance order with regard to the property and the three other adjoining cottages owned by the plaintiff. Thereupon the plaintiff began negotiations with the defendant with a view to repurchasing the property so that he could redevelop it together with the other three cottages if they were all pulled down. In July, 1959, the defendant left the property and went to live elsewhere. Further, thinking that he was going to resell the property to the plaintiff, he stopped paying the premiums necessary to maintain the policy, with the result that the society converted it into a fully paid policy of £184 10s. The negotiations for the resale of the property broke down and, on March 16, 1960, the plaintiff issued an originating summons

1960

Braithwaite v. Winwood.

under R.S.C., Ord. 55, r. 5A, asking for an order that the defendant deliver possession of the property to the plaintiff, and pay the plaintiff the sum of £500 due to him under the covenant. In his affidavit in support of the summons the plaintiff alleged that his power of sale had arisen and become exercisable by reason of the defendant's breach of the covenant to pay the premiums. In his affidavit in answer the defendant explained why he had not paid the premiums, and said that the amount due to the society together with interest up to May 9, 1960, was £52 8s. 4d., which sum he had in hand and was ready and willing to pay. He also said that he wished to be allowed to pay the arrears to the society and to retain possession of the property.

On May 17, 1960, when the summons came before the master, the plaintiff did not ask for an order for payment but only for an order for possession. The master made an order for possession within 28 days of service of the order but, subsequently, at the request of the defendant, he adjourned the summons to the judge.

On May 26, 1960, the defendant went to see the plaintiff and asked him to sign a letter to the society by which the plaintiff was to agree to the defendant reinstating the policy. The plaintiff consulted his solicitors and, on May 27, 1960, wrote to the defendant "referring to your call at my house last night, "I have now had a word with my friend Mr. Stanley [his "solicitor] and he and I both agree that on grounds of justice I "ought to agree to your paying the overdue premium on your "insurance assigned to me with the Royal Liver Society, and I "have accordingly signed the form and sent it along in the "envelope which you handed to me." The defendant, having received that letter, paid to the society the arrears of premiums needed to reinstate the policy and, on June 15, 1960, his solicitors wrote to the plaintiff's solicitors: "We write to confirm that £67, "being the amount required for premiums up to date by the "Royal Liver Friendly Society, has been dispatched to the "society and we have asked that they confirm this payment to "you. Please then be kind enough to confirm to us that no "further action is being taken against Mr. Winwood on the "proceedings instituted against him." The plaintiff's solicitors replied on June 16: "We thank you for your letter of June 15 "contents of which are noted. We must make it clear to you "that the present proceedings will certainly go on. There has "been a grave breach of covenant by Mr. Winwood and our "client is entitled to possession and will press the judge for an "order to that effect. You will appreciate that the master has "already made an order for possession but Mr. Winwood objected "to this and asked for the case to go to the judge. That being "so the judge must hear the case which has been adjourned to "him and is likely to come up for hearing quite soon."

On October 13, 1960, the summons came before the judge; the defendant appeared in person and the summons was adjourned

to enable him to be legally represented. At the date of the hearing the clearance order in respect of the property had not yet been confirmed.

Nathaniel Micklem for the plaintiff.
J. Maurice Price for the defendant.

No cases other than those referred to in the judgment were cited in argument.

CROSS J. stated the facts and continued: Both parties asked me to decide, not simply the question whether or not the plaintiff ought to have possession of the property, but also the entirely separate question whether the plaintiff is now entitled to exercise the power of sale. I agreed to do this, and for this purpose I allowed both parties to give oral evidence supplementing their affidavit evidence and each was cross-examined by counsel for the other.

On the question of whether or not the power of sale is exercisable, it is first necessary to decide what is the meaning of clause 1 of the legal charge. The Law of Property Act, 1925, draws a distinction between the arising of the statutory power of sale and its exercise. Section 101 (1) of the Act provides that where the mortgage is made by deed, as this mortgage was, a mortgagee shall, by virtue of the Act, have the following powers: "(1) a power, when the mortgage money has become due, to "sell." Under an ordinary mortgage, the mortgage money becomes due six months after the date of the mortgage, and the power of sale arises then; but section 103 of the Act provides that the mortgagee shall not exercise the power of sale, although it has arisen, unless and until either (i) notice requiring payment of the mortgage money has been served and default has been made for three months in the payment of the principal, (ii) some interest payable under the mortgage has been in arrear and unpaid for two months, or (iii) there has been a breach of some provision contained in the mortgage deed.

It is difficult to apply the distinction between the arising and the exercise of the power of sale to clause 1 of this deed. To say that the power of sale arose on March 5, 1956, makes nonsense of the proviso, because the proviso is that the mortgagee will not call in the principal money until December 5, 1965, if the covenants be punctually observed and if the power of sale shall not have arisen. I think that this clause really draws no distinction between the arising of the power of sale and the moment when it becomes exercisable. What, in effect, the mortgagee is saying is: "If you comply with all the covenants, I will not call in the "money until December 5, 1965, but on your default the power "of sale shall at once arise and become exercisable." Any other construction would make nonsense of the clause.

1960

Braithwaite v. Winwood.

Cross J.

On that footing, the power of sale was exercisable at the date of the issue of the summons, because at that time there was a subsisting breach of covenant, namely the failure of the defendant to keep up the premiums, which had not been in any way contributed to by the plaintiff. The question is whether the subsequent events estop the plaintiff from saying that the power of sale is still exercisable.

Counsel for the defendant relied in this connection on the principle of equitable estoppel which is conveniently stated by Denning L.J. in *Combe* v. *Combe*.[1] The material words are these: "where one party has, by his words or conduct, made "to the other a promise or assurance which was intended to "affect the legal relations between them and to be acted on "accordingly, then, once the other party has taken him at his "word and acted on it, the one who gave the promise or assur-"ance cannot afterwards be allowed to revert to the previous "legal relations as if no such promise or assurance had been "made by him, but he must accept their legal relations subject "to the qualification which he himself has so introduced, even "though it is not supported in point of law by any consideration "but only by his word."

What is said is that at the interview on May 26, and by his letter of May 27, the plaintiff in effect promised the defendant that if the defendant paid up the arrears, he, the plaintiff, would not rely on the defendant's having allowed the policy to lapse as a default which enabled him to exercise the power of sale. The evidence as to what passed at the interview on May 26 is not very satisfactory. The defendant said that the question of his retaining possesion was discussed at the interview and that he took it, after receiving the letter, that the plaintiff was withdrawing the proceedings. The plaintiff, on the other hand, said that he did not remember the defendant asking to be allowed to remain in possession, that, if he had been asked to dscontinue the action, he would certainly have refused, and that he thought that the defendant had no justification for taking the letter as meaning that the proceedings would be dropped. It is unfortunate that the plaintiff did not state in the letter what was clearly stated by his solicitors on June 16, after the policy had been reinstated, that his consent to its reinstatement had nothing to do with the discontinuing of the proceedings and did not imply that he was going to discontinue them. However, it must be for the defendant to establish the equitable estoppel and, on the evidence, I cannot hold that what was said by the plaintiff at the interview or in the letter was intended to effect the legal relations of the parties or that the plaintiff so conducted himself that he cannot be heard to say that he did not intend to affect the legal relations of the parties. After all, his consent was needed to the reinstatement of the policy in any case

[1] [1951] 2 K.B. 215, 220; [1951] 1 T.L.R. 811; [1951] 1 All E.R. 767, C.A.

because he was the legal owner of it, and he may well have thought the defendant wished to reinstate the policy quite apart from any effect that it might have on the proceedings. On that footing, I need not consider whether what the defendant did, namely, paying up the premiums, would or would not be a sufficient acting on the plaintiff's assurance or promise to found the estoppel, supposing that I had thought that there was a promise or assurance by the plaintiff.

I now have to turn to the question whether the plaintiff ought to have an order for possession, which is a totally different matter. The position before the Judicature Acts, 1873 and 1875, was quite clear; under the ordinary mortgage where the legal estate in fee simple was given to the mortgagee, the mortgagee could at once take possession if he wished to do so, and the Court of Chancery would never grant an injunction restraining him from doing so. Of course, the Court of Chancery had its own weapon which it used against a mortgagee who did take possession. He would have to account strictly for his receipts in any redemption proceedings; but equity never intervened by injunction to prevent the mortgagee exercising his legal right to take possession. After the Judicature Acts, the two jurisdictions were fused, but the mortgagee's right to obtain an order for possession was a right which was enforced in the Queen's Bench Division and not in the Chancery Division. In 1936, by R.S.C., Ord. 55, r. 5A, claims for payment and for possession under mortgages were transferred to the Chancery Division, and the mortgagee was deprived of the right to sign judgment for possession in default of the defendant's appearance which hitherto he had had in Queen's Bench Division proceedings. Since 1936, now that the matter has been transferred to this Division, the plaintiff has to prove his case before he can get an order for possession, even though the defendant does not appear. In 1936 certain practice directions [2] now appearing in the note to Order 55, r. 5A, in the Annual Practice, were issued for the guidance of masters in these cases. I only need read a short passage from them. Under the heading, "Relief Claimed," there are these words [3]: "When possession "is sought and the defendant is in arrear with any instalments "due under the mortgage or charge and the master is of opinion "that the defendant ought to be given an opportunity to pay off "the arrears, the master may adjourn the summons on such "terms as he thinks fit, and if the defendant is in default of "appearance direct the plaintiff's solicitor to communicate such "terms to the defendant by letter."

In *Hinckley and South Leicestershire Permanent Benefit Building Society* v. *Freeman* [4] the question was raised whether this part of the practice direction was valid. It was argued that, although the plaintiff now had to prove his case and could not sign

[2] Annual Practice, 1960, p. 1504.
[3] Annual Practice, 1960, p. 1506.
[4] [1941] Ch. 32; 57 T.L.R. 71; [1940] 4 All E.R. 212.

1960

Braithwaite v. Winwood.

Cross J.

judgment in default of appearance, nevertheless when once he had proved his case, the court had no power to refuse an order for immediate possession in order to give the mortgagor time to make arrangements to have the mortgage transferred to someone else or otherwise to put his affairs in order. That argument was rejected by Farwell J. in the *Hinckley* case,[5] and Upjohn J. approved that decision in the later case of *Robertson* v. *Cilia*.[6] Having had the *Hinckley* case[7] cited to him, he said[8]: "No doubt I "have power to adjourn this matter for a reasonable period to "give the mortgagor an opportunity of making some offer accept- "able to the mortgagee and if necessary trying to find means of "discharging the loan altogether. That was the whole object "of the alteration in 1936; namely, to prevent a mortgagee "turning a mortgagor out of possession almost literally overnight "without giving him an opportunity to meet and try to satisfy his "creditor."

Both those cases were cases of building society mortgages repayable by instalments to which the part of the practice direction to which I have referred expressly relates. In the subsequent case of *Four-Maids Ltd.* v. *Dudley Marshall (Properties) Ltd.*,[9] Harman J. expressed the view that what was said in those cases did not apply to ordinary mortgages where the money lent was not repayable by instalments; that, in such cases, the court had no discretion, and that once the mortgagee proved his case the order for possession must go. Though I hesitate very much to differ from him, I cannot see the logic of the distinction. I can well understand it being held, as was argued in the *Hinckley* case,[10] that the function of the court in these cases is limited to seeing that the plaintiff proves his case and that the mortgagee cannot be deprived of a legal right by a rule of court or a practice direction. But, if once one accepts as Harman J. does, that the court has power to give time, even when the mortgagee has proved his case, I cannot see why that power should be only exercisable in the case of mortgages repayable by instalments, although I appreciate there may be much more occasion for exercising it in the case of a mortgage of the house in which the mortgagor is living than in the case of mortgages of other property.

Assuming, however, that I have a discretion in this matter, I do not think that I ought to exercise it in the defendant's favour. It was, no doubt, understandable that he should have stopped paying the premiums in 1959 because he thought that he was going to sell his house back to the mortgagor. Again, when the negotiations broke down, he was at once anxious to reinstate the policy and until he got the plaintiff's solicitors' letter of June 16, 1960, it was not unreasonable for him to think that

[5] [1941] Ch. 32.

[6] [1956] 1 W.L.R. 1502; [1956] 3 All E.R. 651.

[7] [1941] Ch. 32.

[8] [1956] 1 W.L.R. 1502, 1508.

[9] [1957] Ch. 317; [1957] 2 W.L.R. 931; [1957] 2 All E.R. 35.

[10] [1941] Ch. 32.

once he reinstated it he would be safe. Therefore, if this case had come before me at the end of June, I might have been disposed to give the defendant a period of time to see whether he could not arrange to have the mortgage transferred; but for the last four months the defendant has done absolutely nothing. He has just let the matter drift on, and he is not in fact living on the property. All he says is that if the clearance order is not confirmed and the property remains standing, he would like to go back and live there; and if the property is demolished he would rather sell the site himself than allow it to be sold by the plaintiff together with the sites of the other three houses.

In these circumstances, I do not think that he is entitled to any more indulgence than he has already had. Therefore, I propose to make an order for possession now. Logically, I suppose it might be said that I ought to make it operative at once, but I shall make it operative in the usual way, 28 days after service.

Declaration that the power of sale under the mortgage was exercisable. Order for possession within 28 days of service of the order.

Solicitors: *Curwen, Carter & Evans; Coode, Kingdon & Co. for Derrick Bridges & Co., Barnet.*

V. A. M.

[COURT OF APPEAL.]

* NATIONAL PIG PROGENY TESTING BOARD *v.* GREENALL (VALUATION OFFICER).

[LVC/1861/1958.]

C. A.
1960
Oct. 13, 14, 19.

Lord Evershed M.R., Harman and Donovan L.JJ.

Rating—Agricultural building—Pig progeny testing research station—Surrounding land arable meadow or pasture—Buildings—Whether occupied together with and used solely in connection with agricultural operations on the land—"Agricultural land"—"Agricultural "buildings" — "Thereon" — Meanings — Rating and Valuation (Apportionment) Act, 1928 (18 *&* 19 *Geo.* 5, *c.* 44), *s.* 2 (2).

By section 2 (2) of the Rating and Valuation (Apportionment) Act, 1928, "agricultural land" is defined as meaning "land used "as arable meadow or pasture ground only . . ." and "agricultural "buildings" to mean buildings "occupied together with agricul-"tural land . . . used solely in connection with agricultural "operations thereon."

The respondent board was concerned with the improvement of pigs and carried on business at litter testing stations, where young pigs were reared within doors under carefully-controlled conditions and various tests were carried out on them. One of these stations comprised, in addition to the buildings, nearly 7 acres of land

C. A.

1960

National Pig Progeny Testing Board v. Greenall.

which had been acquired in an uncultivated state. The land was ploughed and harrowed twice but its future use had not been decided upon at the material time. The Lands Tribunal, reversing the decision of the local valuation court, held that the land and the buildings were an "agricultural hereditament" and should be derated. The valuation officer appealed. It was conceded that the buildings were occupied with the land:—

Held, (1) that the land was "agricultural land" as defined in section 2 (2) of the Act of 1928.

(2) That the buildings were used for the agricultural operation of raising pigs but that at the material time when the proposal to rate was made, there was no connection between that use and any agricultural operations on the land, and that, accordingly, the buildings were not "agricultural buildings" and the hereditament was not exempt as an "agricultural hereditament."

(3) That the expression "thereon" in section 2 (2) meant "on "the land" and not "on the holding."

Thompson v. *Milk Marketing Board* [1952] 2 Q.B. 817; [1952] 2 T.L.R. 231; [1952] 2 All E.R. 344, C.A. and *Perrins* v. *Draper* [1953] 1 W.L.R. 1178; [1953] 2 All E.R. 863, C.A. followed.

Decision of Lands Tribunal reversed.

Appeal from the Lands Tribunal (Mr. Erskine Simes Q.C.) on a case stated.

The National Pig Progeny Testing Board appealed from a decision of a local valuation court for the West Riding of Yorkshire (North) given on September 24, 1958, confirming the assessment of a hereditament described as "Litter testing "station," Station Road, Hambleton, with a gross value of £3,300, net annual value of £2,747 and rateable value of £2,198. The ground of the appeal was that the hereditament was an agricultural hereditament and was entitled to exemption from rating pursuant to section 67 of the Local Government Act, 1929. It was agreed that if the contention was unsound the values determined by the court were correct.

At the hearing before the Lands Tribunal the following facts were proved or admitted: The cost of the building was £110,000. The normal cost of commercial piggeries was £22 per pig. The hereditament was formerly a litter testing station which was acquired by the board and it was due to this fact that the land was greater in area than that at the board's other stations. The feeding stuffs for the pigs which were standard mixtures arrived at the hereditament in sacks, and the same standard mixtures were used also at the other stations. The board would not operate the station but for the data which they obtained in relation to pigs reared there. The board were awaiting the report of a working party before deciding as to which of the proposed uses the land should be put. The final decision rested with the board.

The board were a company registered under the Companies Act and their objects as set out in the Memorandum of Association so far as material to this case were: "(i) To promote, under-"take and encourage education, research and experiments and "the collection and recording of information with the aim of "improving the production of pigs and in particular to carry on

"the progeny testing of pigs at progeny testing stations in Great "Britain. (ii) In so far as is necessary for or incidental to the "achievement of the objects aforesaid but not further or other-"wise: (a) To acquire, transport, insure, breed, feed, keep, kill "and sell or otherwise dispose of pigs."

The hereditament comprised an area of 9 acres of which ·83 of an acre was covered by buildings, 1·37 acres used for roads, car park, sewage disposal plant and middens leaving 6·80 acres, which when the board took possession in August, 1957, was "a wilder-"ness of weeds covered with builder's rubble." By the date of the proposal in March, 1958, this area had been twice ploughed and harrowed, but its future use had not definitely been decided. There were two proposed uses, (i) to grow corn from which about 25 per cent. of the straw required in the buildings might have been obtained and grain equal to about 5 per cent. of the food used in those buildings though the grain would have been sold and would not necessarily have come back as part of the food so used, or (ii) to lay down to grass so as to provide facilities for raising and feeding pigs in the open as an alternative method of testing to that used in the buildings. In fact the future use had even then not been definitely determined and an attempted grass ley had proved unsuccessful owing to weather conditions in that year (1959).

The main building had a total area of 34,254 square feet and provided accommodation for 400 pigs, each of which was housed in a separate pen. The building was provided with central heating and air conditioning to ensure uniform conditions throughout. . . . The board had a headquarters office at Letchworth and five outstations of which the appeal hereditament was one. A breeder wishing to have the progeny of a particular boar tested communicated with the headquarters and four pigs of a litter not more than nine weeks old and weighing not more than 45 lb. were, through the headquarters, sold to the board at the current market price less a testing fee of £5 and delivered to the most convenient outstation. At this station they were kept each in a separate pen and fed until they reached a weight of 200 lb. when they were sold to a bacon factory for slaughter. During their stay in the station records were kept of the food consumed daily and their weight each week and any diseases or ailments from which they suffered. The carcasses were also measured and particulars taken at the factory by one of the staff employed at the station and all the records were sent to headquarters for compilation and reports were sent to the breeders from these headquarters to which also payments were made by the factory. . . . The purpose was to feed and raise the pigs as they would be fed and raised on an ordinary commercial pig farm save that each pig was kept in a separate pen and conditions were provided to ensure uniformity so as to ensure proper comparisons. Weighing also took place more frequently than on a commercial pig farm.

C. A.
1960
NATIONAL PIG PROGENY TESTING BOARD v. GREENALL.

As a consequence of this keeping in separate pens, the buildings were considerably larger than would be necessary for keeping 400 pigs on a commercial pig farm where there would normally be about ten pigs to a pen, and a larger staff had to be employed. At this station there were a manager, four pigmen and a station clerk, while in a commercial piggery one and half men would normally be sufficient to look after 400 pigs.

It was admitted in cross-examination that with the present system of testing, land other than that on which the buildings stood was not necessary and in fact the other outstations all occupied much smaller areas than the one in question, the sites varying from three and a half to six acres, and any land not occupied by buildings was grassed down and not used in connection with the station but as amenity land only. The buildings at each station were identical.

It was submitted on behalf of the board that the raising of pigs was an agricultural purpose and it mattered not that the object of raising them was to provide a service to breeders and counsel referred to *Thompson* v. *Milk Marketing Board.*[1] He distinguished the decision of the Lands Valuation Appeal Court in relation to the outstation at Bridge of Allan on the ground that the court were there bound by the finding of fact that the primary purpose of the station was "to give information and advice to "breeders of pigs with the intention of improving the quality of "bacon" and contended that, in considering whether the buildings were agricultural, one should look at what was done and not at the object with which it was done. He further contended that it mattered not if the buildings were ancillary to the land or the land ancillary to the buildings, or if the land was necessary only as a screen or amenity to the buildings and he referred to *Hallam* v. *James.*[2] He also referred to *Perrins* v. *Draper*[3] and *Hardie* v. *Hastie.*[4]

Mr. Raymond Phillips on behalf of the valuation officer contended that there could be no agricultural building unless there was "agricultural land" within the definition in section 2 (2) of the Rating and Valuation (Apportionment) Act, 1928,[5] and that on the facts in the present case it was impossible to say that the land was "used" as "arable or pasture" at the date of the proposal. Alternatively, he contended that even if the land

[1] [1952] 2 Q.B. 817; [1952] 2 T.L.R. 231; [1952] 2 All E.R. 344, C.A.

[2] LVC/1655/1957; 52 R. & I.T. 6; 4 R.R.C. 142.

[3] [1953] 1 W.L.R. 1178; [1953] 2 All E.R. 863, C.A.

[4] 1940 S.C. 329.

[5] Rating and Valuation (Apportionment) Act, 1928, s. 2: "(1) In "this Act the expression 'agricultural "'hereditament' means any here-"ditament being agricultural land or "agricultural buildings. (2) In this "Act the following expressions have "the meanings respectively assigned "to them: 'Agricultural land' means "any land used as arable meadow or "pasture ground only, land used for "a plantation or a wood . . . 'Agri-"'cultural buildings' means build-"ings (other than dwelling-houses) "occupied together with agricultural "land or being or forming part of a "market garden, and in either case "used solely in connection with "agricultural operations thereon."

was agricultural, its user in connection with the testing carried on in the buildings was de minimis. He contended that the buildings could not be said to be used solely in connection with any agricultural operations on the land and that the purposes for which the buildings themselves were used were not agricultural since the object of their user was testing.

Mr. Erskine Simes Q.C. said: "I have come to the decision "that the land was 'agricultural land' within the Act. It seems "to me quite ridiculous to suggest that because at a certain date "land, which has been in bad condition and obviously requires "considerable cultivation before it can produce, is still undergoing "such cultivation is not being used as arable or pasture. No "one would doubt that a field lying fallow was still agricultural "land within the statute even though for the time being it was "not being used to grow arable crops or pasture. Nor do I think "that because, at a particular point of time, the cultivator has "not finally made up his mind as to the purpose for which he "will use the land, that fact can deprive it of its character as "agricultural land, if his intention is to use it for growing crops "or providing pasture, and I am satisfied by the evidence that "it was the intention of the board to use it for one or other of "these purposes. It seems to me, therefore, that the first part "of the definition of an 'agricultural building' is satisfied and "that these are 'buildings occupied together with agricultural "'land.'

"I find more difficulty when I have to consider whether they "are 'used solely in connection with agricultural operations "'thereon.' In the first place I am faced by the decision of the "lands valuation court of Scotland in the case of a precisely "similar station that is not 'used for agricultural purposes only.' "I am not of course bound by that decision which rested upon "the definition of agricultural land and buildings in Scotland "which differs from that which I construe and the court in that "case was bound by the findings of fact that the primary purpose of the station was to give information and advice to "breeders. I differ with respect from the decision of the Scottish "court for it seems to me that in considering the use of a building "one must look at what is done in the building and it is, I "think, clear from the evidence before me that this building is "used for the raising of pigs. It is true that during the course "of this raising records are kept with greater particularity than "on a commercial station and that the pigs are kept in conditions "which differ from those on a commercial farm but the building "is used solely for the keeping and rearing of pigs which seems "to me clearly an agricultural purpose. The collation of records "and the drawing of inferences therefrom, the preparation of "reports and the sending of such reports to breeders is not done "on the premises but at the headquarters at Letchworth which "is also responsible for buying the pigs and receiving the price of "the carcasses from the factory.

C. A.
1960
National Pig Progeny Testing Board v. Greenall.

"I am satisfied by the evidence that at the date of the proposal the land was under cultivation with the intention of using it for a purpose connected with the operations carried on in the buildings.

"In these circumstances it seems to me that having regard to the decision of the Court of Appeal in *Thompson* v. *Milk Marketing Board*[6] as applied by this tribunal in *Hallam* v. *James*[7] the hereditament is an agricultural hereditament and, therefore, entitled to derating.

"The appeal will, therefore, be allowed, a direction given that the hereditament be deleted from the valuation list for the Selby rural district rating area and the valuation officer will pay to the board their costs to be agreed, or in default of agreement taxed by the registrar of the Lands Tribunal on the High Court scale."

The valuation officer appealed.

Anthony Cripps Q.C. and *Raymond Phillips* for the appellant valuation officer.

Lionel A. Blundell Q.C. and *J. T. Plume* for the respondent board.

In addition to the cases referred to in the judgment the following were cited in argument: *Smith* v. *Richmond*[8]; *Parry* v. *Anglesey Assessment Committee*[9]; *Hallam* v. *James*[10]; *Hardie* v. *Hastie*[11]; *Newcastle City Council* v. *Royal Newcastle Hospital.*[12]

Cur adv. vult.

October 19. Lord Evershed M.R. The judgment which Harman L.J. is about to deliver is the judgment of the court.

Harman L.J. stated the facts and continued: The valuation officer's proposal was to rate both buildings and land at a gross value of some £3,000 and a rateable value of £2,198. That proposal was accepted by the local valuation court in September, 1958, but an appeal to the Lands Tribunal heard in January, 1960, was successful and the land and buildings were held entitled to be derated as an agricultural hereditament. The valuation officer appeals to this court.

The answer depends upon the true construction of section 2 (2) of the Rating and Valuation (Apportionment) Act, 1928. Under section 67 of the Local Government Act, 1929, agricultural land or agricultural buildings are entitled to exemption from rates. To identify these one must turn to the Act of 1928, which is in these

[6] [1952] 2 Q.B. 817.
[7] 4 R.R.C. 142.
[8] [1899] A.C. 448; 15 T.L.R. 523, H.L.
[9] [1949] 1 K.B. 246; 64 T.L.R. 635; [1948] 2 All E.R. 1060, D.C.
[10] 4 R.R.C. 142.
[11] 1940 S.C. 329.
[12] [1959] A.C. 248; [1959] 2 W.L.R. 476; [1959] 1 All E.R. 734, P.C.

terms: Section 2 (2): "In this Act the following expressions "have the meanings hereby respectively assigned to them: "'Agricultural land' means any land used as arable meadow or "pasture ground only, land used for a plantation or a wood . . . "'Agricultural buildings' means buildings (other than dwelling-"houses) occupied together with agricultural land or being or "forming part of a market garden, and in either case used solely "in connection with agricultural operations thereon."

It seems to us clear that on this section "agricultural land" is distinct from "agricultural buildings," though either is an "agricultural hereditament." The respondent in order to succeed must, therefore, show that his land is "agricultural land" and that his buildings are "agricultural buildings." The only words appropriate to the former are "land used as arable meadow or "pasture ground only." We agree with the president of the tribunal that this land passes this test. A decision had been made to put it to an agricultural use. It has been ploughed and harrowed, operations essential to that end, and the fact that at the moment of the proposal in March, 1958, the owners had not decided to which agricultural use it should be put does not seem to us fatal to their submission.

That the buildings should rank as agricultural buildings they must pass two tests: first, they must be "occupied together with "agricultural land" and, secondly, must be "used solely in "connection with agricultural operations thereon." It is conceded that these buildings are occupied together with the land which we have held to be agricultural land. They, therefore, pass the first test. The use to which the buildings are put is clear. It is the raising of pigs. True these are not raised in the normal commercial way and the object is not to make a profit by the sale of the carcasses but to collect statistical information for the help of farmers. Nevertheless it seems to us clear that this is an "agricultural operation." The crucial point is whether this use is connected solely with agricultural operations on the land. In our judgment the respondent's case breaks down at this point. The use of the buildings in March, 1958, appears to us to have had no connection at all with any agricultural operations on the land. Those operations had not got beyond the stage of ploughing and it was quite uncertain what the future might bring. It was argued that if it was decided to grow corn the straw produced would provide the necessary connection, while if grass were laid down the future experiments in open air pig rearing would do the like. This may be left to be argued when it happens. The relevant date was the date of the proposal, namely, March, 1958, and at that time and indeed when the case was stated in January, 1960, the question was still undecided. The intention found to exist to use the land for one of these purposes is not the same thing as its user for them or one of them. We cannot agree that the use of the buildings had at the relevant time any connection with the use of the land. The appeal, therefore, succeeds.

C. A.
1960
NATIONAL PIG PROGENY TESTING BOARD v. GREENALL.

As to the cases cited to us, *Thompson* v. *Milk Marketing Board* [1] was quite different. The land there was at the relevant date being used for purposes very much connected with the use of the buildings. Both in that case and the later case *Perrins* v. *Draper*,[2] the Court of Appeal held that the word "thereon" at the end of the section meant "on the land," and not as Mr. Blundell would have us believe "on the holding." In our judgment we are bound to follow those expressions of opinion.

Appeal allowed with costs in the court and before the Lands Tribunal. Costs before the tribunal on the High Court scale.

Ordered that the hereditament should stand entered in the valuation list with a gross value of £3,300, a net annual value of £2,747 and a rateable value of £2,198.

Leave to appeal refused.

Solicitors: *Solicitor of Inland Revenue; Ellis & Fairbairn.*

E. D.

[1] [1952] 2 Q.B. 817; [1952] 2 T.L.R. 231; [1952] 2 All E.R. 344, C.A.

[2] [1953] 1 W.L.R. 1178; [1953] 2 All E.R. 863, C.A.

[CHANCERY DIVISION.]

1960
Nov. 10.

* PRACTICE DIRECTION (PATENTS).

Patent—Practice—Motions—To whom made—R.S.C., Ord. 53A, *r.* 2.

Motions in actions and matters relating to the above will be made to Lloyd-Jacob J. and not to the non-witness judge of the group to which the case is assigned.

The solicitors for the party moving must apply to His Lordship's clerk for a date, and, on being notified when the motion will be in the list for hearing, must give notice to the respondent's solicitors and lodge with the cause clerk (Room 136) the stamped notice of motion and a copy thereof.

The Practice Direction issued on January 20, 1950,[1] is hereby cancelled.

W. F. S. HAWKINS,
Chief Master,
Chancery Division.

November 10, 1960.

[1] [1950] W.N. 57.

[COURT OF APPEAL.]

* *In re* TREPCA MINES LTD.

C. A.

1960
July 8, 11, 12, 13.

Hodson, Ormerod and Harman L.JJ.

[00510 of 1957.]

Company—Winding up—Appeal from liquidator—Rejection of proof by liquidator—Power of appellate court.
Conflict of Laws — Foreign judgment — Immovables — Mineral action involving mining rights—Action to enforce.

The proof of debt of a foreign applicant was rejected by the liquidator of a British company in voluntary liquidation. The proof claimed that the applicant was a creditor of the company in respect, inter alia, of his contingent claim pending in Yugoslavia for the review of the decision of the Supreme Court of Serbia in 1955 reversing a judgment which he had obtained against the company in the county court of Belgrade in 1954 or, alternatively, of his claim to be indemnified for his loss caused by the company's wrongful exploitation, prior to December, 1946, of mining rights vested in him in Yugoslavia.

Roxburgh J. upheld the liquidator's rejection of the proof on the ground, inter alia, that the Belgrade judgment was in personam, and that the company had never submitted to the jurisdiction of the Yugoslav court.

The applicant appealed:—

Held, (1) that as, for the reasons set out below, the judge had been wrong in law in excluding the applicant's proof, the matter had still to be determined by the Companies Court, and that it was not possible to dispose of it finally upon appeal.

In re Kentwood Constructions Ltd. [1960] 1 W.L.R. 646; [1960] 2 All E.R. 655 approved.

(2) That the Belgrade judgment, being a judgment in a mixed action involving mining rights corresponding to a claim for conversion of concentrates extracted from land pursuant to a claim to such rights which were immovable, was not simply an action in personam.

British South Africa Company v. *Companhia De Moçambique* [1893] A.C. 602; 10 T.L.R. 7 applied.

Emanuel v. *Symon* [1908] 1 K.B. 302; 24 T.L.R. 85, C.A. and *Travers* v. *Holley* [1953] P. 246; [1953] 3 W.L.R. 507; [1953] 2 All E.R. 794, C.A. considered.

(3) That, accordingly, the contingent value of the applicant's claim in respect of immovable property in Yugoslavia must be assessed by the court, consideration being given to the prospects of his action in Yugoslavia.

In re English Assurance Co., Holdich's Case (1872) L.R. 14 Eq. 72 and *In re Northern Counties of England Fire Insurance Co., MacFarlane's Claim* (1880) 17 Ch.D. 337 applied.

Decision of Roxburgh J. [1960] 1 W.L.R. 24; [1959] 3 W.L.R. 798n. reversed.

APPEAL from Roxburgh J.[1]

A summons was taken out by a Swiss lawyer acting for the

[Reported by A. H. BRAY, Esq., Barrister-at-Law.]

[1] [1960] 1 W.L.R. 24; [1959] 3 All E.R. 798n.

C. A.
1960
TREPCA MINES LTD., *In re.*

applicant, Radomir N. Pachitch (Pasic), a resident of Switzerland and apparently a Serb by birth, for an order that a decision of the respondent, the liquidator of Trepca Mines Ltd., a British mining company in voluntary liquidation, rejecting a claim by the applicant to be a creditor of the company for £2,616,486, be reversed and the proof ordered to be admitted in full. The proof alleged that the company "was at the date "of the commencement of the winding up [June 3, 1957], and "still is, justly and truly indebted to the applicant in the sum "of approximately £2,500,000, with interest at 4 per cent., "(1) in execution of the judgment of the county court of Bel-"grade of February 10, 1954, or alternatively, (2) being the "value of the creditor's contingent claim now pending in the "county court of Belgrade and the Supreme Court of Serbia "for a review of the decision of the Supreme Court which reversed "the judgment of February 10, 1954; or alternatively (3) being "the value of the said creditor's claim to the ownership of all "mining rights vested in his father, Nikola Pachitch (Pasic), on "his said father's death on December 10, 1926, and exploited "by the company until December 5, 1946, when the mining "rights were nationalised by the Federal Republic of Yugo-"slavia; or alternatively (4) being the value of the above-named "creditor's claim to be indemnified for his loss as a result of the "wrongful exploitation of the mining rights by the company "and their nationalisation as aforesaid; or alternatively (5) "being the value of the above-named creditor's claim that the "company should account to him for the profit wrongfully made "by them by the exploitation of the mining rights as aforesaid."

On appeal to the registrar following the rejection of the proof by the liquidator the matter was not finally concluded. The registrar adjourned the matter to the judge of the Companies Court after counsel who then appeared for the applicant had put forward the contention that the applicant was entitled to rely upon the judgment of the Belgrade court.

On October 20, 1959, Roxburgh J. upheld the decision of the liquidator, holding that the Belgrade judgment was in personam and that the applicant's claim was barred by the Limitation Act, 1939. The applicant, who did not speak English, appeared before Roxburgh J. in person. The applicant appealed.

John Foster Q.C., *C. A. Settle Q.C.* and *Miss V. A. Pearlman* for the applicant.

L. G. Scarman Q.C., *Philip Sykes* and *Owen Stable* for the liquidator.

The following cases which were cited in argument are not referred to in the judgment: *Re Parana Plantations Ltd.*[2]; *Agnew* v. *Usher*[3]; *Sirdar Gurdyal Singh* v. *Rajah of Faridkote*[4];

[2] [1948] 1 All E.R. 742.
[3] (1884) 14 Q.B.D. 78, D.C.
[4] [1894] A.C. 670; 10 T.L.R. 62, P.C.

D'Almeida Araujo (J.) Lda. v. *Sir Frederick Becker & Co. Ltd.*[5]; *The Atlantic Scout*[6]; *The Tolten*[7]; *Dollfus Mieg. et Compagnie S.A.* v. *Bank of England*[8]; *In re Law Car & General Insurance Corporation*[9]; *Deschamps* v. *Miller*[10]; *In re Hawthorne.*[11]

HODSON L.J. This is an appeal from an interlocutory judgment of Roxburgh J.[1] given on October 21, 1959, whereby he rejected an application by the applicant to reverse the decision of the liquidator of Trepca Mines Ltd. rejecting the proof of debt of the applicant for the sum of approximately £2,500,000. This court is asked to set aside the judge's order and to admit the proof either in whole or in part, or to remit the case to a judge of the Companies Court in order that the question at issue between the parties may be decided, it being contended in this court that the judge in two respects made an error in law in rejecting the applicant's proof so that he was deflected from the task which was before him of himself assessing the claim.

I think it is convenient in this connection to refer to a recent decision of Buckley J., *In re Kentwoood Constructions Ltd.*,[2] where, there having been a petition to wind up the company and the claimants, a firm of chartered accountants, having been employed to investigate the company's affairs, the claimants lodged a proof of debt in the winding up for £525 for professional services: the liquidator rejected the proof, and the claimants issued a summons asking that the decision of the liquidator might be reversed and that the proof be ordered to be admitted in full. The judge, in considering the matter before him, had to consider whether it was open to him to receive evidence as to the amount of the claim and whether he could (as the rules provide) accept the claim not wholly but in part. He said[3]: "It was argued on behalf of the liquidator that the "question before the registrar was simply whether the liquidator "was right or wrong, on the evidence available to him at the "date when he rejected the proof, in rejecting the proof. I do "not think that is really the function of the court on an appeal "from a rejection of a proof. When application is made to the "court to reverse a decision of a liquidator in rejecting a proof, "evidence is filed which is very commonly much fuller than "the evidence available to the liquidator at the time when he "decides to reject the proof; and the court is bound to decide "the rights of the claimant in the light of the evidence which "is before the court, and not merely to express a view as to "whether the liquidator was right or wrong in rejecting the

[5] [1953] 2 Q.B. 329; [1953] 3 W.L.R. 57; [1953] 2 All E.R. 288.
[6] [1950] P. 266.
[7] [1946] P. 135; 62 T.L.R. 378; [1946] 2 All E.R. 372, C.A.
[8] [1950] Ch. 333; 66 T.L.R. (Pt. 1) 675; [1950] 1 All E.R. 747, C.A.
[9] [1913] 2 Ch. 103; 29 T.L.R. 130, 532, C.A.
[10] [1908] 1 Ch. 856.
[11] (1883) 23 Ch.D. 743.
[1] [1960] 1 W.L.R. 24; [1959] 3 W.L.R. 798n.
[2] [1960] 1 W.L.R. 646; [1960] 2 All E.R. 655.
[3] [1960] 1 W.L.R. 646, 647.

C. A.
1960
Trepca Mines Ltd., *In re.*
Hodson L.J.

"proof when he rejected it." The judge concluded by saying[4]: "It is not merely the function of the court to say that a decision "is right or wrong; it may vary it in any way it thinks necessary in the light of the evidence before the court. The court "must approach the question de novo and determine to what "extent the claimants ought to be allowed to rank as a proving "creditor."

I refer to that case as showing that the position as I see it is this, that, if (as the applicant contends) the judge was wrong in law in the two points which he took, which excluded the applicant's proof, the matter still must be determined by the court, that is to say by the judge of the Companies Court, and that really it is not possible to dispose of the matter finally upon this appeal.

The only other matter to which I need refer by way of preface is this. The applicant himself, although he had been represented by counsel before the registrar, appeared before the judge in person. He did not speak English: he conducted the proceedings through an interpreter. The proceedings were conducted in English so far as the court was concerned as the court was listening to the English language through the mouth of the interpreter. But the difficulties of the judge were no doubt enhanced by the fact that, in a difficult matter, questions of law were left to be decided by him without any assistance from trained lawyers acting on behalf of a man who had not command of the English language.

[His Lordship then stated the facts as to the proof and continued:] Although the proof has been rejected on the ground that the judgment of February 10, 1954, was no longer in existence—because, indeed, it has been reversed by a judgment of an appellate court dated September 5, 1955—the judge dealt with the matter in a different way, because he held that the judgment was not effective, being a judgment in personam, and was governed by the principle of *Emanuel* v. *Symon*.[5] The principle enunciated in that case is to be found I think most conveniently stated in the judgment of Buckley L.J.[6]: "In "actions in personam there are five cases in which the courts of "this country will enforce a foreign judgment: (1) Where the "defendant is a subject of the foreign country in which the judgment has been obtained; (2) where he was resident in the "foreign country when the action began; (3) where the defendant in the character of plaintiff has selected the forum in "which he is afterwards sued; (4) where he has voluntarily "appeared; and (5) where he has contracted to submit himself "to the forum in which the judgment was obtained." Buckley L.J. continued: "The principle upon which this court proceeds "in enforcing foreign judgments is stated by Blackburn J. in

[4] [1960] 1 W.L.R. 646, 648.
[5] [1908] 1 K.B. 302; 24 T.L.R. 85, C.A.
[6] [1908] 1 K.B. 302, 309.

"*Schibsby* v. *Westenholz*[7] in these words: 'We think that for "'the reasons there'—i.e., in the case of *Godard* v. *Gray*[8]— "'given, the true principle on which the judgments of foreign "'tribunals are enforced in England is that stated by Parke B. "'in *Russell* v. *Smyth*,[9] and again repeated by him in *Williams* "'v. *Jones*,[10] that the judgment of a court of competent juris- "'diction over the defendant imposes a duty or obligation on "'the defendant to pay the sum for which judgment is given, "'which the courts of this country are bound to enforce; and "'consequently that anything which negatives that duty, or "'forms a legal excuse for not performing it, is a defence to "'the action.'"

In the events which happened in the present case, the defendant never having submitted to the jurisdiction of the Yugoslav court, if the rule in *Emanuel* v. *Symon*[11] applies (as the judge thought) there could be no basis for this claim to succeed on the footing of a foreign judgment. But the difficulty about applying that decision in itself is this: that this is not simply a judgment in personam, it is a judgment in a mixed action which involves mining rights. The claim was a claim corresponding to a claim in this country for conversion of the concentrates which were extracted from the land, in pursuance of a claim made by the applicant to the mining rights, which are (as indeed has been conceded in argument in this court) immovable; and for the purposes of what is conveniently called the rule in *British South Africa Co.* v. *Companhia De Moçambique*[12] the position is this: this court will not entertain actions in respect of immovables which are situate in a foreign country. I think it is sufficient to read the headnote of that case.[13] "The Supreme "Court of Judicature has no jurisdiction to entertain an action "to recover damages for a trespass to land situate abroad; the "rules of procedure under the Judicature Acts with regard to "local venue (Ord. 36, r. 1) did not confer any new jurisdic- "tion." Accordingly, so far as the mining rights themselves are concerned, quite apart from the claim for conversion, the only competent court is the court of Yugoslavia; so that the judge's way of disposing of the judgment is not, I think, a satisfactory or proper answer to the applicant's claim in the present case.

It is quite true that that does not solve the problem, but it leaves open the question whether the applicant can, in any proceedings in this country, claim for conversion, relying upon a judgment of the courts of his own country in so far as that judgment deals with a right to immovable property. It is true that the judgment of the court in his favour for £2,500,000 was reversed by the Court of Appeal; but proceedings were taken

[7] (1870) L.R. 6 Q.B. 155, 159.
[8] (1870) L.R. 6 Q.B. 139.
[9] (1842) 9 M. & W. 810, 819.
[10] (1845) 13 M. & W. 628, 633.
[11] [1908] 1 K.B. 302.
[12] [1893] A.C. 602; 10 T.L.R. 7, H.L.
[13] [1893] A.C. 602.

C. A.
1960
TREPCA MINES LTD., *In re.*
Hodson L.J.

by him after that in order to restore his earlier judgment. On the same day as the commencement of the winding up, on June 3, 1957, some proceedings were taken which failed, I think, in the subsequent month of July. He again, as we are informed, put in train proceedings which he is entitled to take in his own country, for the purpose of upsetting the judgment of the court which reversed the judgment in his favour, on the ground that he has found fresh evidence. It is quite true that this may be a very slender basis for the valuation of what would be a purely contingent claim; but the value of that contingency has never in fact been assessed at all. The position was that lawyers on both sides gave their attention (in the form of affidavits) to the prospects of success or otherwise of the proceedings which are now said to be on foot; and orders were made that those gentlemen should attend for the purposes of cross-examination before the judge. We were told that the lawyers who represented the applicant at any rate did in fact present themselves, but that no assessment of the contingency was ever made because of the course taken by the judge in, as it were, brushing aside the judgment altogether.

The point was taken late in argument in this case that in any event the judgment of the Yugoslav Court of Appeal in 1955, which reversed the judgment of 1954, ought not to be regarded in this country as of any validity because its decision was against public policy. It is said that the applicant had obtained a final judgment and that what happened was not an appeal in the ordinary sense of the word at all but that a third party, namely, a representative of the State, whose title corresponds roughly to that of the prosecutor or Procurator-General in this country, intervened and, after argument as a third party, obtained a reversal of the decision. No authority has been adduced to us on this topic, but it is said that for that reason one ought not in this country to pay regard to a judgment which reverses a final judgment when the reversing judgment has been obtained in that way. Secondly, it is said that on perusal of the judgment it shows that political considerations entered into the reasoning of the court which are foreign to our ideas of the administration of justice and therefore it is against public policy that the judgment should be recognised.

I am unable to accept the second argument. It was not pursued at great length; and it was admittedly (as counsel said) a matter very largely of first impression. But on reading the judgment of 1955, so far as I can tell it was a judgment which was based on legal grounds and not so tainted with political considerations as to make it absurd from our point of view to regard it as a judgment in the juristic or legal sense.

So far as the first point is concerned, it does not seem to me that the mere fact that the system of law of another country allows a judgment to be overturned by the intervention of a legal official, call him the Procurator-General or what you will, makes the

judgment disentitled to respect as a judgment. So the position is, as I see it, that there is a contingency to be valued.

Mr. Scarman, on behalf of the liquidator, says that the argument based on *British South Africa Co.* v. *Companhia De Moçambique*,[14] if accepted, really destroys the other part of the claim. The other part of the claim (I leave out paragraph (3); and paragraphs (4) and (5) are really the same) relates to "the value of "the . . . creditor's claim to be indemnified for his loss as a "result of the wrongful exploitation of the mining rights by the "company and their nationalisation as aforesaid"—that is, during the period between his father's death in December, 1926, and December 5, 1946. I do not think it does destroy it. I think it destroys the claim only to this extent, that it is impossible for the claimant to rely on the judgment as a judgment in personam. This disposes of his claim under paragraphs (1) and (2); but if he succeeds in obtaining a judgment in Yugoslavia he can rely upon it as a judgment settling the right to the immovable property which must form the basis of any claim for conversion or the like which he may make, founded upon that declaration of his right to the mining rights.

The judge dealt with the claim with which I am now dealing in this way: The liquidator had disposed of the whole of this claim from the father's death because he said it was barred by the Limitation Act, 1939. It was pointed out, however, that the company were operating in the country between 1938 and 1941, when they were turned out by the Germans, and there could not be any possibility of their converting any of the concentrates before 1938 unless in some way they inherited the liability of their predecessor in title, some other company, before 1938: nor could they have converted any of these concentrates after 1941, when the Germans came into the country. But there still remains the period of three years, and the question then arises whether a claim relating to that period is barred by the Limitation Act, 1939.

The judge took the view that the claim as formulated was really based on the judgment, and the alternative claim was a claim from December 10, 1926, and no other date, and he was not at first prepared to entertain a claim from 1938 unless such a claim were formulated before him. In that state of affairs, he asked the applicant whether he was anxious or willing to amend, to which he received a negative reply, and thereupon he said: "There is no claim from 1938: the only claim is from 1926, and that claim is barred."

[His Lordship referred to the Limitation (Enemies and War Prisoners) Act, 1945, and said that Roxburgh J. was in error in the way in which he dealt with the limitation point, because although the claim from 1938 to 1941 would, in the ordinary course of events, be barred, it could be saved by the provisions of the Act

[14] [1893] A.C. 602.

C. A.
1960
TREPCA MINES LTD., *In re.*
Hodson L.J.

of 1945. His Lordship continued:] So far as the legal points are concerned, it seems to me that the applicant succeeds in this court in showing that his claims have not been assessed, for reasons which were not in themselves good reasons, and that they still must be assessed by the court. It is quite true that it is open to the court to assess those claims at a nil figure. It is a course which is very seldom taken, in cases of winding up: the authorities show that, and the rule indeed indicates that.

I do not propose to pursue that matter further, because the judge who will have to handle this matter will be well aware of his duties, and, indeed, it is open to him to direct that the claim be not entertained unless an action is brought. There is no need for the contingency to be valued upon the facts as they appear today. But that is a matter for him. It seems to me that the matter must be assessed; and in that connection consideration will necessarily have to be given to the evidence which has been put before the court as to what the prospects are in Yugoslavia in relation to the action in connection with the immovables. It was argued on behalf of the liquidator that there was in fact nothing to be assessed, that there was no judgment at the time of the commencement of the winding up, namely in 1957, because at that time the judgment of 1954 had been reversed and, therefore, there was no basis for the claim. That argument I think fails, having regard to the fact that although the value of claims has to be assessed at the date of the commencement of the winding up, what happens subsequently to that date must necessarily be relevant in order to find out what the real value of that claim may be. That, I think, appears from the judgment in *In re English Assurance Co., Holdich's Case.*[15] Lord Romilly M.R., referring to the opinion which had been expressed by Lord Cairns, said[16]: "No doubt the day of the winding-up order is the time at which "the value of the policy or annuity is to be calculated; but sub-"sequently facts may be given in evidence for the purpose of "showing what the real value was at that time, such as the "sudden death of the annuitant or of the assured, in the one "case a benefit to the company, in the other to the estate of the "assured." The principle which is referred to in that case, and subsequently in *In re Northern Counties of England Fire Insurance Co., MacFarlane's Claim,*[17] seems to me to show that it is not a complete answer to this claim to say that there was nothing in existence at the date of winding up, that there was no judgment and nothing upon which the claimant could found. In my judgment, therefore, the matter must be sent back for further consideration.

There was a further argument addressed to this court which derives from the decision in a matrimonial case, *Travers* v. *Holley,*[18] where it was held in a divorce suit that where the courts

[15] (1872) L.R. 14 Eq. 72.
[16] Ibid. 80.
[17] (1881) 17 Ch.D. 337.
[18] [1953] P. 246; [1953] 3 W.L.R. 507; [1953] 2 All E.R. 794, C.A.

of New South Wales and the English courts claimed the same jurisdiction, it would be contrary to principle and inconsistent with comity if the courts of this country refused to recognise a jurisdiction which mutatis mutandis they claimed for themselves. Arguing from that, reliance was placed upon a dictum of Denning L.J. in *In re Dulles' Settlement (No. 2)*.[19] Denning L.J., dealing with the same or a kindred point, but obiter, in considering the operation of R.S.C., Ord. 11 (which deals with service out of the jurisdiction), said[20]: "The plaintiff [in *Harris* v. *Taylor*[21]] sued "the defendant in the Isle of Man for a tort committed there. "The defendant was not in the island, but the Manx court gave "leave to serve him out of the jurisdiction of that court, on the "ground that the cause of action was founded on a tort com-"mitted within their jurisdiction. The defendant entered a "conditional appearance in the Manx court and took the point "that the cause of action had not arisen within the Manx juris-"diction. That point depended on the facts of the case, and it "was decided against him; whence it followed that he was "properly served out of the Manx jurisdiction in accordance with "the rules of the Manx court. Those rules correspond with the "English rules for service out of the jurisdiction contained in "Order 11; and I do not doubt that our courts would recognise a "judgment properly obtained in the Manx courts for a tort "committed there, whether the defendant voluntarily submitted "to the jurisdiction or not; just as we would expect the Manx "courts in a converse case to recognise a judgment obtained in "our courts against a resident in the Isle of Man, on his being "properly served out of our jurisdiction for a tort committed "here."

An argument was addressed to this court, based upon the view of Denning L.J. as to what would be fair in such a case as this, having in mind the provisions of our own Order 11, rule 1 of which reads: "Except in the case of a writ to which rule 1A of "this Order applies, service out of the jurisdiction of a writ of "summons or notice of a writ of summons may be allowed by "the court or a judge whenever . . . (*b*) Any act, deed, will, con-"tract, obligation, or liability affecting land or hereditaments "situate within the jurisdiction, is sought to be construed, "rectified, set aside, or enforced in the action . . . (*ee*) The action "is founded on a tort committed within the jurisdiction." It is argued, relying on the observations of Denning L.J., that in effect we should in this case ignore the position as it has always been understood in this country since not only *Emanuel* v. *Symon*[22] but other cases which have been decided, and give effect to the judgment of the Yugoslav court in toto, whether it is an action in personam or not. I find myself unable to take that step. The decision in *Travers* v. *Holley*[23] was a decision limited to a

[19] [1951] Ch. 842; [1951] 2 T.L.R. 145; [1951] 2 All E.R. 69, C.A.
[20] [1951] Ch. 842, 851.
[21] [1915] 2 K.B. 580.
[22] [1908] 1 K.B. 302.
[23] [1953] P. 246.

C. A.
1960
Trepca Mines Ltd., *In re.*
Hodson L.J.

judgment in rem in a matter affecting matrimonial status, and it has not been followed, so far as I am aware, in any case except a matrimonial case. Moreover, it is quite clear from the legislature's recognition of the rule in the Foreign Judgments (Reciprocal Enforcement) Act, 1933, that the classification of actions which was referred to by Buckley L.J. in *Emanuel* v. *Symon*[24] has been recognised in this country. Having regard to the Act of 1933, it would be a step which I for one am not prepared to take, to say that the *Travers* v. *Holley*[25] point really affects the whole of this question of jurisdiction as to the enforcement of a foreign judgment, and that *Emanuel* v. *Symon*[26] ought to be treated as a case which need not be regarded as binding upon this point because the court there had not addressed itself thereto.

The appeal should be allowed, for the reasons given earlier in my judgment.

Ormerod L.J. I agree, and for the same reasons.

Harman L.J. I also agree. The proof claims one astronomical sum under five heads. It seems to me that the first head is excluded by the fact that there is no judgment subsisting—there neither was at the date of the winding up nor is there now any judgment subsisting in the applicant's favour.

As to (2), the contingency is the chance that he may, by procuring a reversal of the Supreme Court's decision against him in 1955, once more become possessor, so to speak, of a judgment in his favour. Even so, for the reasons given by my Lord, that would not as such be enforceable in this country: therefore (2) goes.

As to (3), that appears to be based on the value of the applicant's ownership of these mining rights in 1926, if he did own them at that time, upon which he founds his cause of action. That claim has long since been barred: therefore (3) goes.

But (4) and (5)—which are equivalent the one to the other—may under certain circumstances have some value, and Roxburgh J. did not consider that question because of his mistaken view about the Limitation Act, 1939, and the curious effects of the Act of 1945.

That the appellant's rights to damages are of anything but the most shadowy nature, I am not persuaded. Even supposing him to establish in his own country (which, of course, is the first prerequisite) that he has some title or had some title to these mining rights, there may yet be many answers to his claim in this country for damages for conversion; and in assessing, or trying to assess, the validity of this contingent claim there is a mort of considerations which have not been canvassed in this court but which would provide a defence or reduce the claim to little or to nothing. All that we must leave open because we are not in a

[24] [1908] 1 K.B. 302.
[25] [1953] P. 246.
[26] [1908] 1 K.B. 302.

position to assess it, nor is it our function so to do; but it will remain for the tribunal of fact to come to a conclusion upon it. Of course the longer the matter goes on without any decision in Yugoslavia in the applicant's favour the more shadowy his claim becomes. I agree, however, that, having regard to the grounds upon which the judge dismissed the claim—which were really in the nature of preliminary points and which are not valid—the appeal must be allowed.

Appeal allowed.
Case remitted to Companies Court for the value of the applicant's claim to be ascertained.

Solicitors: *Sidney Pearlman; Freshfields.*

[COURT OF APPEAL.]

* *In re* VUMA LTD.

[No. 00579 of 1960.]

C. A.
1960
Oct. 26.
Lord Evershed M.R., Harman L.J.

Company—Winding up—Petition—Judgment creditor's petition for compulsory winding up—Opposition by majority of creditors—No evidence supporting opposition—Company insolvent and without assets—Whether opposition of majority conclusive—Discretion of court—Companies Act, 1948 (11 *&* 12 *Geo.* 6, *c.* 38), *s.* 346.

A petition presented by an unsatisfied judgment creditor for the compulsory winding up of a company was opposed by two out of three creditors. No evidence was filed as to the grounds of opposition. The petitioner showed that the company was insolvent and had no assets with which to pay debts:—

Held, that under section 346 of the Companies Act, 1948,[1] the court had a discretion to decide whether it was just and equitable to order that a company should be wound up and, although the wishes of the majority of the creditors was a relevant consideration, opposition to a winding up by the majority was not conclusive. The exercise of the discretion in favour of a winding-up order was not confined to cases where the petitioning creditor showed that the opposition was founded on irrelevant or improper motives or that the company's business was being conducted fraudulently.

In re B. Karsberg Ltd. [1956] 1 W.L.R. 57; [1955] 3 All E.R. 854, C.A. distinguished.

Decision of Buckley J. reversed.

APPEAL from Buckley J.

Vuma Ltd. (hereinafter called the "company") was incorporated on February 19, 1959, with a total paid up capital of

[1] Companies Act, 1948, s. 346: "(1) The court may, as to all matters "relating to the winding up of a "company, have regard to the wishes "of the creditors . . . of the com- "pany, as proved to it by any suffi- "cient evidence, . . ."

C. A.
1960
Vuma Ltd., *In re.*

£100. The objects of the company, as stated in its memorandum of association, was to carry on business as general merchants. In April, 1960, A.E.I. Hotpoint Ltd., having issued a writ claiming £584 9s. for goods delivered between October and December, 1959, obtained judgment under R.S.C., Ord. 14, for the sum claimed with costs (a total sum of £603 9s.). On May 5, 1960, execution was issued but the effects were claimed by one F. C. Hopkinson (who bore the same name as one of the two signatories to the memorandum of association). In June, A.E.I. Hotpoint Ltd. presented a petition to have the company wound up by the court but at the hearing two creditors, R. S. Stokvis & Zonen N.V. of Rotterdam, Holland, and Robeck Distributors (London) who had both given notice to the petitioner that they would support the petition, opposed it The amounts of the debts of these two creditors as stated in their notices were £988 14s. 2d. (this being a judgment debt) and £2,129 13s. respectively.

Buckley J. dismissed the petition and the petitioner appealed.

J. R. Bickford Smith for the petitioning creditor.
Ralph Instone for the opposing creditors.

In addition to the case referred to in the judgment of Lord Evershed M.R. the following cases were cited in argument: *In re Great Western (Forest of Dean) Coal Consumers' Co.*[2]; *In re Clandown Colliery Co.*[3]

Lord Evershed M.R. This petition was presented by a judgment creditor, A.E.I. Hotpoint Ltd., for the winding up of Vuma Ltd. When the matter came before Buckley J. it emerged that the only other two creditors who are known to exist but who had hitherto supported the petitioning creditor had changed their minds and opposed the making of the order. It is right to say that the amounts owing to the two opposing creditors, which is something to which by section 346 the court should have regard, were considerably more than the amount owing to the petitioning creditor. It is said by Mr. Instone for the opposing creditors that if the majority of the creditors oppose the making of an order, that is the end of the matter unless some special circumstances are shown; and he suggested that the special circumstances which should be shown were that the opposing creditors were acting from some irrelevant or improper motive or that there was some fraud established in the conduct of the company's business. I cannot accept the statement which Mr. Instone makes that his general proposition is the view of everybody in the companies court. The language of the statute, so far as relevant in section 346, is that "The court may, as to

[2] (1882) 21 Ch.D. 769. [3] [1915] 1 Ch. 369.

"all matters relating to the winding up of a company, have "regard to the wishes of the creditors . . . as proved to it by any "sufficient evidence," etc. In Palmer's Company Law, 20th ed. (1959), p. 700, it is stated thus: "A petitioning creditor "who cannot get paid a sum presently payable has, as against "the company, a right, ex debito justitiae, to a winding-up order; "even though the assets are overcharged by debentures. This "right to a winding-up order is, however, qualified by another "rule, viz., that the court will regard the wishes of the majority "in value of the creditors, and if, for some good reason, they "object to a winding-up order, the court in its discretion may "refuse the order." It is manifest, if that is a correct statement, that it is very far removed from the proposition submitted by Mr. Instone. In the last edition of Buckley, 13th ed. (1957), p. 450, on the Companies Act the matter is put more as Mr. Instone has stated it: "This right of the creditor, however, is not "his individual right but his representative right as one of a "class. If a majority of the class, viz., the creditors of like "degree, take a different view, the court, in the absence at all "events of special circumstances making an order 'just and "'equitable,' gives effect to such right as the majority desire "to exercise." The cases cited are the same as those referred to in Palmer,[1] and of the cases cited we have been particularly referred to the one in the Court of Appeal recently of *In re B. Karsberg Ltd.*,[2] and to that I will return in a moment.

[His Lordship stated the facts and went on:] It appears from the evidence before us that the company has no assets whatever, and no attempt has been made on the respondents' side to show that it has any assets or any prospects of successful business. The only other thing that ought to be added is this. It seems that the reason why the opposing creditors took the view they did was that they received through the solicitors representing the company an offer of payment by instalments, and we are told (and of course I accept it) that between the dismissal of the petition and today that offer has been implemented, that is to say, Mr. Bickford Smith for the petitioning creditor says he received in fact a cheque from a firm of solicitors which has been cashed. I have no doubt that the opposing creditors have formed the view in their own, quite natural, material interests that if the petition is dismissed they will get something, and perhaps in due time everything, from whomsoever is providing the money, whereas if the company is wound up they will find an absence of anything available for anybody. That is of course a good explanation of why they oppose the petition. But again I cannot accept Mr. Instone's proposition that if that perfectly relevant

[1] *In re Crigglestone Coal Co.* [1906] 2 Ch. 327; 22 T.L.R. 585, C.A.; *In re Clandown Colliery Co.* [1915] 1 Ch. 369, and *In re Ithaca Shipping Co. Ltd.* (1951) 84 Ll.L. Rep. 507.

[2] [1956] 1 W.L.R. 57; [1955] 3 All E.R. 854, C.A.

C. A.
1960
Vuma Ltd., *In re.*
Lord Evershed M.R.

view is taken by the opposing creditors the court has no function to perform. The court may, and will, regard the fact that perhaps that is the best chance of the creditors being paid. Against that I confess I am impressed by the circumstance that on the only evidence before us this company has no assets at all. We know nothing about what it has done and it appears to have no prospects whatever, so far as the evidence goes, of having any assets. I would not have thought that, if special circumstances must be shown, that was other than a special circumstance which the court ought to consider in deciding whether this company ought to carry on business.

I need only say a sentence or two about the *Karsberg* case.[3] That was a case in which the company in question was in voluntary liquidation. Of the fifty-six creditors, fifty-one at least opposed, and their view was that the voluntary liquidation was the best thing for everybody concerned and that in the voluntary liquidation the necessary inquiries and control would be made and exercised. It was pointed out by this court that where a company went into voluntary liquidation a compulsory order would not be made if there were satisfactory grounds, at any rate, shown for continuing the voluntary liquidation and particularly if the vast majority of the creditors thought that was the best thing to do. I cannot see upon the facts and on what Romer L.J. said in that case that it follows that in this case there is nothing more to be said once it is established that two out of the three creditors, who admittedly are owed more than the petitioning creditor, prefer and express their preference for no order and no winding up. Here is a judgment creditor. Any assets which would be or could be found would be subject to execution at once, and, as I say, if special circumstances have to be shown I would have thought on the evidence that enough has been shown. With great respect to Buckley J. I do not think it was right simply to treat the fact of the majority opposition as conclusive. I am persuaded on the material in this case that the court in the exercise of its discretion ought to order a winding up, and I would, accordingly, allow the appeal.

Harman L.J. I agree. In the circumstances disclosed in the petition it was at least incumbent upon those who opposed it to say why they opposed it and to explain to the court what it was that induced them, a company in Ireland and another one in Rotterdam, to leave this hopelessly insolvent and assetless company encumbering the ground. They did not do that, but they persuaded the judge that all he had to do was to count heads. With every respect to him, I do not think that is right. The position shown was one which gave grounds for the gravest suspicion as to the company's trading and as to its position in the commercial community. It was not enough, I think, for

[3] [1956] 1 W.L.R. 57.

two people who had supported the petition simply to walk into court and say: "We now oppose" without putting in an affidavit. Neither the opposing creditors nor the company chose to file any evidence at all, and in my view it is not the law, and never has been, that under those circumstances a judgment creditor is not entitled to his remedy. I observe that in the passage in Buckley, which alone gives some colour to the respondents' case, the creditors are spoken of as "creditors of "like degree." I am not sure I understand what that means. Of the three creditors here one has a judgment on which it has tried to effect execution, the second has a judgment and the third none, and it may be that has something to do with what the textbook says. It does seem to me that a creditor who has pursued his remedy to judgment and has proceeded to execution and finds no assets at the company's place of business other than assets claimed by some third party is at least entitled to put the opposition upon their oath as to why they oppose his otherwise just demands. I would, therefore, allow the appeal.

Appeal allowed: petitioning creditor's costs of the appeal to be paid by the opposing creditors.

Solicitors: *Cochrane & Cripwell; McKenna & Co.; Coward, Chance & Co.; Clifford Symons.*

E. D.

[COURT OF CRIMINAL APPEAL.]

* REGINA *v.* DAVEY.

REGINA *v.* DAVEY.

C. C. A.
1960
Oct. 17.
Pilcher, Paull and Atkinson JJ.

Crime—Verdict of jury—Unanimity—Need for—Judge's direction.
Crime — Conspiracy — Complicated charge — "Rolled-up" charge — Undesirability.

The appellants, together with five other persons, were charged on an indictment containing, inter alia, a count alleging conspiracy that, on certain days over a period of 11 years, the accused conspired together to defraud the creditors of a large number of companies, the names of which were set out in the count. Some of the alleged conspirators had had nothing to do with the affairs of some of the companies. The judge, in directing the jury on the need for unanimity in arriving at their verdicts, said: "Sometimes in "the past judges used to tell the juries that they have to be unani-"mous, but I always say—and it is true—you all have to agree "before you can find anybody guilty, and there is no reason I know "of why any judge should worry about that, from my experience, "because whereas in lots of your own affairs, on committees, you do "not always agree, nevertheless those of you who have experience of "board meetings may find that again and again agreement is

C. C. A.
1960
Reg.
v.
Davey.

"reached and no vote is taken, and hardly ever is a vote taken at a "board meeting, and juries seriously realising what they are doing "are united by a passion for the right verdict, a passion for stern "or real justice, if you like, and the result I should think is that in "ninety-nine cases out of one hundred there is not a disagreement "at all, but solidarity and sense." The appellants were found guilty of conspiracy. On appeal:—

Held, allowing the appeals, (1) that each member of the jury should return a verdict according to the evidence, and any suggestion that a member should adopt a view which was contrary to that which he really held merely to achieve unanimity would amount to a misdirection; that in the present case a juryman listening to the summing-up might be left with the impression that the necessity for unanimity when reaching a decision had been in some measure relaxed, and since this was not so, the jury had been misdirected.

Dictum of Lord Hewart C.J. in *Rex* v. *Mills* [1939] 2 K.B. 90, 92; 55 T.L.R. 590; 27 Cr.App.R. 80; [1939] 2 All E.R. 299, C.C.A. applied.

(2) That the count alleging conspiracy was bad since separate conspiracies were therein charged as one conspiracy.

Reg. v. *Dawson* [1960] 1 W.L.R. 163; [1960] 1 All E.R. 558, C.C.A. applied.

Appeals against conviction and sentence.

The appellants, Edward Charles Davey and Owen Morris Davey, were charged with five other persons before Judge Maude Q.C., at the Central Criminal Court on an indictment which contained nineteen counts, of which count 1 contained a charge of conspiracy, counts 2, 3, 4 and 5 were charges of causing other persons to execute valuable securities by false pretences, counts 6 and 16 contained charges of circulating false statements with regard to the affairs of certain companies with which the accused were connected, counts 7, 8, 9, 10, 11, 12, 14, 15, 17 and 19 were charges of fraudulent conversion, and count 18 was a charge of causing a cheque to be delivered by virtue of a forged instrument. The first appellant was charged upon counts 1, 2, 7, 11 and 16, and the second appellant on all the counts contained in the indictment. Count 1 of the indictment charged all seven prisoners "that on divers days between June 6, 1947, "and June 30, 1958, you conspired together and with persons "unknown to cheat and defraud the creditors and the share-"holders of certain limited liability companies, that is to "say . . ."

Both the appellants were convicted. The first appellant was convicted on the charge of conspiracy only; the second appellant was also convicted on the count of conspiracy and also on eleven other counts contained in the indictment. The first appellant was sentenced to 15 months' imprisonment, and the second appellant was sentenced to a total of seven years' imprisonment.

Both the appellants appealed against their convictions and sentences, inter alia, on the ground that the judge misdirected the jury (the form of the direction is set out in the judgment) and on the ground that the charge of conspiracy was bad in

that it charged seven persons with conspiring together to defraud the shareholders and creditors of a large number of companies, and some of the persons charged in the count had had nothing to do with some of the companies.

W. A. Sime Q.C. and *J. W. A. Sloss* for Edward Davey.
E. D. Sutcliffe Q.C. and *Edward Eyre* for Owen Davey.
Malcolm Morris Q.C. and *S. H. Noakes* for the Crown.

The following cases were cited in argument: *Rex* v. *Mills* [1]; *Rex* v. *Walhein* [2]; *Rex* v. *Creasey* [3]; *Rex* v. *West* [4]; *Reg.* v. *Dawson.* [5]

PILCHER J. The appellants, who are father and son, appeal by leave of this court given in July, 1960, against their convictions and sentences which were as follows: Owen Morris Davey was convicted before the commissioner, Judge Maude, at the Old Bailey in January, 1960, on count 1 of an indictment which contained nineteen counts. Count 1 was a charge of conspiracy to defraud in terms which I will refer to briefly presently; he was also convicted upon eleven other counts, three being in respect of false pretences, five in respect of fraudulent conversion, one for causing a cheque to be delivered by virtue of a forged instrument and two for circulating false statements in regard to the affairs of certain companies with which he was connected. He was sentenced by the judge to two years, two years, two years and one year consecutively, making a total sentence of seven years.

His son, Edward Charles Davey, was convicted on count 1 only, namely, the conspiracy charge, and was sentenced to fifteen months' imprisonment on that count.

Count 1, which was the conspiracy charge, as finally and formally amended, alleged a conspiracy between the two appellants and five other persons that, on divers days between June 6, 1947, and June 30, 1958, they conspired to cheat and defraud the creditors of some fourteen companies, the names of some of which were altered from time to time over the years. Besides the two appellants, a man named White was found guilty on this count and was sentenced to a term of imprisonment of nine months which he has now served, as he did not present any appeal either against his conviction or his sentence.

The case which the commissioner had to try was a long and very troublesome one, involving consideration by the jury of complicated facts extending over a long period. The hearing extended in all for more than two months, and the judge's

[1] [1939] 2 K.B. 90; 55 T.L.R. 590; 27 Cr.App.R. 80; [1939] 2 All E.R. 299, C.C.A.
[2] (1952) 36 Cr.App.R. 167, C.C.A.
[3] (1953) 37 Cr.App.R. 179, C.C.A.
[4] [1948] 1 K.B. 709; 64 T.L.R. 241; 32 Cr.App.R. 152; [1948] 1 All E.R. 718, C.C.A.
[5] [1960] 1 W.L.R. 163; [1960] 1 All E.R. 558, C.C.A.

C. C. A.
1960
Reg.
v.
Davey.

summing-up extended over four days. Having been granted leave to appeal, Owen Morris Davey presented certain grounds of appeal which were as follows:

"(1) The learned judge misdirected the jury in that he stated "or implied that there was no need or no longer need for the "jury to be unanimous in their verdict.

"(2) The learned judge failed to direct the jury upon the "evidence relevant to count 1.

"(3) Count 1 of the indictment was bad in law in that "separate conspiracies were therein charged as one conspiracy.

"(4) The inclusion of the charge of conspiracy in the indict-"ment was unfair to the accused in that it inordinately "prolonged the trial and impeded the defence with prejudicial "evidence that would otherwise have been inadmissible."

It will be seen that grounds (1) and (4) are comprehensive and, if established, would entitle this court to allow the appeal of both appellants on all counts. Grounds (2) and (3) are directed specifically to the conspiracy charge, ground (2) alleging misdirection by the judge, and ground (3) alleging that the count as framed was bad in law.

It is clear from a perusal of the summing-up and such of the evidence as we have seen, which has not been a great deal, that the case for the prosecution was that Owen Morris Davey was the prime mover in the conspiracy to defraud which lasted over a long period. He was a man who all his life had been interested in the shopfitting and building trades, and from time to time he dealt with all the various persons who were charged with him as co-conspirators under count 1. The case for the prosecution was that he was a completely unscrupulous man who, with the assistance of others who joined him from time to time in the conspiracy, some for longer periods and some for shorter periods, over a period of eleven years in all, had enriched himself, and to a lesser extent his family, by a number of extremely ingenious frauds involving the use, sometimes contemporaneously and sometimes successively, of over a dozen different limited liability companies, and some registered businesses, whereby the creditors and the shareholders of these companies and businesses had been defrauded. His son, Edward Charles Davey, had been working with him from the start of his business career and had originally begun to work with his father as a young man. He was, I think, a draughtsman and acted as secretary to a number of companies, and he was one of the persons charged as a conspirator with his father on the ground that he had been privy to most, if not all, of the offences of which his father was found guilty, and in respect of which his father was said to have conspired.

That is the background of this case, and the first ground of appeal, as I have said, was that the judge misdirected the jury on the question of unanimity. Having dealt generally with what I may call the preliminaries, he said to the jury:

"Sometimes in the past judges used to tell the juries that they "have to be unanimous, but I always say—and it is true—"you all have to agree before you can find anybody guilty, "and there is no reason I know of why any judge should worry "about that, from my experience, because whereas in lots of "your own affairs, on committees, you do not always agree, "nevertheless those of you who have experience of board meet-"ings may find that again and again agreement is reached and "no vote is taken, and hardly ever is a vote taken at a board "meeting, and juries seriously realising what they are doing "are united by a passion for the right verdict, a passion for "stern or real justice, if you like, and the result I should think "is that in ninety-nine cases out of one hundred there is not a "disagreement at all, but solidarity and sense."

Before I deal with that particular passage I may be allowed, on behalf of the court, to make one or two preliminary observations. It seems to us that the ordinary juror who reads the newspapers is probably aware that before a verdict of guilty or not guilty can be reached every member of the jury has to agree with his fellow jurors upon the verdict which is the verdict of the jury as a whole. Each individual juror, when empanelled and sworn, takes a personal oath to render a true verdict according to the evidence. It sometimes happens that a judge assumes that the members of the jury are aware of this fundamental necessity and omits to mention in his summing-up that the verdict of the jury on the issue of guilt or innocence must be unanimous. More often, during the summing-up, having dealt with the question of the burden of proof, he simply reminds the jury that their verdict must be unanimous and that each of them must be satisfied upon the evidence whether guilt has been established or not. On occasion juries, having deliberated for some time, ask for further guidance on some particular point upon which they have difficulty in arriving at a unanimous conclusion, whereupon the jury having returned to the jury-box, the judge gives them such further guidance on the particular point raised as he can, and also deals with the necessity for unanimity in appropriate words.

We have given very careful consideration to the passage which I have read from the summing-up of the judge on the necessity for unanimity. I am sorry to say we find it ill-expressed, in some respects contradictory and extremely difficult to understand. We think that the ordinary juryman, listening attentively, would also find it so and might be left with the impression that, whereas in the past judges had told juries, and told them correctly, that their verdict must be unanimous, the necessity for there to be unanimity of view had now been in some measure relaxed and was no longer of such importance as it used to be in the past. The jurors might also have thought that they were now entitled to regard themselves more as being in the position of committee men or members of a board of

C. C. A.
1960
Reg.
v.
Davey.

directors who, after discussing a particular point on which contradictory views were held, might eventually achieve unanimity in this fashion, namely, that the juror or jurors who held a view contrary to that held by the majority, or held a view upon which he was unable to form a concluded opinion, was entitled, as is a member of a committee or a member of a board of directors, to sink his own view without amending it or calling for a vote, and to agree with the majority of his colleagues although he himself was still in a state of uncertainty. We need hardly add that this course is not permissible to a juror who has taken a personal oath to render a true verdict according to the evidence. There must, of course, be discussion when the jury retire to consider their verdict. A juror may retire to the jury room after a summing-up in a state of doubt or indeed at that moment may hold a view which does not accord with what turns out to be the view of his colleagues. During the discussion his doubts may be resolved or he may be satisfied that the view which he originally held was wrong, in which case unanimity is achieved. A director or a member of a committee may continue to hold his own view, but may sink it in deference to a contrary view held by his colleagues and allow the majority decision to go through. He may also abstain from recording a vote if a vote is taken, in which case unanimity is not achieved.

We should like to refer to two cases which have been cited to us. The first is *Rex* v. *Mills*,[1] where the jury, having deliberated for some time, returned for guidance and the recorder at the Central Criminal Court dealt with the question of unanimity in this fashion. He said, repeating the words used by Finlay J. in *Rex* v. *Klein*,[2] "... It is of the utmost importance that a "jury should come to a conclusion one way or the other at the "end of a trial, because it is burdensome upon all concerned, "including the accused, because it only means this, that unless "you do, the matter has got to be tried all over again; there-"fore you see the importance and necessity of coming to a "conclusion one way or the other. Now this very eminent "judge said this: That where you have got one or two, a small "minority, in the jury who are thinking perhaps differently from "the others, it is quite consistent with their oaths as jurymen "that they should, after hearing what the others have got to "say, come to the conclusion that they themselves might be "wrong, and it would be consistent with the discharge of their "duty and with their oaths under those circumstances, if they "thought they were wrong, to accept the view of the majority "and come to the conclusion that the majority might be right, "and in that way you come to a conclusion in which you all "agree by the exchange of view, and perhaps a man in the "minority might say: 'Well, I may be wrong.' That is quite "consistent with the discharge of your duty."

[1] [1939] 2 K.B. 90; 55 T.L.R. 590; 27 Cr.App.R. 80, C.C.A.

[2] C.C.C., February 9, 1932.

On appeal it was contended that that direction by the recorder was incorrect in substance because he had used the words that the jury themselves "might be wrong," and although he had also used the words "if they thought they were "wrong," nonetheless the use of the word "might" vitiated the summing-up of this particular point. Lord Hewart C.J., having dealt first with the point that had been made on behalf of the appellant that the observations of the recorder constituted a misdirection because he had said: "I cannot release you until you have come to a conclusion," and that might amount to putting pressure on the jury, whereas, of course, he could have released them even though they disagreed, said [3]: "The difficulty is, what may have been the effect on the "minds of the jury of the words: 'Where you have got "'one or two, a small minority, in the jury who are think-"'ing, perhaps differently from the others . . .'" Then he read the passage which I have read and continued: "That "would be true only if the minority had been honestly and "sincerely led to come to a view different from the view they "had hitherto held.

"The criticism which has been directed against that passage "is that it may conceivably have led the jury or some members "of the jury to coquette with the notion that, for the sake of "mere conformity or convenience, it would be consistent with "their oaths to make it appear that they accepted a view which, "in fact, they did not accept. Such a conclusion as that would "be quite subversive. A loose acquiescence by a minority in the "view of the majority for the sake of conformity would not merely "be most undesirable, but flagrantly wrong. It is fundamental "that a jury should agree, and by 'agree' is meant honestly "agree, not make a colourable appearance of agreeing." Then he dealt with the other points in that case, including the recorder's final words: "I cannot release you until you have come to a "conclusion." Then he ended up with these words [4]: "There "can be no doubt what the learned recorder intended to convey "to the jury in this case, but he used one or two perilous "phrases which may conceivably have caused some members "of the jury to incline their minds to a wrong view."

That is the first of the cases to which we wish to refer, because it does set out the principle which should govern the question of unanimity where that arises.

The second case is *Rex* v. *Walhein*.[5] That again was a case where the recorder at the Central Criminal Court was called upon to assist the jury, who had returned saying they had found difficulty in arriving at a unanimous verdict, and the recorder then addressed them as follows [5]: "You are a "body of twelve men. Each of you has taken an oath to

[3] [1939] 2 K.B. 90, 92; 27 Cr.App.R. 80, 83.

[4] [1939] 2 K.B. 90, 93; 27 Cr.App.R. 80, 85.

[5] (1952) 36 Cr.App.R. 167, C.C.A.

C. C. A.
1960
Reg.
v.
Davey.

"return a true verdict according to the evidence, but, of course, "you have a duty not only as individuals, but collectively. No "one must be false to that oath, but in order to return a collec- "tive verdict, the verdict of you all, there must necessarily be "argument, and a certain amount of give and take and adjust- "ment of views within the scope of the oath you have taken, "and it makes for great public inconvenience and expense if "jurors cannot agree owing to the unwillingness of one of their "number to listen to the arguments of the rest. Having said "that, I can say no more. If you disagree in your verdict in "relation to one or other of these men, you must say so." In dealing with that matter Lord Goddard C.J. said[6]: "In our "opinion, that was a perfectly satisfactory direction. Jurors "often have to be reminded that the case may be one in which "some of them may start by taking one view and then, finding "that the others are against them, may talk the matter over, "subordinate their views to those of the majority and concur "in the verdict. That is the only way in which juries can "arrive at verdicts."

If the word "subordinate" means sink their own views and adopt a view which is contrary to the view they really hold in order to achieve unanimity, it seems to me that passage from Lord Goddard's judgment runs contrary to previous decided cases, and in particular is in conflict with what was said in *Rex* v. *Mills*.[7] We can hardly feel that it would be permissible to attribute that view of the word in view of the decision in *Mills*, and of the fact that *Mills* was clearly referred to and was distinguished. Therefore, we think that the words "subordinate their views" must mean come to a different conclusion after proper discussion, and not sink their views in order to achieve unanimity.

The other case to which we were referred was *Reg.* v. *Creasey*,[8] which, in our view, does not really take the matter any further, and I only mention it as we were referred to it. It appears to us to support the principle laid down in *Rex* v. *Mills*.[9] Those are the only cases to which we would refer.

We have formed a clear view on the matter and it appears to us to be in conformity with the decided cases. If the jury are to be directed on the question of unanimity the direction must be clear. Taking the view which we do, that the judge's direction on this point was confusing and by implication inaccurate, we think it is not only "conceivable," which was the adjective used in *Rex* v. *Mills*, but more than possible that the jury, after a very long trial, may have remembered the homely analogy in regard to members of a committee and members of a board of directors suggested to them by the judge in his summing-up, and have arrived at their verdict without a true appreciation of what their duty was as members of a jury, and may have regarded themselves more as being in the position of members of a committee

[6] 36 Cr.App.R. 167, 168.
[7] [1939] 2 K.B. 90.
[8] (1953) 37 Cr.App.R. 179, C.C.A.
[9] [1939] 2 K.B. 90.

or a board of directors. If they did form that view, or if they may have formed that view, that, of course, would entirely vitiate the whole trial.

It is not suggested here that if the first ground of appeal with which we have been dealing is entitled to succeed, this is a case in which we could properly apply the proviso to section 4 of the Criminal Appeal Act, 1907. That means that that point is sufficient to deal with this appeal, but we should like to say a word on count 1, which is dealt with specifically in the third ground of appeal. It is said that count 1 was bad in law, in that separate conspiracies were therein charged as one conspiracy. We could say a good deal on this particular point, but we are quite satisfied that count 1 as it appears in the indictment before us is bad, in that it charges seven persons that on divers days over a period of 11 years they conspired together to cheat and defraud the creditors of a large number of companies, and bad for this reason, that some of the seven conspirators had nothing to do with the affairs of some of the companies, and the first two companies which are mentioned, I think, were wound up in May and November of 1953, and certainly some of the alleged conspirators did not come into the picture until after that date. It is what one might call a "rolled-up" charge of conspiracy. It may well be that it would have been possible to allege a number of separate conspiracies between certain of the seven persons named, one of whom almost certainly would always have been Owen Morris Davey, and may refer in each of the conspiracies to the particular companies which were relevant to that conspiracy. On the other hand, it might have been possible to alter the words of the count, keeping some at any rate of the conspirators in it, if not all, and charge them with conspiring together to float companies with the object of defrauding the creditors of those companies when they were floated. But it seems to us to be quite impossible, and a bad count, to charge all the seven persons there named over a period of 11 years with conspiring to cheat and defraud the creditors of companies, some of which they had never heard of and some of which were not in existence at the time.

We need only mention the two cases of *Rex* v. *West* [10] and *Reg.* v. *Dawson*.[11] It seems to us that it is perfectly clear from the decisions in both those cases, and perhaps particularly in *Reg.* v. *Dawson*,[11] that a charge of conspiracy of this kind should not be "rolled up" in the fashion that this charge was. We only mention that matter because if the conspiracy charge was bad, it may well be that it introduced evidence upon the specific charges against the appellants which otherwise would not have been admissible, and although the ground upon which we think these two appeals against conviction should be allowed is the first

[10] [1948] 1 K.B. 709; 64 T.L.R. 241; 32 Cr.App.R. 152, C.C.A.

[11] [1960] 1 W.L.R. 163; [1960] 1 All E.R. 558, C.C.A.

C. C. A.
1960
Reg.
v.
Davey.

ground, namely, the misdirection of the learned judge on the question of unanimity, we feel the conspiracy charge is also fatal to count 1 and possibly also, if further argument had been addressed to us, might have vitiated the convictions on the other charges.

That being so, these two appeals against conviction will be allowed and the convictions quashed.

Appeals allowed.

Solicitors: *Registrar, Court of Criminal Appeal; Director of Public Prosecutions.*

J. D. P.

[CHANCERY DIVISION.]

1960
Oct. 26.
Buckley J.

* *In re* ANGUS' WILL TRUSTS.
HALL AND ANOTHER *v.* ANGUS AND OTHERS.

[1960 A. No. 733.]

Will—Construction—Implied gift—Gift of moiety of residue remaining after "my wife has received her jus relictae"—Wife not entitled to jus relictae—Whether implied gift of residue to wife.

By his will, a testator, a Scotsman dying domiciled in England, gave and bequeathed "the moiety of my property that remains "after my wife shall have received her jus relictae" to his trustees on trust to pay certain moneys towards the erection of a memorial and upkeep of his parents' grave and "to pay my wife the interest "on the residue of the property so long as she shall live and at the "death of my wife or if she shall have died before me then I "bequeath the said property in equal shares" to his brothers, sisters, nephews and nieces then living. Under Scottish law the jus relictae was a legal provision accruing to the widow of one dying domiciled in Scotland amounting, where there were no children of the marriage surviving, to one half of the movable property. The testator died in 1957, and his widow died in 1959. There were no children of the marriage, and the whole of the estate was comprised of personal and movable property.

On a summons to determine whether on the true construction of the will the gift of the "moiety" which should remain after the testator's wife should have received the jus relictae extended to the whole of the testator's property or to only one half of it, and whether, if it extended to only half, there was an implied gift of the other half to the widow:—

Held, (1) that it was inconsistent with the terms of the will as shown by the testator's assumption that his wife was entitled to jus relictae, to suppose that he was indicating an intention to make a gift of any property at his disposal except the life interest in the property settled on trust, and there was not, therefore, an implied gift of any part of the estate to the wife.

[Reported by Philippa Price, Barrister-at-Law.]

Adams v. *Adams* (1842) 1 Hare 537 and *Hall* v. *Leitch* (1870) L.R. 9 Eq. 376 considered.

(2) That since the testator believed that his wife was entitled to the jus relictae, that was to one half of his property, and that, therefore, only half of his property remained at his disposal, the word "moiety" in his will meant "one equal half part," so that what was given to the trustees was one half of the testator's property. Accordingly, during the lifetime of the widow, there was an intestacy as to the income of one half of the estate, but on her death it passed to the class entitled under the gift over who then became beneficially entitled to the whole of the residuary estate.

ADJOURNED SUMMONS.

By his will dated October 16, 1940, and which appeared to be drawn by the testator himself, the testator, John Angus, who was by birth a Scotsman, provided as follows: "I give and "bequeath the moiety of my property that remains after my "wife shall have received her jus relictae unto my trustees "upon trust to pay the sum of £40 for the erection of a suitable "memorial and to hold the sum of £50 for the upkeep of my "parents' grave . . . and to pay my wife the interest on the "residue of the property so long as she shall live and at the "death of my wife, or if she shall have died before me then I "bequeath the said property in equal shares between all such "of my brothers and sisters nephews and nieces who shall be "living at that time."

According to the evidence of a Scottish lawyer, "By the "law of Scotland, jus relictae was a legal provision accruing "to the widow of a person dying domiciled in Scotland out of "his movable or personal succession, wherever situated. It is "in the nature of a debt attaching to the free succession [after "payment of debts and administration expenses] amounting to ". . . one half [of the free succession] where there are no "surviving children." There were no children of the marriage. The testator died on October 14, 1957, domiciled in England, and his widow died on May 31, 1959. The whole of the estate was comprised of personal property.

The plaintiffs, the personal representatives of the widow, took out an originating summons to determine (i) whether on the true construction of the will, the gift of the moiety which should remain after the testator's wife should have received the jus relictae extended to the whole of his property or to only one half of it or whether it failed for uncertainty or otherwise; (ii) whether if that gift of a moiety extended to only one half of the estate, there was on the true construction of the will, a gift by implication or otherwise to the testator's widow of the other half of the estate or whether it was undisposed of.

Peter Giffard for the plaintiffs.

George Hesketh for the defendants, the members of the class of the testator's brothers and sisters, nephews and nieces, who were living at the death of the widow.

1960

Angus' Will Trusts, *In re.*

The cases cited in argument are referred to in the judgment.

Buckley J. In this case I have to determine a question of construction of the will of a testator named John Angus, who was by birth a Scot, and was born in Scotland, but it is common ground that he died domiciled in England. The only party who would be concerned to say the contrary would be the plaintiffs representing the testator's widow and they do not so contend. [His Lordship stated the facts and continued:] Mr. Giffard, for the representatives of the widow, has submitted that the property which was settled on the trusts under the will consists only of one half of the testator's residuary estate, and that there is an implied gift to the widow of an absolute interest in the other half. On the other hand, Mr. Hesketh, who appears for representative defendants, contends, in the first place, that the gift of the "moiety of my property that remains after my wife "shall have received her jus relictae" means, in the circumstances of this case, the whole of the testator's residuary estate. Alternatively, he says, if it only means one half, then there is an intestacy as to the income of one half of the residuary estate during the life of the testator's widow but after her death the whole of the residuary estate is given to the class of beneficiaries whom his clients represent. Mr. Giffard in support of his argument says, not unnaturally, that when the testator gives the moiety of his property it is impossible to suppose that he meant to give the whole, however mistaken he may have been about his power to dispose of more than half. He says all that is given to the trustees is one moiety of the testator's property, and that is given to the trustees to be held upon the trusts set out in the will. He says that the testator has indicated that he intended that his wife should take the other half of his estate absolutely. He has referred me to two authorities in that connection, one of which he admits to be against him, and the other in his favour. The first is *Adams* v. *Adams*,[1] in which the testator, after directing the payment of his debts, funeral and testamentary expenses "devised and bequeathed all and every "his (the testator's) real and personal estate" upon trust to his children subject to the dower and thirds at common law of his wife, and his will contained a direction to apply the rents and profits after deducting the dower and thirds of his wife to the maintenance of his children. In that case it was held that there was no gift by implication to the wife who was not in fact entitled to any dower. Wigram V.-C. pointed out in his judgment[2] that there were two different types of cases. On the one hand, there was the case where the testator's testamentary document contained a recital that he had given property by his testamentary disposition to someone when in fact he had omitted to do so, and in such case the court could ascertain from the

[1] (1842) 1 Hare 537. [2] Ibid.

recitals the intention of the testator to make the recited gift, although he had not properly expressed that intention positively in his testamentary disposition. On the other hand, there was the case in which the testator declared wrongly that somebody was entitled to certain property which in fact belonged to the testator: where that was the case, Wigram V.-C. said, such a declaration could not be relied on as evidence of an intention by the testator to make a gift of that property to the person in question. It is pointed out in Jarman on Wills, 8th ed. (1951), p. 629, that such a declaration does not amount to a gift if the testator evidently conceived that the person referred to possessed a title independent of the testator's own title, and that it would be wrong, in those circumstances, to suppose that he intended to make a disposition in favour of the other person.

The other case referred to by Mr. Giffard was *Hall* v. *Leitch*,[3] where the testator, who was entitled to a policy of insurance of £500 on the joint lives of himself and his wife, bequeathed all his personal estate "save and except the sum of £500 payable "at my death under a policy of insurance, to my wife, and to "which she is absolutely entitled under the said policy." He devised all his residue with that exception to trustees on trust for his wife for life and for his children after her death. The question arose whether there was an implied gift to the widow of the £500 payable under the policy. Malins V.-C. stopped counsel who appeared for the widow, and evidently formed a view on first impression in favour of the widow's claim. Counsel for the parties who argued to the contrary did not refer to any authorities, nor apparently to the passage to which I have referred in Jarman on Wills. Malins V.-C. came to the conclusion that the widow was entitled by implication to the £500. That case certainly is much more favourable to the view put forward by Mr. Giffard in the present case than is *Adams* v. *Adams*,[4] but the reasoning in *Adams* v. *Adams*[4] appears to me to be unanswerable. That reasoning was not, I think, brought to the attention of Malins V.-C. in *Hall* v. *Leitch*.[5] If *Hall* v. *Leitch*[5] were otherwise an authority binding on me, and I had to choose between *Adams* v. *Adams*[6] and *Hall* v. *Leitch*,[7] I should prefer the former. However, the present case is not precisely the same as *Hall* v. *Leitch*,[7] and I think it is sufficient for me to say that I do not feel bound in the present case to follow the decision of Malins V.-C. It seems to me clear that this testator conceived that he had no power to deprive his wife of whatever she might be entitled to out of the estate by way of jus relictae under Scottish law. That would be a liability of his estate which would have to be met before his testamentary disposition would operate in Scotland. In the way in which he has framed his dispositions, it seems to me that he is recognising

[3] (1870) L.R. 9 Eq. 376.
[4] 1 Hare 537.
[5] L.R. 9 Eq. 376.
[6] 1 Hare 537.
[7] L.R. 9 Eq. 376.

1960

Angus' Will Trusts, *In re.*

Buckley J.

that that would be the position if his wife were entitled to jus relictae, and he is also assuming that she would be entitled to jus relictae. It seems to be inconsistent with what the testator himself said in his will to suppose that he is by these words indicating an intention to make a gift of any property which was at his disposal except in so far as he gave her a life interest in his property which was settled on trust. So, I come to the conclusion, first of all, that there is no implied gift such as Mr. Giffard has contended for of any part of the estate to the wife.

I pass to the next question which is whether it is possible to spell out of this will a gift of the whole of the residue to the trustees upon the trusts set out in the will. In support of this argument Mr. Hesketh quoted from Stroud's Judicial Dictionary, 3rd ed., p. 1811, the meaning of the word "moiety," where a decision of Chatterton V.-C. is referred to in *Morrow* v. *M'Conville* [8] in which passage it is said: "'although the proper "'meaning of the word "moiety" is a half part, it is here, in my "'opinion, used by the testator, who seems to have been an ill-"'educated person, in the sense of an equal part or share. I am "'not aware of any judicial opinion having been expressed on the "'meaning of this or a similar word; in the Imperial Dictionary "'. . . I find one of its meanings given as a part or share as distin-"'guished from a half part.'" Mr. Hesketh says, therefore, that "a moiety" need not necessarily mean a half, and he also remarks that careful draftsmen, if they want to use the word "moiety," usually say one equal moiety, suggesting perhaps that one could have a moiety which was not an equal moiety. The meanings given for "moiety" in the Shorter Oxford Dictionary (1944), vol. 1, p. 1270, are first "a half and, especially, in legal or quasi-legal "use; secondly, loosely one of two (or more) parts into which "something is divided." Then there are several meanings set out which I do not think are appropriate to the present case. An example of the loose meaning of the word which is given is "The southern and greater moiety of this island: Fuller." No doubt in the appropriate context one can come to the conclusion that the word "moiety" does not mean an equal half part. If the testator's widow was entitled to jus relictae, she would have been entitled to a half share and the property bequeathed by the will would have been one half of the testator's property which was left for him to dispose of. I do not find anything here which enables me to put on the word "moiety" anything other than what I think is its primary meaning of "equal half part." Therefore, in my judgment what is given to the trustees is a half of his property. The testator then goes on to express his reason for giving that half, that is, that he thinks his wife will have the other half by right of jus relictae. He gives one half to his trustees, and they are to make certain payments out of that in connection with the memorial and grave. Then he directs the trustees to

[8] (1883) 11 L.R.Ir. 236, 252.

pay to his wife the interest on the residue of the property, which must mean what remains of the half, so long as she shall live. Down to that point, I think that it is clear that the testator is dealing with only one half of the estate. But then he goes on "and at the death of my wife or if she shall have died before "me." Pausing there, if she died before him she could have been entitled to nothing by way of jus relictae. Then he says: "I "bequeath the said property in equal shares" to the class of beneficiaries to which he has referred. What does he mean there by "the said property?" He is dealing in this will with two possibilities, one being the event of his wife surviving him and dying after his death, and one of her predeceasing him. In either of those events he gives "the said property." Reading back I think that "the said property" must be the property of which he has given a moiety before—by the opening words of the clause "the moiety of my property that remains after my wife shall have "received her jus relictae": "The said property" relating back to "my property," I think that he gives in this clause everything which he was competent to dispose of at the time of his death. He gives it in equal shares between all his brothers and sisters, nephews and nieces. So far as the moiety given to the trustees is concerned, this will operate as a trust in favour of the brothers and sisters, nephews and nieces. But, so far as there is no earlier gift, there must be a direct gift of anything not already disposed of to the brothers and sisters. The result is, in my judgment, that during the lifetime of the wife there was an intestacy as to the income of one half of his estate, but at her death the brothers and sisters and nephews and nieces who were living at her death became beneficially entitled to the whole of the residuary estate.

Declaration accordingly.

Solicitors: *Cartwright, Cunningham, Haselgrove & Co.; Clarke, Rawlins & Co.*

[COURT OF APPEAL.]

C. A.
1960
Nov. 1, 2, 3.
Ormerod, Willmer and Upjohn L.JJ.

* WILLIAM MALLINSON & SONS (MFG.) LTD. *v.* KEY TRANSPORT CO. LTD.
S. HUGHES (HIRERS) LTD. (THIRD PARTY).
COASTAL TRANSPORT LTD. (FOURTH PARTY).
HENRY LONG (MANNINGHAM) LTD. (FIFTH PARTY).

[Plaint No. P. 110.]

Court of Appeal — County court — Appeal from — Jurisdiction — Fact, question of—Claim exceeding £200—Claim for damages originally exceeding £200 amended to reduce claim to less than £200—Prayer

C. A.

1960

WILLIAM MALLINSON & SONS (MFG.) LTD. v. KEY TRANSPORT CO. LTD.

for damages "limited to £400"—Third party proceedings by defendants for indemnity—Whether claim as between defendants and third party an action for damages exceeding £200—Whether third party entitled to appeal on question of fact—County Court Rules, 1936 (*S.R. & O.*, 1936, *No.* 636/*L.* 17), *Ord.* 12, *r.* 3 (2)—*County Courts Act,* 1959 (7 *&* 8 *Eliz.* 2, *c.* 22), *s.* 109.

The plaintiffs claimed damages against the defendants to whom they had entrusted goods for transmission. The original claim was erroneously particularised in the sum of £205 10s. 4d., but at the hearing that sum was amended to £198 1s. 7d. By their prayer the plaintiffs claimed damages "limited to £400." The defendants denied liability, but issued a third party notice against sub-contractors to whom they had entrusted the carriage of the goods, and claimed an indemnity against liability in respect of the plaintiffs' claim. The third party in turn claimed against a fourth party and the fourth party against a fifth party.

The county court judge heard all those matters together and gave judgment for the plaintiffs against the defendants for £195 1s. 7d. with costs, and judgment for the defendants against the third party for that sum; and he made further orders as to costs which in effect made the third party liable for the costs of all the other parties.

The third party sought to appeal from certain of the judge's findings of fact in favour of the defendants. The defendants were the only respondents to that appeal. On the hearing of the preliminary question whether the third party had a right of appeal on a question of fact under section 109 of the County Courts Act, 1959 [1]:—

Held, that the court had jurisdiction to entertain an appeal on a question of fact as between the parties before it, for the defendants' claim for an indemnity against the third party was an action separate and distinct from that between the plaintiffs and the defendants, and was one in which the sum claimed must necessarily exceed £200, since an indemnity must include not only the plaintiffs' claim for £198 but also the costs which the defendants might have to pay by reason of the fault of the third party. Nor did it matter that the claim for the indemnity was brought by the convenient method of third party proceedings and not in a separate action, for the effect of Order 12, rule 3 (2), of the County Court Rules, 1936,[2] was to give the defendants and the third party the same rights to relief as they would have had if the defendants' claim had been made in a separate action.

Accordingly, it was unnecessary for the court to decide what were the effects in law on the right of appeal on a question of fact

[1] County Courts Act, 1959 (7 & 8 Eliz. 2, c. 22), s. 109: "(1) Subject "to the provisions of this section and "to the following provisions of this "Part of this Act, if any party to "any such proceedings in a county "court as are mentioned in the next "following subsection is dissatisfied "with the determination of the judge "or jury on any question of fact, the "party aggrieved by the judgment or "order of the court may appeal there-"from to the Court of Appeal. . . . "(2) Subject as aforesaid, the proceed-"ings in which a right of appeal is "conferred by this section are—(a) "any action founded on contract or "tort, or for money recoverable by "statute, where either—(i) the debt, "demand or damage claimed exceeds "two hundred pounds; . . ."

[2] County Court Rules, 1936, Ord. 12, r. 3 (2): "As between the defendant "by whom the third-party notice has "been given and the third party, the "judge may grant to either party "any relief or remedy which might "properly have been granted if the "claim against the third party had "been made in a separate action, "and may give such judgment for "either party against the other as "may be just."

as between the plaintiffs and the defendants of (a) the fact that the original particulars claimed a sum in excess of £200 and by amendment a sum less than £200, and (b) the fact that the plaintiffs' prayer claimed damages "limited to £400."

Leslie v. *Liverpool Corporation* [1960] 1 W.L.R. 1; [1959] 3 All E.R. 898, C.A. considered.

APPEAL from Judge Wingate Saul, sitting at Dartford County Court.

The plaintiffs, William Mallinson & Sons (Mfg.) Ltd., claimed damages from the defendants, Key Transport Company Ltd., in the county court. By their particulars of claim they stated that the defendants as common carriers had agreed with them to carry 26 plywood veneered mahogany panels safely from Crayford, Kent, to Shipley, Yorkshire, but that the goods were damaged during transit. The claim as originally presented particularised the damage at a total of £205 10s. 4d.; and by their prayer the plaintiffs claimed damages "limited to £400." Between the issue of those particulars and the hearing in the county court, the plaintiffs realised that they had made an error in their calculation of the sum of £205 10s. 4d., and accordingly applied for and were given leave during the hearing to amend that figure to £198 1s. 7d. No leave was sought to amend the prayer.

The defendants, who had entrusted the goods in question to sub-contractors, S. Hughes (Hirers) Ltd., admitted that they were common carriers but did not admit the damage. They then issued a third party notice against the sub-contractors in which they said that the third party were common carriers and set out the circumstances which gave rise to their claim and they claimed an indemnity from the third party against liability in respect of the plaintiffs' claim. The third party, who had carried the goods from Crayford to Hull and had then entrusted them to Coastal Transport Ltd., did not admit any of the allegations made against them, and issued a fourth party notice against Coastal Transport Ltd., that notice being in exactly the same form as the third party notice. Coastal Transport Ltd., who had not carried the goods at all but had entrusted them to Henry Long (Manningham) Ltd., also denied liability and issued a fifth party notice against Henry Long (Manningham) Ltd. in similar terms to the third party and fourth party notices claiming an indemnity, the defence to which was rather more elaborate than the other defences in respects not relevant to the present report.

When all those issues came on together in the county court, the judge gave judgment on April 6, 1960, for the plaintiffs for £195 1s. 7d. with costs against the defendants, and judgment for the defendants against the third party for the same sum and the taxed costs on scale 4 which the defendants would have to pay to the plaintiffs; and he ordered that the defendants should recover against the third parties their own costs in the proceedings. He also gave judgment for the fifth party against the fourth party with costs and for the fourth party against the third

C. A.
1960

William Mallinson & Sons (Mfg.) Ltd. v. Key Transport Co. Ltd.

party for costs, and the taxed costs which the fourth party would have to pay to the fifth party.

The third party sought to appeal from that judgment on two grounds; the first ground was that the county judge was in error in his finding of fact that the third party was instructed by the defendants that the goods were not to be transhipped in the course of their journey to Shipley; and the second ground related to the pleadings. The details of the grounds of appeal are not relevant to this report, but a preliminary point arose as to whether, in the circumstances of this case, the third party had a right of appeal on a question of fact under section 109 of the County Courts Act, 1959, in view of the fact that though the claim as originally delivered asked for damages exceeding the sum of £200, there had been an amendment of those particulars which reduced the amount to less than £200. The only respondents to the appeal were the defendants, Key Transport Company Ltd.

The Court of Appeal heard argument on that issue as a preliminary point and then proceeded to hear the appeal on the questions of fact and dismissed the appeal.

The case is reported only on the preliminary point as to jurisdiction.

R. N. Titheridge for the third party.
John Gower for the defendants.

The following cases, in addition to that referred to in the judgments, were referred to during the argument: *North* v. *Holroyd* [3]; *Mason* v. *Burningham*.[4]

Ormerod L.J. stated the facts which, so far as they are relevant to the preliminary question, are set out above. His Lordship continued: The first point which had to be considered by this court was whether in the circumstances the third party had any right of appeal on a question of fact. Mr. Titheridge argued that as in the first place the claim was for a larger sum than £200, it carried with it a right of appeal on questions of fact, and the mere fact that there had been an amendment later did not deprive the third party of that right.

There is no doubt that in the ordinary course of events there is no appeal from a judgment of a county court judge on questions of fact, but by section 109 of the County Courts Act, 1959, there may be an appeal on questions of fact in certain circumstances. [His Lordship read section 109 (2) and continued:] As I understand the argument which was put here, it was said that this claim did exceed £200, and, in those circumstances, there was a right to maintain this appeal. Mr. Titheridge based his argument

[3] (1868) L.R. 3 Exch.Cas. 69.

[4] [1949] 2 K.B. 545; 65 T.L.R. 466; [1949] 2 All E.R. 134, C.A.

on a recent decision of this court in *Leslie* v. *Liverpool Corporation*,[1] where certain views were expressed by Lord Evershed M.R. on this matter. That was a claim for damages for personal injuries in which the prayer stated that the damages were limited to a sum of £400. It was agreed by both parties that the damages could not amount to a larger sum than £100, and in those circumstances there could not be a claim for damages exceeding £200 and, therefore, there could be no appeal on a question of fact. It was held that although a claim for damages limited to £400 was not necessarily a claim in excess of £200, yet, having regard to the nature of the claim, the court would treat the plaintiff as having claimed more than £200 when the action started and, therefore, as being entitled to appeal on questions of fact.

It is unnecessary, having regard to the view I have formed, to deal with that case at any length. But Mr. Titheridge bases his submissions very largely on the fact that it was a case where a sum in excess of £200 was claimed when the action was started. But there was no amendment in that case, and although it is not necessary to decide the question, my view as at present advised would be that if the pleadings were amended at some stage to put the claim at not more than £100, there would be no right of appeal on a question of fact. But in the present case there is the further complication that the prayer was limited to damages to the amount of £400. Whether that would be sufficient in the circumstances of this case to say that the claim was one for over the sum of £200 is a matter on which obviously there might be considerable argument, because the parties here have agreed that the sum of £198 1s. 7d., which is less than the £200, is the sum which is claimed in respect of every head of damage which is particularised, and there is nothing in the claim to indicate that there would be any liability for general damages in addition to that. However, that is not the question which we have to consider. We are not considering the right of the defendants to appeal against the judgment which has been given in favour of the plaintiffs against them. We are considering the appeal of the third party against the defendants. That is an entirely separate matter, and the question we have to consider is whether, in the circumstances, the claim of the defendants against the third party is a claim which is in excess of the sum of £200. The third party notice is a claim by the defendants to be indemnified by the third party against any liability that the defendants may have to the plaintiffs, and that admittedly would include any costs which the defendants may have to pay to the plaintiffs, and the costs which the defendants may have to incur or will have incurred in defending the action. Those are all the matters which are or may be the subject of the indemnity claimed by the defendants against the third party. The amount of damage which the defendants have claimed against the third party is the sum of

[1] [1960] 1 W.L.R. 1; [1959] 3 All E.R. 898, C.A.

C. A.
1960
William Mallinson & Sons (Mfg.) Ltd. v. Key Transport Co. Ltd.
Ormerod L.J.

£198 1s. 7d. That is the amount which the plaintiffs have claimed against the defendants. But the claim of the defendants for indemnity is not for that sum only but is also for the costs which they may have to pay by reason of the fault of the third party. In my view, that means that the claim by the defendants against the third party is a claim exceeding the sum of £200. It is well to bear in mind Order 12, rule 3 (2) of the County Court Rules, 1936, which is the same as the High Court Rule on the subject. That provides: "As between the defendant by "whom the third-party notice has been given and the third party, "the judge may grant to either party any relief or remedy which "might properly have been granted if the claim against the third "party had been made in a separate action, and may give such "judgment for either party against the other as may be just." The joinder of the third party is a convenient method, which is frequently adopted, of dealing with all matters between the parties. In this case the judge decided, no doubt at the request of the parties, that the whole of the matter should be dealt with at the same time. Nonetheless, the claim by the defendants against the third party is a separate claim, and it is in respect of that claim that the judge has made certain findings of fact which are impugned in this court today. My view is that, for the reasons which I have given, it is open to the third party to appeal on those findings of fact, and it is the duty of this court to consider the submissions which have been made. [His Lordship then proceeded to deal with the main issues in the appeal.]

Willmer L.J. I will deal first with the preliminary point which has been raised here, namely, whether this is a case where the debt, demand or damage claimed exceeded £200 so as to admit of an appeal on fact alone. I should be disposed to say that, as between the plaintiffs and the defendants, the claim was for one exceeding £200, bearing in mind the general terms of the prayer in the particulars of claim, namely, a claim for damages limited to £400. It is perfectly true that in the body of the particulars of claim, as amended, the plaintiffs' loss is particularised as £198 1s. 7d. But there is nothing in the particulars of claim to show that a claim for general damages over and above the particularised loss was excluded, and I venture to think that, had counsel asked for, and had the judge awarded, general damages over and above the particularised loss, it could not have been said that such a claim was not open on the pleadings. It is to be remarked that even the conventional figure of 40s. for nominal damages would just have brought the claim over the vital £200 mark. On this point, I confess I do not find very much help in the authorities which were cited to us, but at least I do not think that the view I have expressed is inconsistent with what was said by Lord Evershed M.R. in *Leslie* v. *Liverpool Corporation*,[2] to which my Lord has referred.

[2] [1960] 1 W.L.R. 1.

It is, however, for the reasons already given by my Lord, unnecessary to reach any final conclusion on this point, for what we are concerned with in the present case is the defendants' claim over against the third party. As to this I entertain no doubt that this must be regarded as a claim for a sum exceeding £200. If that were not so, it would follow that the order which the judge in fact made, and which my Lord has already read, would have been an order made without any jurisdiction. It was conceded by Mr. Gower that if, instead of bringing the third party into this case, the defendants had chosen to launch a separate action claiming an indemnity against the plaintiffs' claim and costs, then in such separate action there would undoubtedly have been a right of appeal on fact. Can it make any difference that the claim has in fact been put forward by way of third party proceedings instead of by way of a separate action? The answer to that, I think, is to be found in the provisions of Order 12, rule 3 (2). The effect of that, as I understand it, is to provide that, as between themselves, the defendants and the third party have the same rights and liabilities as they would have if the claim were put forward in a separate action.

It was urged on us by Mr. Gower that such a decision might possibly lead to some absurd results; and he instanced the result which might arise in cases of this sort, where the plaintiff's claim against the defendant might be below £200, so that there would be no appeal on fact, and yet the defendants' claim against the third party (by reason of the addition of the claim for indemnity against costs) would exceed £200, so that there would be a right of appeal on fact. It was suggested it would be anomalous that the defendant should have a right of appeal as against the third party or vice versa, and yet be denied a right of appeal against the plaintiff. It may be that there could be anomalous cases, but, if so, it is not a matter for this court to correct: it would be a matter for the legislature. Moreover, as pointed out by Mr. Titheridge, there must inevitably be cases in which that sort of situation may arise, for instance, where the defendant, in addition to his claim for indemnity against the plaintiffs' claim, may put forward a separate claim of his own in the third party proceedings. In those circumstances, like my Lord, I am abundantly satisfied that in this case, as between the defendants and the third party, there is clearly a right of appeal on fact. [His Lordship then dealt with the other issues in the appeal.]

UPJOHN L.J. Three points arise in this appeal. The first is whether having regard to the terms of section 109 of the County Courts Act, 1959, we have jurisdiction to entertain an appeal on fact. I agree that, in the circumstances of this case, we have such a jurisdiction. I prefer to rest my judgment on the narrow point that this is an appeal between two parties only, the respondents who were the defendants in the court below, and the third party who is the appellant here. As between them, there is an

C. A.
1960
WILLIAM MALLINSON & SONS (MFG.) LTD. v. KEY TRANSPORT CO. LTD.
Upjohn L.J.

issue of fact as to whether a certain term is incorporated in their contract. The claim made by the defendants in the third party notice is to be indemnified against the claim which they had to meet from the plaintiffs, the plaintiffs having been successful. That claim was for £198 and for an indemnity against the costs which the defendants had to pay the plaintiffs of the action below and of the defendants' proper costs of defending the action. That plainly must be a claim greatly in excess of £200, and I think on that ground there is jurisdiction to entertain an appeal on the facts. I would prefer myself to leave over for consideration when it arises as to what is the effect of a general claim to damages limited to £400.

Solicitors: *Peacock & Goddard for Myer Wolff & Co., Kingston-on-Hull; W. R. Millar & Sons.*

M. M. H.

[QUEEN'S BENCH DIVISION.]

1960
Oct. 21.
Lord Parker, C.J., Ashworth and Elwes JJ.

* MOORE *v.* GOODERHAM.

Firearms — Meaning — "Lethal weapon" — Airgun — Gun capable of causing serious injury only when misused by firing it at close range at vulnerable part of body—Least powerful type of airgun obtainable—Whether lethal weapon—Firearms Act, 1937 (1 *Edw.* 8 *&* 1 *Geo.* 6, *c.* 12), *ss.* 19 (1), 32 (1).

The defendant sold an airgun to a boy whom he knew or had reasonable ground for believing to be under 17, and was charged with an offence against section 19 (1) of the Firearms Act, 1937.[1] The justices found that the gun was designed to fire pellets and darts. It was incapable of causing more than trivial injury, except probably to the eye at extremely close range. It was the least powerful type of airgun obtainable. When discharged from the gun at a range of a few inches at the surface of a piece of plywood five thirty-seconds of an inch in thickness lying on a hard floor a metal pellet became embedded in the plywood to such an extent as to be visible from the far side and the point of a dart penetrated the wood. The justices held that the gun was not a lethal weapon and, therefore, not a firearm within the meaning of the section and, accordingly, dismissed the information. The prosecutor appealed:—

Held, that if a gun was capable of causing more than trifling injury when misused, it was capable of causing injury from which

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[Reported by GROVE HULL, Esq., Barrister-at-Law.]

[1] Firearms Act, 1937, s. 19: "(1) "No person under the age of 17 years "shall purchase or hire any firearm or "ammunition, and no person shall "sell or let on hire any firearm or "ammunition to any other person "whom he knows or has reasonable "ground for believing to be under the "age of 17 years . . ."

S. 32: "(1) In this Act the following expressions have the meanings "hereby respectively assigned to "them: . . . 'firearm,' except where "otherwise expressly provided, means "any lethal barrelled weapon of any "description from which any shot, "bullet or other missile can be discharged . . ."

death might result and was, in consequence, lethal and a firearm within the meaning of the section; that the findings of the justices led inevitably to the conclusion that this gun was a firearm; and that the appeal must, therefore, be allowed.

Dicta of Lord Goddard C.J. in *Read* v. *Donovan* [1947] K.B. 326, 327, 328; 63 T.L.R. 89; [1947] 1 All E.R. 37, D.C. considered.

Per curiam. Section 19 of the Act is designed to prevent, inter alia, a gun getting into the hands of a very small child who may misuse it by firing it point blank at an eye or an ear, and it is therefore not the right test to ask whether the gun is likely to cause death if properly handled.

Case stated by Lowestoft justices.

On November 9, 1959, an information was preferred by the prosecutor, William Alexander Moore, against the defendant, Stanley John French Gooderham, that he, on August 31, 1959, in the Borough of Lowestoft, sold a certain firearm, namely, a "Diana" airgun, to Michael Alan Holmes, a person whom he knew or had reasonable ground for believing to be under the age of 17 years, contrary to section 19 of the Firearms Act, 1937.

The justices tried the information on November 12, 1959, and found that on August 31 the defendant had sold the gun to Holmes, who was a person under 17 and whom the defendant at the time knew or had reasonable ground for believing to be under 17. The gun was in the form of a barrelled weapon and a missile could be discharged from it. It was designed to discharge small cup-shaped plastic or metal pellets, or small darts with a point at one end and a tuft of fibres at the other. The discharge was effected by air forced into the barrel behind the pellet or dart by releasing a compressed spring. The gun was of a type which was the least powerful which could be obtained. It was offered for sale packed in a carton with instructions which indicated that it was suitable for use indoors. Its power was such that it was capable of causing some injury, but it was incapable of causing death to a human being and incapable of causing more than trivial injury expect, probably, to the eye at extremely close range, and unlikely to cause even trivial injury at a range of more than a few feet. The power of the gun was such that when it was discharged at a range of a few inches at the surface of a piece of plywood five thirty-seconds of an inch in thickness, lying on a hard floor, a metal pellet became embedded in the plywood to such an extent as to be visible from the remote side and the remote surface was penetrated by the point of the dart, the body of which failed to penetrate the nearer surface. No evidence was adduced by the prosecution as to the relative resistance to penetration by the missiles of plywood and human skin.

It was contended for the prosecutor that the gun was a firearm for the purposes of section 19 of the Act.

The justices were of opinion that the gun was not a lethal weapon, and consequently not a firearm for the purposes of section 19. They were of opinion that a lethal weapon must be capable of causing not merely some injury, but the sort of injury

1960

Moore
v.
Gooderham.

which might result in death. The gun appeared to them to be little more than a toy and capable of causing injury only to a very minor degree. They accordingly dismissed the information.

The prosecutor appealed.

Leslie Boreham for the prosecutor.

The defendant did not appear and was not represented.

The only case which was cited in argument is referred to in the judgment.

Lord Parker C.J. stated the facts, referred to sections 19 (1) and 32 (1) of the Firearms Act, 1937, and continued: The sole question for the justices was whether this "Diana" airgun was a firearm within section 19 (1). They held that it was not, and they came to that conclusion on the ground that, having regard to the definition in section 32 and, in particular, the word lethal, the weapon in question must be one likely to cause injury of the sort which might result in death. They rejected a contention that a lethal weapon was one which was merely capable of causing injury which was unlikely to cause death. In saying that, I understand that they were giving to the word lethal this sense, that the weapon must be of a sort which causes injury of a type from which death would in the ordinary way result. I think that they were fully entitled to give to the word lethal the sense that the injury must be of a kind which may cause death. That is the ordinary meaning of the word, but it is to be observed that in this connection one is not considering whether a firearm is designed or intended to cause injury from which death results, but rather whether it is a weapon which, however misused, may cause injury from which death may result. Section 19 is designed to prevent, amongst other things, a weapon getting into the hands of a very small child who may misuse it by firing it point blank, and point blank, say, at an eye or an ear, or some particularly vulnerable part; and if it is capable of causing more than trifling and trivial injury when misused, then it is a weapon which is capable of causing injury from which death may result. It seems to me here that the justices were really looking at the weapon and saying: Is it the sort of weapon which in the ordinary way if properly handled will cause death?

That being the approach to the matter, what were the facts here? This was a barrelled weapon from which missiles could be discharged, the missiles being either plastic or metal pellets or small darts. The justices say that it was the least powerful type of airgun which was obtainable. The power of the gun was such "that it was capable of causing some injury but it was incapable "of causing death to a human being, and incapable of causing "more than trivial injury." Pausing there, if there was nothing more in the case I think the justices would have been justified in coming to the decision they did, but they go on to qualify that

by saying, "except probably to the eye at extremely close range, "and unlikely to cause even trivial injury at a range of more than "a few feet." Then they go further and say: "The power of the "said airgun was such that when it was discharged at a range "of a few inches at the surface of a piece of plywood five thirty-"seconds of an inch in thickness, lying on a hard floor a metal "pellet became embedded in the plywood to such an extent as to "be visible from the remote side and the remote surface was "penetrated by the point of a dart, the body of which failed to "penetrate the nearer surface." It is true, as the justices point out, that they did not have evidence before them comparing the resistance of the human skin with the resistance of a piece of plywood, but I find it quite impossible on that finding to say that this was not a weapon which, when misused, was capable of causing injury from which death might result.

I should only add that reference has been made to *Read* v. *Donovan* [1] where, in the course of his judgment, Lord Goddard C.J. said [2]: "If a weapon is a lethal weapon, which means a "weapon capable of causing injury, and if such a weapon is bar-"relled and a shot, bullet or other missile can be discharged from "it, it is a firearm." Again, at the end of his judgment, he said [3]: ". . . the question simply is whether the weapon is capable "of inflicting harm." That was a case in which the weapon in question, if misused, was clearly a lethal weapon and, in those circumstances, I do not feel that too much attention can be paid to the definition given in that judgment. But I am far from saying that it is wrong, if one once considers that all that it is necessary to find is a weapon capable of doing something more than trivial harm, because, in those circumstances, death may well result if it is fired at a particularly vulnerable point. I think the justices were wrong and that on their findings there is only one conclusion, namely, that the offence was made out. In those circumstances I would send the case back to the justices with such a direction.

ASHWORTH J. I agree.

ELWES J. I agree.

Appeal allowed with costs.

Solicitors: *Lee, Ockerby, Johnson & Co. for R. W. Gash, Ipswich.*

[1] [1947] K.B. 326; 63 T.L.R. 89; [1947] 1 All E.R. 37, D.C.
[2] [1947] K.B. 326, 327.
[3] Ibid. 328.

[QUEEN'S BENCH DIVISION.]

1960
Oct. 21.

Lord Parker C.J., Ashworth and Elwes JJ.

* MORTON *v* CHANEY.

MORTON *v.* CHRISTOPHER.

Firearms—Certificate—Ambit—"Sporting purposes"—Loan to person not holding certificate with instructions to shoot rats—Firearms Act, 1937 (1 *Edw.* 8 *&* 1 *Geo.* 6, *c.* 12), *s.* 4 (7).

Justices—Jurisdiction—Functi officio—Plea of guilty followed by fine—Accused recalled and acquitted—Whether justices have jurisdiction so to act—Whether functi officio.

A. owned a rifle for which he held a firearm certificate. He lent the rifle and some ammunition to B., who did not hold a certificate, with instructions that B. should use the rifle to shoot rats on A.'s caravan site. A. was charged with lending the rifle and ammunition to B., B. not being a registered firearms dealer and not showing that he was by virtue of the Act entitled to acquire the rifle and ammunition, contrary to section 11 of the Firearms Act, 1937.[1] B. was charged with being in unlawful possession of the rifle in that he did not hold a certificate, contrary to section 1 of the Act. The justices first tried the information against B., who pleaded guilty and was fined. They then tried the information against A.,

[Reported by Grove Hull, Esq., Barrister-at-Law.]

[1] Firearms Act, 1937, s. 1: "(1) "Subject to the provisions of this "Act, no person shall purchase, "acquire or have in his possession "any firearm or ammunition to "which this Part of this Act applies "unless he holds a firearm certificate "in force at the time. (2) If any "person—(*a*) purchases, acquires or "has in his possession any firearm or "ammunition to which this Part of "this Act applies without holding "a firearm certificate in force at the "time . . . he shall, subject to the "provisions of this Act, for each "offence be liable, on summary con-"viction, to imprisonment for a term "not exceeding three months or to a "fine not exceeding fifty pounds, or "to both such imprisonment and "fine. . . ."

S. 4: "(1) The following provisions "of this section shall have effect not-"withstanding anything in section "one of this Act . . . (7) A person "carrying a firearm or ammunition "belonging to another person holding "a certificate may, without himself "holding a certificate, have in his "possession that firearm or ammuni-"tion under instructions from and "for the use of that other person for "sporting purposes only."

S. 11: "(1) No person shall sell "or transfer to any other person in "the United Kingdom, other than a "registered firearms dealer, any fire-"arm or ammunition to which this "Part [Part I] of this Act applies, "unless that other person produces a "firearm certificate authorising him "to purchase or acquire it or shows "that he is by virtue of this Act "entitled to purchase or acquire it "without holding such a certifi-"cate . . . (4) If any person—(*a*) "contravenes or fails to comply with "any of the provisions of this sec-"tion . . . he shall, for each offence, "be liable on summary conviction to "imprisonment for a term not exceed-"ing three months or to a fine not "exceeding twenty pounds, or to both "such imprisonment and fine."

S. 32 (1): "In this Act the follow-"ing expressions have the meanings "hereby respectively assigned to "them:—'acquiring' means hiring, "accepting as a gift and borrowing "and the expressions 'acquire' and "'acquisition' shall be construed "accordingly . . . 'transferring' in-"cludes letting on hire, giving, "lending, and parting with posses-"sion, and the expressions 'trans-"fer,' 'transferee' and 'transferor' "shall be construed accordingly."

who contended that the loan of the rifle was for sporting purposes only within the meaning of section 4 (7) of the Act and that he was, therefore, not guilty of an offence under section 11. The justices upheld this submission and acquitted A. They then, being of opinion that B. had, by reason of this holding, been wrongly convicted, recalled him and dismissed the information against him. The prosecutor appealed:—

Held, (1) that the mere fact that some shooting was a sport in the sense that it was enjoyable was not enough to bring it within section 4 (7) of the Act and that, on the facts, the loan was not for sporting purposes only, and that the two cases must, therefore, be sent back with a direction that the offences were proved.

(2) That the action of the justices in recalling B. and finding him not guilty was, on any view, wrong, since after sentencing him they were functi officio.

APPEALS by case stated by Huntingdon county justices sitting at St. Ives.

On October 15, 1959, an information was preferred by the prosecutor, Arthur Thomas Morton, against William James Chaney, that on or about August 25, 1959, at Oldhurst in the county of Huntingdon he did lend a certain firearm and ammunition, namely a .22 rifle to which Part I of the Firearms Act, 1937, applied, to Raymond John Christopher, not being a registered firearms dealer and not showing that he was by virtue of the Act entitled to purchase or acquire the said firearm and ammunition without holding a firearm certificate, contrary to section 11 of the Firearms Act, 1937.

The justices heard the information on November 24, 1959, and found that Chaney was the owner of a caravan site known as The Grove, Oldhurst, and Christopher was a tenant on the site. Chaney was the owner of a .22 rifle for which he held a firearm certificate issued by Huntingdonshire County Police. The certificate was issued to Chaney so that he could kill vermin on the caravan site. On August 25, 1959, Chaney lent the rifle to Christopher with instructions that Christopher should shoot rats on the site. Christopher did not hold a firearm certificate.

It was contended by Chaney that he was not in breach of section 11 of the Act because the loan of the rifle to Christopher was for sporting purposes only within the meaning of section 4 (7).

The justices were of opinion that the loan of the rifle by Chaney to Christopher was within the meaning of section 4 (7) and that the shooting of rats was a sporting purpose and they accordingly dismissed the information.

On October 15, a further information was preferred by the prosecutor against Christopher that on August 26, 1959, at Oldhurst in the county of Huntingdon he unlawfully did have the rifle in his possession, he not then holding a firearm certificate in force at the time, contrary to section 1 of the Act.

The justices heard the information on November 24, when Christopher pleaded guilty and was fined.

After sentencing Christopher the justices tried and dismissed

1960

MORTON v. CHANEY.

the information against Chaney as described above. They then formed the opinion that, since they had found Chaney not guilty, Christopher had been wrongly convicted, and they accordingly recalled Christopher and dismissed the information against him.

The prosecutor appealed in both cases.

The appeals were heard together.

Edward Gardner Q.C. and *Keith Topley* for the prosecutor.

The defendants did not appear and were not represented.

The following cases, not referred to in the judgment, were cited in argument: *Rex* v. *Wandsworth Justices, Ex parte Read* [2]; *Jeffryes* v. *Evans.* [3]

LORD PARKER C.J. stated the facts in the first appeal, read sections 4 (7) and 11 of the Firearms Act, 1937, and continued: The sole question in the first appeal is whether Christopher was in possession of this rifle under instructions from and for the use of Chaney "for sporting purposes only." The justices have held that the instructions given that Christopher should shoot rats made the case into one of having the rifle in his possession for sporting purposes. I find it quite unnecessary and, indeed, inadvisable, to attempt any definition of what is included within the words "for sporting purposes only." There are two things about which I am clear. One is that the mere fact that some sort of shooting is a sport in the sense that someone gets enjoyment out of it is not enough to bring it within those words. The second thing is that, so far as this case is concerned, I am quite satisfied that the shooting of rats is not in the ordinary sense of the term shooting for sporting purposes. Accordingly, so far as the Chaney appeal is concerned, the case must go back to the justices with a direction that the offence was proved.

[His Lordship stated the facts in the second appeal, read section 1 of the Act, referred to the action of the justices in recalling Christopher and finding him not guilty, and continued:] It seems to me that that action of the justices was, on any view, wrong. The moment they had sentenced Christopher they were functi officio and could do nothing more in the matter. In having him back and finding him not guilty they were clearly acting in excess of their jurisdiction. Accordingly this case must also go back to the justices with the direction that they exceeded their jurisdiction in dismissing the information against him, and that he was guilty of the offence.

ASHWORTH J. I agree with my Lord's judgment in both cases.

ELWES J. I also agree.

Appeals allowed with costs.

Solicitors: *Sharpe, Pritchard & Co. for A. C. Aylward, Huntingdon.*

[2] [1942] 1 K.B. 281; 58 T.L.R. 88; [1942] 1 All E.R. 56, D.C.

[3] (1865) 34 L.J.C.P. 261.

[QUEEN'S BENCH DIVISION.]

*REGINA v. NOTTINGHAM JUSTICES. *Ex parte* BROWN.

1960
Oct. 27, 28.

Lord Parker C.J., Ashworth and Elwes JJ.

Animal—Dog—Control—Complaint—Information laid against owner that dog was dangerous and not kept under proper control—Order by justices that dog to be kept under proper control—Whether proceedings correctly instituted—Dogs Act, 1871 (34 *&* 35 *Vict. c.* 56), *s.* 2.

Justices—Information—Information or complaint—Control of dog—Whether proceedings instituted by information or complaint—Dogs Act, 1871, *s.* 2—*Magistrates' Courts Act,* 1952 (15 *&* 16 *Geo.* 6 *&* 1 *Eliz.* 2, *c.* 55), *ss.* 42, 100 (1).

The applicant was charged by way of information that she was the owner of a dangerous dog which was not kept under proper control, contrary to section 2 of the Dogs Act, 1871.[1] She pleaded guilty to the information, and the justices, adjudging the dog to be dangerous, ordered her to keep it under proper control. The applicant moved for an order of certiorari to quash the order of the justices on the ground that the proceedings before them were a nullity, having been started by way of information, whereas they should have been started by complaint:—

Held, that section 2 of the Dogs Act, 1871, envisaged two stages: first, a court of summary jurisdiction, on a complaint being made, could make a summary order; secondly, where that order was disobeyed, the person disobeying was liable to a penalty. The first stage was in the nature of a civil or administrative proceeding and that part of the section spoke of a complaint; it was only in the second stage that an offence was involved and liability to a penalty arose. In the present case the proceedings arose under the first stage of the section and should have been started by complaint; accordingly, having been started by information, they were a nullity; neither the plea of guilty nor section 42 nor section 100 (1) of the Magistrates' Courts Act, 1952,[2] could cure that invalidity and an order for certiorari would issue.

Haldane v. *Allan,* 1956 S.C. 41; 1956 S.L.T. 325 applied.

[Reported by A. D. Rawley, Esq., Barrister-at-Law.]

[1] Dogs Act, 1871, s. 2: "Any "court of summary jurisdiction may "take cognisance of a complaint that "a dog is dangerous, and not kept "under proper control, and if it "appears to the court having cog- "nisance of such complaint that such "dog is dangerous, the court may "make an order in a summary way "directing the dog to be kept by the "owner under proper control or "destroyed, and any person failing to "comply with such order shall be "liable to a penalty not exceeding "twenty shillings for every day "during which he fails to comply "with such order."

[2] Magistrates' Courts Act, 1952, s. 42: "In any enactment conferring "power on a magistrates' court to "deal with an offence, or to issue a "summons or warrant against a per- "son suspected of an offence, on the "complaint of any person, for refer- "ences to a complaint there shall be "substituted references to an in- "formation."

S. 100 (1): "No objection shall "be allowed to any information or "complaint, or to any summons or "warrant to procure the presence of "the defendant, for any defect in it "in substance or in form, or for any "variance between it and the "evidence adduced on behalf of the "prosecutor or complainant at the "hearing of the information or com- "plaint."

1960

Reg.
v.
Nottingham
Justices.
Ex parte
Brown.

Application for certiorari.

On October 22, 1959, information was laid before the justices for the City of Nottingham by Alan Campbell, Inspector of Police, for that Betty Brown, the applicant, on September 26, 1959, in the City of Nottingham was the owner of a dangerous dog which was not then and there kept under proper control, contrary to section 2 of the Dogs Act, 1871. The applicant pleaded Guilty to the information and on January 11, 1960, the justices made the following order: "Alan Campbell . . . having "made a complaint that Betty Brown . . . on September 26, "1959 . . . was the owner of a certain dangerous dog, which was "not then, nor now is kept under proper control, contrary to "section 2 of the Dogs Act, 1871.

"On hearing the said complaint the . . . court does adjudge "that the said dog is dangerous, and is not kept under proper "control and that the [applicant] is the owner of the said "dog, and does further adjudge and order that the said dog "shall be kept by the [applicant] under proper control. . . ." The applicant applied for certiorari to bring up and quash the order of the justices on the ground that the proceedings, having been commenced by information and not by complaint, were a nullity.

James Comyn for the applicant.

The justices did not appear and were not represented.

In addition to the cases referred to in the judgment, the following were cited in argument: *Rhodes* v. *Heritage* [3]; *Reg.* v. *Shaw*.[4]

Lord Parker C.J. Mr. Comyn moves on behalf of Betty Brown for an order of certiorari to remove into this court and quash an order made by justices in petty sessions, sitting at Guildhall, Nottingham, on January 11, 1960, whereby they ordered that the said Betty Brown, being the owner of a dangerous dog, should keep the said dog under proper control. The applicant was charged by way of information for that she "on "September 26, 1959, in the City of Nottingham was the owner "of a dangerous dog which was not then and there kept under "proper control, contrary to section 2 of the Dogs Act, 1871." She pleaded Guilty, and the order to which I have referred was made. She then discovered, presumably by taking legal advice, that there was a doubt as to whether the original proceedings by way of information were properly instituted and, as the result of the advice which she received, she instituted these proceedings. It will be seen, therefore, that this case is not distinguished

[3] [1951] W.N. 221; [1951] 1 T.L.R. 802; [1951] 1 All E.R. 904, D.C.

[4] (1865) 10 Cox C.C. 66.

in any way by merits but raises a highly technical point, though nevertheless a point which is of some importance.

Section 2 of the Dogs Act, 1871, reads in this way: "Any "court of summary jurisdiction may take cognisance of a com- "plaint that a dog is dangerous, and not kept under proper "control, and if it appears to the court having cognisance of "such complaint that such dog is dangerous, the court may "make an order in a summary way directing the dog to be kept "by the owner under proper control or destroyed, and any person "failing to comply with such order shall be liable to a penalty not "exceeding twenty shillings for every day during which he fails to "comply with such order."

Looking at this matter quite apart from authority, it seems to me plain on the wording of that section that there are really two stages envisaged. In the first stage the court of summary jurisdiction, on a complaint being made, may make a certain order in a summary way. The second stage is this, that if the person concerned fails to comply with that order, he shall be liable to a penalty. It seems to me, therefore, that on the wording of that section the first step is really in the nature of a civil or administrative proceeding, quite apart from the fact that it speaks throughout of a complaint. Certainly, there is no offence involved at any stage until there is failure to comply with an order which is made, when a penalty may be inflicted.

The matter has come before the courts in Scotland in *Haldane* v. *Allan*.[1] The Lord Justice-General, Lord Clyde, said[2]: "In my view the section contemplates two quite separate pro- "ceedings, both of which may take place before a court of "summary jurisdiction, and both of which may be initiated "by the procurator fiscal. The first is an administrative process "involving no question of any offence or penalty, but involving "an order by the court in regard to what is to be done with the "dog. The second proceeding envisaged in the section is of "quite a different character. It is a criminal process for a "penalty in respect of failure to comply with an administrative "order." I entirely agree with the analysis of the Lord Justice-General.

The next question that arises is whether, although this was by way of information and not by way of complaint, the matter is cured by section 42 of the Magistrates' Courts Act, 1952, which provides: "In any enactment conferring power on a "magistrates' court to deal with an offence, or to issue a "summons or warrant against a person suspected of an offence, "on the complaint of any person, for references to a complaint "there shall be substituted references to an information." No doubt the object of that section was this, that in the older statutes references to complaints and informations in regard to

[1] 1956 S.C. 41; 1956 S.L.T. 325. [2] 1956 S.L.T. 325, 326.

1960

Reg.
v.
Nottingham Justices.
Ex parte Brown.

Lord Parker C.J.

offences were used indiscriminately. In no case was an information used where the matter was a civil proceeding, but in the case of offences sometimes the statute talked of the proceedings being instituted by information and sometimes by complaint. No doubt it was for that reason that section 42 was passed and, indeed, on its face it only applies to offences because it says: "In any enactment conferring power on a magistrates' court to "deal with an offence, or to issue a summons or warrant against "a person suspected of an offence . . ." In other words, it is dealing with offences and saying plainly that in reference to offences there shall be substituted references to an information. That section, therefore, cannot touch this case.

The other section of the Magistrates' Courts Act which, it might be thought, could cure this mistake in the initiation of the process is section 100 (1) which provides: "No objection shall "be allowed to any information or complaint, or to any summons "or warrant to procure the presence of the defendant, for any "defect in it in substance or in form, or for any variance between "it and the evidence adduced on behalf of the prosecutor or "complainant at the hearing of the information or complaint." In other words, if you are dealing with an information no objection shall be allowed if it is deficient in substance or in form. Equally, if you are dealing with a complaint no objection shall be allowed if it is deficient in substance or in form, but there is nothing in that section which would allow an information to be valid and free from objection when the process should have been commenced by way of complaint. Indeed, it is to be observed that some four days after the coming into force of the Magistrates' Courts Act the matter came before Oxford County Sessions,[3] and it was held that section 100 (1) could not validate, as it were, proceedings which were wrongly instituted.

Finally, this court has been very properly referred to a number of cases in an affidavit by the clerk to the justices, who have not appeared on this application. In *Lockett* v. *Withey*,[4] which deals with quite a different matter, it does look as if proceedings commenced by information under section 2 of the Dogs Act had come before this court without any objection being taken to the method by which the proceedings had been commenced. Evidently the point was not raised and, indeed, it is not clear from the report whether the information was in regard to what I have called the first stage in section 2, or whether it was in respect of the second stage, namely, disobedience of an order already made.

Other cases were referred to by the clerk to the justices, perhaps the most important of which is *Reg.* v. *Hughes*.[5] That was a case in which magistrates perfectly properly dealt with a case which was brought before them on a warrant, and it later

[3] (1953) 103 L.J. 437.

[4] (1908) 25 T.L.R. 16; 21 Cox C.C. 748.

[5] (1879) 4 Q.B.D. 614; 14 Cox C.C. 284, C.C.R.

appeared that the warrant had been obtained illegally in that there was no written information on oath by the constable concerned. Apparently the defendant did not move to set aside the proceedings and conviction, but proceedings were taken against the constable for perjury. Notwithstanding the fact that the proceedings had been illegally commenced, it was held that there were judicial proceedings properly before the magistrates and that accordingly perjury lay. For myself, I find it unnecessary to go through the case in detail. It is clearly quite a different case from this case. It may well be that whereas the defendant in that case could have moved to set aside his conviction on the ground that the warrant was illegal, yet the constable concerned was guilty of perjury, since, until the conviction was set aside, there were judicial proceedings in which he had given evidence on oath. Indeed, in a later case, *Gray* v. *Commissioners of Customs*,[6] Lord Coleridge C.J. said this[7]: "In this case I think the point raised has been "directly ruled in the case of *Reg.* v. *Hughes*,[8] which is a case "of great authority, and was decided by no less than nine judges, "and only one of those judges dissented from the judgment. "The point there settled was shortly this, that where a defen- "dant is actually charged and appears before justices, and those "justices have jurisdiction, and though the defendant may have "been brought before the justices by illegal process, yet inasmuch "as the justices have jurisdiction and they adjudicate on the "case, that adjudication cannot afterwards be disputed by raising "objections to the arrest." To my mind, that passage in the judgment of Lord Coleridge points the distinction between the case of *Hughes*[9] and this case. In the case of *Hughes*[9] the justices had jurisdiction, whereas here the process from the very beginning was a nullity and they never had any jurisdiction at all. Accordingly, I have come to the conclusion in this case that the proceedings were wrongly initiated. They were a nullity from the beginning, and neither the plea of Guilty nor section 42 nor section 100 of the Magistrates' Courts Act can in any way cure that invalidity. Accordingly, in my judgment the order should go.

ASHWORTH J. I agree, and would only add one small point which seems to me very much to support the application in this case. The applicant's affidavit exhibits documents A and B, the documents issued by the court at Nottingham before which she appeared. The first refers to an information. The second, which is a printed form, obviously appropriate for the Dogs Act and proceedings under section 2, contains in print the expression "[Alan Campbell] . . . having made a complaint that Betty Brown "... was the owner of a certain dangerous dog," and goes on:

[6] (1884) 48 J.P. 343.
[7] Ibid. 344.
[8] 4 Q.B.D. 614.
[9] Ibid.

1960

Reg. v. Nottingham Justices. *Ex parte* Brown.

Ashworth J.

"On hearing the said complaint the said court does adjudge "that the said dog is dangerous." That form, in my judgment, is absolutely correct and in this instance, unfortunately, before that stage was reached, the inspector had called it an information.

Elwes J. I agree.

Application granted.
No order for costs.

Solicitors: *Hancock & Willis for German & Soar, Nottingham.*

[QUEEN'S BENCH DIVISION.]

1960
July 20, 28, 29.

Davies J.

* ULLAH *v.* HALL LINE LTD.

Legal Aid—Costs—Taxation—Expert witnesses—Solicitor and client costs—Disallowance of costs allowed on party and party taxation—Items not authorised—Payable by defendants to legal aid fund—Solicitor's right to recover—Legal Aid (General) Regulations, 1950 (*S.I.* 1950, *No.* 1359) (*as amended by the Legal Aid (General) (Amendment No.* 1) *Regulations,* 1954 (*S.I.* 1954, *No.* 166) *and Legal Aid (General) (Amendment No.* 2) *Regulations,* 1955 (*S.I.* 1955, *No.* 1829)), *reg.* 14 (4), (5), (6).

In an action in which a legally-aided plaintiff recovered damages for personal injuries against the defendants, the plaintiff called as witnesses a doctor and a consulting engineer. The solicitor paid (1) 5 guineas to the doctor for his report; (2) 90 guineas to the doctor for three days' attendance at the hearing; and (3) 30 guineas to the consulting engineer for two days' attendance. Those items were allowed on the party and party taxation and had been, or would be, paid in full to the legal aid fund by the defendants. On the solicitor and client taxation the taxing master disallowed the first and second items in part and the third item completely under regulation 14 (6) of the Legal Aid (General) Regulations, 1950,[1] on the ground that they were not authorised. On the doctor's

[1] Legal Aid (General) Regulations, 1950, reg. 14 (as amended): "(3) "Where it appears to the assisted "person's solicitor necessary for the "proper conduct of the proceedings "to take or to apply to the court for "leave to take any one or more of "the following steps, namely:—(*a*) to "add any further party to the pro-"ceedings; or (*b*) to bespeak any "transcript of shorthand notes of "any proceedings; or (*c*) to lodge "any interlocutory appeal; or (*d*) to "instruct more than one counsel; or "(*e*) to set up or set off any right or "claim having the same effect as a "cross-action (other than a counter-"claim or set-off arising out of the "same transaction and capable of "being pleaded as a defence), or to "reply to any right or claim so set "up or so set off by any other "party; he shall (unless the certifi-"cate provides for the act in question "to be done) apply to the appro-"priate Area Committee for autho-"rity so to do, and no payment shall "be allowed on taxation for any such "step taken without their approval. "(4) The Law Society may give "general authority to solicitors act-"ing for assisted persons in any "particular class of case to obtain the "report or opinion of one expert and "to tender one person's expert evi-"dence, and if so they shall state the "maximum total fee to be paid for "any report or opinion or expert wit-"ness. (5) Where it appears to an "assisted person's solicitor necessary

report he allowed 3 guineas, being the maximum fee under the general authority under regulation 14 (4), and 30 guineas for the doctor's fee under a specific authority given to the solicitor by the area committee under regulation 14 (5) (*b*). On a summons by the plaintiff's solicitor to review the taxation:—

Held, (1) that although the solicitor had specific authority to call the medical witness at a fee of 30 guineas, he had not elected to rely on the specific authority and was therefore entitled to 35 guineas, being the maximum fee for three days under the general authority under regulation 14 (4) (post, p. 1326).

(2) That on the true construction of regulation 14 (6), in order to give an effective meaning to the paragraph, one had to add qualifying words to "no payment may be made" such as "to the "detriment of the fund" and, accordingly, that regulation did not prohibit the allowance under solicitor and client taxation under the Third Schedule to the Act of disbursements made without authority where those disbursements had been allowed as between party and party. Since all the disputed items were allowed upon the party and party taxation, no question of their allowance arose for consideration on the solicitor and client taxation under the Third Schedule, and the taxing master erred in disallowing them. Such items recovered by the fund were payable to the applicant solicitor (post, p. 1330).

SUMMONS.

By a judgment dated March 17, 1959, the plaintiff, Kolim Ullah, an assisted person under the Legal Aid and Advice Act, 1949, recovered damages for personal injuries against the defendants, Hall Line Ltd., with costs. The plaintiff's solicitor brought in his bill for taxation of costs as between (a) party and

"for the proper conduct of the proceed-
"ings either—(*a*) to obtain a report or
"opinion of one or more experts or to
"tender expert evidence in a case of a
"class not included in any general
"authority under the foregoing para-
"graph; or (*b*) in a case of a class so
"included, to pay a higher fee than
"that stated by The Law Society or
"to obtain the report or opinion of
"more than one expert or to tender ex-
"pert evidence of more than one per-
"son, he may apply to the appropriate
"Area Committee for authority so to
"do and if the Area Committee give
"authority they shall state the maxi-
"mum number of reports or opinions
"that may be obtained, or the maxi-
"mum number of persons who may
"be tendered to give expert evidence,
"and the maximum total fee to be
"paid therefor. (6) Save as provided
"by this Regulation, no payment
"shall be made for the report or
"opinion of an expert or for expert
"evidence tendered by or on behalf
"of an assisted person. (6A) Where
"it appears to the assisted person's
"solicitor necessary for the proper
"conduct of the proceedings for any
"act to be done, but that the act is
"either unusual in its nature or
"involves unusually large expendi-
"ture, he may request the appropri-
"ate Area Committee to obtain The
"Law Society's prior approval of the
"act, and, where such prior approval
"has been obtained, no question as
"to the propriety of the act shall be
"raised on taxation as between
"solicitor and client in accordance
"with the provisions of the Third
"Schedule to the Act."

NOTE.—The following appears in the Law Society Gazette, June, 1952, p. 227: "The Law Society,
"pursuant to the power conferred on
"it by regulation 14 (4) of the Legal
"Aid (General) Regulations, 1950,
"hereby gives a general authority to
"solicitors acting for assisted persons
"in proceedings for damages for per-
"sonal injuries to obtain the report
"or opinion of one medical expert at
"a fee not exceeding £3 3s., and to
"tender one medical expert's evidence
"at a fee not exceeding £15 15s. for
"the first day (£10 10s. for half a
"day or for any subsequent day) and
"his proper expenses of attending the
"hearing."

1960

Ullah
v.
Hall Line
Ltd.

party and (b) solicitor and client under the Third Schedule to the Act of 1949. In the party and party taxation three items of disbursements were claimed: (1) "Paid Sir Hugh Griffiths' "[doctor] charges" for a report 5 guineas; (2) "Sir Hugh "Griffiths' fees for attending three days at the hearing" 90 guineas [30 guineas a day]; (3) "Mr. A. V. Evans, consulting "engineer, fees for two days attending at the hearing, 30 guineas. Those items were allowed in full on the party and party taxation, but on the solicitor and client taxation, the taxing master disallowed the first and third items completely and allowed only 30 guineas on the second item. On an objection being laid the taxing master allowed 3 guineas on the first item.

The plaintiff's solicitor took out a summons to review the taxation and the matter came before McNair J. on May 31, 1960, when it was adjourned for the Law Society to be represented. At the hearing before Davies J. the Law Society was not represented but the Lord Chancellor, acting under regulation 21 of the Legal Aid (General) Regulations, 1960, had appointed as solicitors Messrs. Joynson-Hicks & Co. (who appeared by counsel) to intervene in the review.

The argument was heard in chambers and the judgment given in open court. The relevant facts are more fully stated in the judgment.

Stanley Waldman for the plaintiff's solicitor, the applicant.
Colin Duncan for the Lord Chancellor, to intervene.

Cur. adv. vult.

July 29. Davies J. read the following judgment: This is a summons at the instance of Mr. Sydney Silverman, the plaintiff's solicitor, to review a taxation under the Third Schedule of the Legal Aid and Advice Act, 1949. It came originally before McNair J. on May 31, when it was adjourned for the Law Society to be represented. At the hearing before me, on July 20 and 28, the Law Society were not represented but by that time the Lord Chancellor, acting under regulation 21 of the Legal Aid (General) Regulations, 1960, had appointed Messrs. Joyson-Hicks & Co. to intervene in the review. Under regulation 21 (4), "The solicitor appointed by the Lord Chancellor to intervene "in a review of taxation shall be entitled to production of all "documents . . . and to . . . be heard on the review, with a "view to ensuring that all considerations which are proper to "be taken into account are placed before the court. . . ." There is also a provision in that regulation that the solicitor so appointed may instruct counsel: accordingly, Messrs. Joynson-Hicks & Co. instructed Mr. Colin Duncan to appear before me at the hearing to put forward the considerations that he thought appropriate. It was agreed by Mr. Duncan and by Mr. Waldman, who appeared for the applicant, that regulation 21 (which came into

operation on March 28, 1960), being a procedural regulation, applied to this review, though the questions at issue in the review fall to be decided under the old regulations, namely, the Legal Aid (General) Regulations, 1950, as amended, since the original taxation took place in November of last year pursuant to a judgment dated March 17, 1959.

The action was one in which the legally aided plaintiff, Kolim Ullah, recovered damages against the defendants, the Hall Line Ltd. Under the judgment the plaintiff's solicitor, Mr. Sydney Silverman, brought in his bill for taxation (a) as between party and party and (b) as between solicitor and client, under the Third Schedule to the Act. No question at all arises as to the party and party taxation: it is on the solicitor and client taxation that the taxing master's decision is objected to.

The matter arises in this way. In the party and party bill there were the following items of disbursements claimed: "Paid "Sir Hugh Griffiths'," the well-known doctor, "charges," for a report, 5 guineas; "Sir Hugh Griffiths' fees for attending "three days at the hearing," 90 guineas (that is three lots of 30 guineas); "Mr. A. V. Evans', consulting engineer, fees for "two days attending at the hearing," 30 guineas. The decision to which the taxing master felt himself in the first place to be obliged to come was this: he allowed one fee of 30 guineas for Sir Hugh Griffiths, he disallowed entirely the 5 guineas for Sir Hugh Griffiths' report; and he disallowed entirely the fee of 30 guineas to the engineer, Mr. Evans. However, on the objection to that being laid, the taxing master did alter his decision to this extent (and I will explain in a moment how it arises): namely, he allowed a further 3 guineas in respect of the report given by Sir Hugh Griffiths.

The result in terms of money is this. The solicitor has paid out of his own pocket in respect of these three items a total of 125 guineas (£131 5s.). All these items were allowed on the party and party taxation and have been or will be paid into the Legal Aid Fund, there being no question of any sort or kind as to the solvency of the defendants. Of this sum Mr. Silverman was originally only allowed 30 guineas (£31 10s.). That has been increased (as I have said) by the taxing master after the objections to 33 guineas (£34 13s.). So that if the taxing master's decision stands, Mr. Silverman will be out of pocket by 92 guineas (£96 12s.) and the fund will be unjustifiably enriched by the same amount.

This is obviously a remarkable state of affairs and appears to be a manifest injustice. So strongly did this aspect of the matter strike me at the first hearing that before the argument ended I adjourned the summons in order to see whether it might not be possible for an ex gratia payment to be made to Mr. Silverman in full so as to avoid any injustice, whatever the legal position might be. As a result of this, on July 26, the Law Society wrote to Mr. Silverman offering to pay the disputed

1960

Ullah
v.
Hall Line
Ltd.

Davies J.

amount in full as an ex gratia payment, with the consent of the Lord Chancellor and the Treasury. This offer was, however, refused by the solicitor, on the ground that he wished the legal point to be decided.

To what extent the legal point which I have to try to decide this morning will recur I do not know. It may be that there are various pending cases in which the same point may arise. But so far as the main point is concerned it is unlikely to arise in the same form under the new regulations, for this reason: save as to the question of the employment of two counsel, under the new regulations, even though authority in advance has not been obtained, the taxing master will enjoy an overriding discretion.

I think it is right now that, having referred to the financial aspect of it, I should read the objections and the taxing master's answers. These are the objections: "The taxing master having "held that these disbursements are properly chargeable against "the defendants and allowed them in the party and party bill "of costs so that on proof of payment they will be included in "the party and party certificate of taxation and recovered from "the defendants, has no authority or power to deduct them or "any part of them in the solicitor and client taxation under the "Legal Aid and Advice Act, 1949, or any regulation validly "made thereunder, or from his certificate of taxation under that "Act. Alternatively, if he had discretion to make any such "deduction, he ought not in respect of these items to have "exercised it. In the further alternative on the true interpre-"tation of the correspondence between the plaintiff's solicitor "and the secretary of the No. 1 (London) Legal Aid Area "Committee, Item No. 2 was in fact authorised by the said "committee. In the yet further alternative, the amounts to be "excluded from the solicitor and client allocatur should be only "£2 2s. in respect of Item 1 and £42 in respect of Item 2, "the sums of £3 3s. for Sir Hugh Griffiths' report and £21 "in respect of his attendance at court on the second and third "days of the hearing being authorised under the general "authority."

To that, the master's answers are in the following terms: "No. 1. I have allowed £3 3s. part of this item"—that is, the 5 guineas for the report—"under the general authority "given by the Law Society pursuant to regulation 14 (4) of the "Legal Aid (General) Regulations.

"No. 2. There is nothing in the Legal Aid and Advice Act "which invalidates regulation 14 (6) of the regulations made "thereunder, which regulation in my view means that no allow-"ance is to be made on taxation under the Third Schedule for "expert evidence which has not been authorised in manner laid "down by the regulations. The Area Committee by the letter "dated December 8, 1958, authorised the calling of Sir Hugh "Griffiths the medical expert to give evidence at the hearing

"at a fee of 30 guineas. This letter in my opinion means 30 "guineas only, and not 30 guineas per day, even when read with "the letter of December 1, 1958, to which it is a reply. The "authority is a specific authority given under regulation 14 (5) "(*b*) which requires the maximum fee to be stated. It supersedes "the general authority under regulation 14 (4) published in "June, 1952, by the Law Society and is not an extension of "such general authority. The solicitor must be deemed to have "elected to rely on the specific authority relative to calling the "medical expert. The fact that 30 guineas per day has been "allowed on the party and party taxation does not override the "regulations requiring prior authority on a taxation under the "Third Schedule.

"No. 3. There is no authority either general or specific to "cover the consulting engineer. I am not prepared to hold that "regulation 14 (6) does not apply merely because the solicitor "in obtaining a pre-legal aid report from the witness was "impliedly authorised by the plaintiff to call such witness at "the trial. I overrule this objection."

Three questions, therefore, arise. (1) Was the report from and the calling of Sir Hugh Griffiths at a higher figure than that prescribed in the general authority authorised?—that is to say, was the solicitor specifically authorised to engage Sir Hugh Griffiths at 30 guineas a day plus his 5-guinea report? This question does not arise in connection with the fees of the consulting engineer because there is no suggestion that there was any specific authority there.

(2) If not, then is the authority limited to the specific 30 guineas, or can the solicitor rely on the general authority, which would entitle him to the 3 guineas for the report, which has been allowed, plus 15 guineas for the first day, 10 for the second, and 10 for the third? That is to say, he would have been entitled, if the answer to that is "Yes," to 38 guineas (£39 18s.).

But the all-important question, of course, is the third question: if these disbursements have been allowed and recovered or are certain to be recovered on the party and party taxation, is the solicitor ipso facto entitled to them on the solicitor and client taxation?

As to the first question, the specific authority, the facts are quite short. On December 1, 1958, the solicitor wrote to the area secretary in these terms: "It will be necessary to call "as a witness on the plaintiff's behalf Sir Hugh Griffiths. I "have been in communication with Sir Hugh as to fees and he "informs me that he is willing to attend and to accept the fee "which is usually allowed to him in legal aid cases, namely, "25 guineas per day. I do not think that special autho-"rity is required, but nevertheless I should be glad if you "will confirm that there is no objection to calling Sir Hugh "Griffiths as witness on these terms." The answer from the

1960

Ullah
v.
Hall Line
Ltd.

Davies J.

area secretary is the kind of answer one often gets in court: it is not an answer at all. What the letter of December 8 says is: "Your letter of December 1 has now been considered by my "committee, who authorise you to call Sir Hugh Griffiths to "give evidence at the hearing, if this is necessary, at a fee of "30 guineas, subject to any order made by the master on "directions."

So there you have Mr. Silverman asking whether Sir Hugh Griffiths may be called at a fee of 25 guineas a day; and the answer is: "You can call him for 30 guineas."

The regulation which applies to this matter is regulation 14 (5).

One has, of course, to look also at regulation 14 (4) and the general direction made thereunder.

This is a short question of construction as to specific authority on the two letters which I have read; and it seems to me quite impossible to say, when the area secretary, in reply to the question "Can we have Sir Hugh Griffiths at 25 guineas a day?" writes back and says: "You can have Sir Hugh Griffiths at 30 "guineas," that that can possibly mean it is an authority to call Sir Hugh Griffiths at 30 guineas a day. It is said, of course, that they could have called Sir Hugh Griffiths under the general regulation for 35 guineas—15 plus 10 plus 10—the case having lasted three days. But, as was pointed out by Mr. Duncan at the hearing of the summons, non constat that the case was going to last three days; and if the case had finished on the first day they would have been limited under the general direction to 15 guineas. I think that the conclusion is inevitable, seeing that the solicitor must be taken to have known the provisions of regulation 14 (5) that the authority must state the maximum total fee, that—albeit that it was not at all a helpful answer to the inquiry when the area secretary said "30 guineas"—that was the maximum total fee. Therefore, in my judgment, on this question of specific authority Mr. Silverman does not make out any case at all.

The second of the two minor points is the question as to whether, 30 guineas having been authorised by that letter, Mr. Silverman can say: "Oh, but nevertheless I am entitled to have "more than the 30 guineas, namely the 35 guineas authorised "under the general direction—15 plus 10 plus 10"—in addition, of course, to the 3 guineas to which he is entitled for the report. The taxing master has come to the conclusion that he is not so entitled; that he elected to rely on the 30 guineas. I do not think that is right. It seems to me that the taxing master's decision is inconsistent. If the election for 30 guineas applies to the fee for calling Sir Hugh Griffiths in the witness-box or having him present in court, one would have thought it would apply equally to the fee for the report. The taxing master has agreed on reconsideration that 3 guineas is allowable for the report. I cannot see that it is possible to say that Mr. Silverman has elected in

any shape or form here. He thought he was right in his construction of the letter. It turned out that he was wrong. In my opinion, therefore, on any view he would be entitled, in addition to the 3 guineas for the report, to the 35 guineas for the three days that Sir Hugh Griffiths was present in court, which would be 38 guineas in all.

But, of course, that is not what makes the matter so important. The important matter is to deal with the problem whether all these amounts, having been allowed in full as reasonable disbursements on the party and party taxation, are to be paid or not out of the pocket of Mr. Silverman.

In addition to the statutory provisions to which I have already referred, I shall refer quite shortly to one or two other provisions; first, section 12 (1) of the Act under which the regulations are made, which provides: "The Lord Chancellor may make such "regulations as appear to him necessary or desirable for giving "effect to this Part of this Act or for preventing abuses thereof." The word "abuses" is perhaps not unimportant in this connection. It is relied on very strongly by Mr. Waldman, for the applicant, because it would appear that if this decision is right, and if the regulations do mean what it is said they mean by Mr. Duncan, so far from preventing abuses they obviously in this case would create a manifest abuse.

That is the section under which the regulations are made. I need not, I think, concern myself with the Lord Chancellor's power to modify the Act under section 17 (4). I will turn to consider the provisions of the Third Schedule to the Act, and I think I need only refer to two paragraphs. First, paragraph 2 (1) of the Third Schedule: "The sums allowed to a solicitor in "connection with proceedings in the House of Lords or the "Supreme Court shall be the full amount allowed on taxation "of the costs on account of disbursements and eighty-five per "cent. of the amount so allowed on account of profit costs: . . ." Then paragraph 4 (1) of the Schedule: "Subject to the last "foregoing paragraph, costs shall be taxed for the purposes of "this Schedule according to the ordinary rules applicable on a "taxation as between solicitor and client where the costs are to "be paid out of a common fund in which the client and others "are interested: Provided that no question shall be raised as to "the propriety of any act for which prior approval was obtained "as required by regulations."

Then one turns finally to regulation 14. I think it is most important, in considering regulation 14 and the relevant parts of it, to observe that it is not a regulation that is dealing only, or indeed primarily, with taxation: it is a regulation which deals (as it is said to deal) with the "Conduct of proceedings on behalf of "assisted persons," and it deals with all manner of things, such as for example the right of solicitor or counsel to give up the case, and so on. The only paragraphs to which I think it necessary to refer are these: first, paragraph (3) of regulation 14,

1960

Ullah
v.
Hall Line
Ltd.

Davies J.

then paragraph (4) which deals with the general authority, then paragraph (5), and, of course, the present matters come directly under that paragraph; Mr. Evans, the engineer, comes under sub-paragraph (*a*) of regulation 14 (5), and Sir Hugh Griffiths under sub-paragraph (*b*); then paragraph (6); and finally (and it is only for comparison, because it does not touch the present case), paragraph (6A). As I have said, regulation 14 deals with many other matters.

It being conceded, in view of my finding, that there was no prior authority for the retainer (if that is the right word) or calling of Sir Hugh Griffiths at a fee higher than that in the regulation, and it being beyond question that there was no prior authority in the case of Mr. Evans, the question that I have posed arises for decision. The argument of Mr. Waldman for the applicant is in substance this: (1) That, if a payment of the sort in question here has been allowed on party and party taxation, that payment is ipso facto allowable on a solicitor and client taxation under the Third Schedule, and that there is no occasion for any further consideration or taxation in respect of that matter. (2) That the regulations made by the Lord Chancellor are made (as I have already touched on) for "preventing abuses" of the Act, and that the decision to which the taxing master felt himself driven, so far from preventing an abuse, obviously creates a gross abuse. (3) That if and so far as the regulations are ambiguous the court, while not of course straining the language, should lean towards a construction which is in accordance with justice and common sense.

At one time I thought that Mr. Waldman was asking me to hold that the regulations were ultra vires if in the present circumstances they prevented the solicitor from being reimbursed the moneys which he had decided inter partes he had properly expended. In my judgment it would have been quite impossible so to hold. But in his reply counsel made it plain that that was not his contention. His submission was that on the assumption that the regulation is intra vires a reasonable interpretation is to be preferred to an unreasonable one. On this basis one observes, dealing with the first point, that paragraph 4 (1) of the Third Schedule refers to ". . . the ordinary rules applicable on a taxation "as between solicitor and client where the costs are to be paid "out of a common fund in which the client and others are "interested . . ."; and it is said with some force that if one were to have a solicitor and client taxation following upon a party and party taxation it would be inconceivable that a disbursement which had been allowed as between party and party should be disallowed as between solicitor and client.

Attention was also drawn to the direction of the senior registrar of the Probate, Divorce and Admiralty Division, dated November 17, 1950 (Law Society's Legal Aid Handbook (Revised Edition), pp. 177, 178). That sets out the form in which the bills are to be presented, with parallel columns for solicitor and client

and party and party respectively. It says this: "The solicitor "and client columns should show only those items which do not "appear in the party and party columns. After taxation separate "summaries for the two sets of columns should be completed. "The sum of the two totals will give the solicitor and client "costs." That direction in its terms applies, of course, only to the Probate, Divorce and Admiralty Division, but the form of the bill specified therein appears to have been generally adopted, and certainly was in the present case.

The important points to be noted are: (a) that items in the party and party columns should not be included in the solicitor and client columns; and (b) that the total of the two columns is said to be the solicitor and client costs. The solicitor followed this practice in the present case. The disputed items were in the party and party column but not in the solicitor and client column. But as a result of the disallowance on solicitor and client taxation of the amounts in question, the total of the two columns comes to £607 19s. but the solicitor and client costs come to only £511 7s.

Reference was also made by both sides to other passages in the Legal Aid Handbook; but as these are not authoritative I do not consider it necessary to refer to them.

As to Mr. Waldman's second point, which is really another way of putting his third point, and also his point on what I at first thought was the ultra vires argument, no one would, I apprehend, seek to dispute that if words are ambiguous the preferable construction to put upon them is that which is the more reasonable and the more just.

Mr. Duncan's argument really comes to this. He submits that the words in regulation 14 (6), "no payment shall be made," mean precisely the same as the words in regulation 14 (3), "no "payment shall be allowed on taxation." Indeed, he goes further and submits that precisely the same meaning is to be attached to the words which I have read in regulation 14 (6A)—though in a converse sense—"no question as to the propriety "of the act shall be raised on taxation." This argument from counsel appearing (in effect) for the Lord Chancellor strikes me as a bold one. I find myself quite unable to contemplate that the Lord Chancellor, in framing the regulations, would in such a short space use entirely different words to mean the same thing, and I do not accept that that is the proper construction of the regulations. The material words in this case are the words in regulation 14 (6), "no payment shall be made." I hold that those words do not mean the same as "no payment shall be "allowed on taxation." That is a fairly simple step. What, then, do the words mean? Mr. Duncan concedes that they do not import a prohibition against the payment of Sir Hugh Griffiths or Mr. Evans, the engineer, by Mr. Silverman in the first place. Indeed, if they meant that, it would seem that these payments could not be allowable on a party and party taxation.

1960

Ullah
v.
Hall Line
Ltd.

Davies J.

It is impossible, in my view, to give any effective meaning to these words unless one writes in some qualifying words. It is plain that the purpose and intent of the regulations is to protect the legal aid fund—or, using the words of section 12, to prevent abuses of the Act. In my opinion, therefore, it is implicit in regulation 14 (6) that the payment may be made if it does not injure the fund. " . . . no payment may be made," therefore, is equivalent to " no payment may be made to the detriment of the " fund." The costs claimed in this case would, of course, fall to be paid out of the fund, but they would not be paid to the detriment of the fund since ex concessis the fund has recovered or will recover them from the defendants.

Regulation 14 (6), therefore, does not, in my opinion, prohibit this allowance upon solicitor and client taxation under the Third Schedule to the Act of disbursements of the sort in question made without prior authority, if those disbursements have been allowed as between party and party. What it does do is to prohibit the payment out of the fund of such disbursements unless the fund recovers or is in a position actually to recover them from the other party to the litigation. If the legally aided litigant has failed, then of course there would be no question of recovering from the other party. Even if the legally aided litigant has won, it would not be by any means certain at the date of the taxation that the party and party costs taxed in favour of the legally aided litigant would actually be recovered. Items such as those in dispute would nevertheless, in my view, be properly included in the solicitor and client costs, having already been " allowed " as between party and party. The prohibition imposed by regulation 14 (6) is, in my view, a prohibition against actual payment to the solicitor out of the fund unless and until it is ascertained that the fund will not suffer by such payment.

How this would work out in practice I do not know. But, rightly or wrongly, this is the interpretation which in my view is the correct one to put upon these not altogether clear regulations.

In the result, therefore, since all the disputed items were allowed upon the party and party taxation no question of their allowance arose for consideration on the solicitor and client taxation under the Third Schedule, and the taxing master erred in disallowing them.

That is all that I have to decide. But in view of the fact that it is admitted here that the fund has recovered or will unquestionably recover those items from the defendants, there can be no question of any detriment or loss to the fund and these items are therefore payable to the applicant solicitor.

Order accordingly with costs.
Leave to appeal.

Solicitors: *S. Silverman; Joynson-Hicks & Co.*

C. J. E.

[CHANCERY DIVISION.]

* *In re* BEDFORD, DECD.
RUSSELL *v.* BEDFORD.

1960
Nov. 8, 10, 11.

Cross J.

[1960 B. No. 720.]

Will—Construction—"Free of duty"—Chattels of artistic or historic interest—Specific legacy free of duty—Direction to trustees to pay duties payable "on my death"—Whether duty contingently payable on sale by legatees payable out of residue—Finance Act, 1930 (20 *&* 21 *Geo.* 5, *c.* 28), *s.* 40.

By clause 2 of his will a testator bequeathed to his children to be fairly and equally distributed among them "free of duty" all his chattels of a certain character. By clause 14 he directed his trustees to "pay the estate duty payable on my death in respect of "any part of my estate real or personal and all legacy succession "and other duties payable on my death on any gifts by this my "will or any codicil hereto which are made free from duty." The residue of his estate was directed to be divided in various proportions between a number of beneficiaries who took absolute interests therein. The chattels bequeathed to the testator's children included chattels of artistic or historic interest which were exempted from estate duty while in the hands of the legatees by section 40 of the Finance Act, 1930.[1]

On a summons to determine whether the duty which would become payable on the proceeds of sale of the exempt chattels in the event of their being sold by the legatees in their lifetime should be borne by the legatees themselves or by the testator's residuary estate:—

Held, (1) that, prima facie, where there was a gift of exempt chattels "free of duty," the freedom from duty included the duty contingently payable in the event of a sale of the chattels by the legatee.

In re Scott [1916] 2 Ch. 268; 31 T.L.R. 227, C.A. applied.

(2) That it would be wrong to read clause 14, which was merely an administrative direction, as cutting down the prima facie meaning of the phrase "free of duty" in clause 2; and that the duty which would become payable on the sale of the chattels by any of the legatees in their lifetime was, therefore, payable out of the testator's residuary estate.

[1] Finance Act, 1930, s. 40: "(1) "Where there pass on the death of "a person dying after the commence- "ment of this Act any objects to "which this section applies, the "value of those objects shall not be "taken into account for the purpose "of estimating the principal value of "the estate passing on the death or "the rate at which estate duty is "chargeable thereon, and those "objects shall, while enjoyed in kind, "be exempt from death duties. (2) In "the event of the sale of any objects "to which this section applies, the "death duties shall . . . become "chargeable on the proceeds of sale "in respect of the last death on "which the objects passed and, as "respects estate duty, at the rate "appropriate to the principal value of "the estate passing on that death "upon which estate duty is leviable, ". . . and the person by whom or "for whose benefit the objects were "sold shall be accountable for the "duties. . . . (3) The objects to "which this section applies are such "pictures, prints, books, manuscripts, "works of art, scientific collections "or other things not yielding income "as on a claim being made to the "Treasury under this section appear "to them to be of national, scientific, "historic or artistic interest. . . ."

1960

BEDFORD, DECD., *In re.*

ADJOURNED SUMMONS.

The testator, Hastings William Sackville, twelfth Duke of Bedford, made his will on February 21, 1952. By clause 1 he appointed the plaintiffs, the Honourable Victor Alexander Frederick Villiers Russell and Douglas James Watherson Dryburgh to be executors and trustees of his will and bequeathed a legacy of £500 to the Honourable Victor Russell "free of duty" if he proved the will and accepted the trusteeship.

Clause 2 of the will provided "I bequeath to my children the "most Honourable John Robert Russell (commonly known as "'the Marquis of Tavistock') [now the thirteenth Duke of Bed-"ford] the Honourable Daphne Crommelin Russell and Lord "Hugh Hastings Russell (to be fairly and equally distributed "according to value among them in such manner as they shall "agree or in case of difference as shall be settled by my trustees "whose decision shall be final) free of duty all my motor cars "and motor accessories all my plated goods wearing apparel "watches trinkets furniture pictures wines liquors and consum-"able stores and provisions and all other articles and effects of "personal domestic household stable garage or garden use or "ornament or consumption (other than money securities for "money and documents of title) belonging to me at my death "and not otherwise effectually disposed of by me."

By clause 3, the testator bequeathed "free of duty" to the person who should inherit the Woburn Settled Estates certain farm and other stock. By clause 4, he made a specific bequest "free of duty." By clause 5, he devised a certain freehold house "free of all duty." By clauses 6, 7 and 8, he made a number of pecuniary legacies all "free of duty." By clause 13 he devised and bequeathed all his real and personal property to his trustees on trust for sale. Clause 14 provided: "My trustees "shall out of the moneys to arise from the sale calling in and "conversion of or forming part of the said real and personal "property and out of any ready money pay my funeral and "testamentary expenses and debts and the legacies given by this "will or any codicil hereto and pay the estate duty payable on "my death in respect of any part of my estate real or personal "and all legacy succession and other duties payable on my death "on any gifts by this my will or any codicil hereto which are made "free from duty." By clause 15, the testator provided that his trustees should divide his residuary estate into one hundred equal parts and hold it in various proportions for a number of beneficiaries all of whom took absolute interests.

On March 12, 1953, the testator made a codicil revoking two of the pecuniary legacies made by clause 8 of his will and substituted two other pecuniary legacies for them. In all other respects he confirmed his will.

The testator died on October 9, 1953, and his will and the codicil were proved by the executors named therein on November

7, 1953. The general rate of estate duty applicable to property passing on the testator's death was 80 per cent.

The chattels bequeathed to the testator's children by clause 2 of his will included chattels of artistic or historic interest which were valued, for probate purposes, at £11,296 15s.

The trustees took out a summons asking (1) whether the specific legatees of exempt chattels would or would not be entitled to be paid out of the residuary estate the estate duty which would become payable (a) on the sale by any of the specific legatees in his or her lifetime of any exempt chattels or (b) on breach of the statutory undertaking relating to the chattels required by section 48 of the Finance Act, 1950 [2]; (2) if the answer to question (1) was in the affirmative, that directions might be given to the executors as to what provision they should make for the duty contingently payable with a view to the distribution of the balance of the residuary estate.

At the date of the hearing none of the exempt chattels had yet been distributed between the specific legatees and none of them had been sold since the testator's death nor had the statutory undertaking, which had been given by the executors, been broken.

E. G. Wright for the executors.
John Brightman for the specific legatees.
Michael Fox for the residuary legatees.

The following cases, not referred to in the judgment, were cited in argument: *In re Swaythling (Lord)* [3]; *In re Howell* [4]; *In re Reckitt.* [5]

CROSS J. referred to the testator's will and death and continued: The chattels bequeathed to the testator's children by clause 2 of his will included a number of chattels of artistic or historic importance which are given exemption from duty while they remain unsold in the hands of the legatees, under the

[2] Finance Act, 1950, s. 48: "(1) "... section 40 of the Finance Act, "1930, ... shall apply to objects "which pass on a death occurring "after the date of the passing of this "Act only if an undertaking is given, "by such person as the Treasury "think appropriate in the circumstances of the case, that, until the "objects again pass on a death or "are sold,—(*a*) the objects will be "kept permanently in the United "Kingdom, and will not leave it "temporarily except for a purpose "and a period approved by the "Treasury; and (*b*) reasonable steps "will be taken for the preservation "of the objects; and (*c*) reasonable "facilities for examining the objects "for the purpose of seeing the steps "taken for their preservation, or for "purposes of research, will be allowed "to any person authorised by the "Treasury so to examine them. ... "(3) Where any objects are exempted "from estate duty in pursuance of "an undertaking under subsection "(1) of this section, and the Treasury "are satisfied that at any time "during the period for which the "undertaking was given it has not "been observed in a material respect, "then estate duty shall become "chargeable on the value at that "time of those objects. ..."

[3] (1912) 29 T.L.R. 88.

[4] [1952] Ch. 264; [1952] 1 T.L.R. 371; [1952] 1 All E.R. 363.

[5] [1932] 2 Ch. 144, C.A.

1960

Bedford, decd., *In re.*

Cross J.

provisions of section 40 of the Finance Act, 1930. The question which arises is whether the duty which would become payable on the proceeds of sale of those chattels in the event of them being sold by any of the three legatees during their lifetime should be borne by those legatees or will have to be provided for out of the testator's residuary estate. The rate of duty on the residuary estate, having regard to the settled property which passed on the testator's death, is the highest rate, 80 per cent.; so that, if the claim of the legatees to have that duty contingently payable provided for out of residue is right, a large part of the residuary estate—possibly all of the residuary estate—will have to be held up to abide the event whether or not the duty becomes payable.

The history of the exemption starts with section 20 of the Finance Act, 1896, and it was then confined to settled chattels. That section, as originally passed, was in the following terms: "(1) Where any property passing on the death of a deceased per-" son consists of such [chattels] not yielding income as appear to " the treasury to be of national, scientific, or historic interest, " and is settled so as to be enjoyed in kind in succession by dif-" ferent persons, such property shall not, on the death of such " deceased person, be aggregated with other property, but shall " form an estate by itself, and, while enjoyed in kind by a " person not competent to dispose of the same, be exempt " from estate duty, but if it is sold or is in the possession of some " person who is then competent to dispose of the same, shall " become liable to estate duty." Subsection (2) provided that the person selling the chattels, or the person who comes into possession and becomes competent to dispose of them, shall be accountable for the duty.

The construction of that section came before the Court of Appeal in 1904 in *In re Leconfield.*[1] By his will, Lord Leconfield (who died in 1901) directed his trustees to pay out of the residuary proceeds of his estate "so much of the estate duty and other death " duties . . . which . . . shall become payable upon or by reason of " my death in respect of all the estates and property (including as " well real estate as leaseholds, moneys, funds, stocks, shares and " securities) of which I shall immediately before my death be seised " or entitled as tenant for life under or by virtue of or by reference " to the will of the late . . . [Lord] Egremont." The contents of Petworth House of which the testator was tenant for life immediately before his death under Lord Egremont's will were exempt from duty under section 20 of the Finance Act, 1896, because they were of national or historic interest and were settled property. The question which was raised was whether, when estate duty fell to be payable on those chattels, either because of a sale by the next life tenant or when they eventually came into possession of a person competent to dispose of them under the

[1] (1904) 90 L.T. 399, C.A.

settlement, that estate duty would be payable out of the free estate of the testator under that direction in his will. The Court of Appeal held that the estate duty which eventually might become payable on the exempted chattels would not be payable upon or by reason of the death of Lord Leconfield; it would become payable on the sale of the chattels and in consequence of the sale of the chattels, or alternatively upon the chattels coming into the possession of an absolute owner and in consequence of that fact, but not upon or by reason of the death of Lord Leconfield.

The provisions of section 20 of the Act of 1896 were varied by section 63 of the Finance (1909–10) Act, 1910, in two ways which are material. First, the exemption was extended to legacy duty and succession duty and did not apply only to estate duty; and, secondly, the exemption was extended to cases where the chattels in question were not settled but were the subject of an absolute bequest, but in that case it was provided that "the duty "shall only become chargeable when the property is sold, and then "only in respect of the last death on which the property passed." If, therefore, exempted chattels were given absolutely to a legatee, and he sold them during his lifetime, duty would become payable in respect of the death of the original testator, whereas, if the legatee in question retained the chattels during his lifetime and then died, so that they passed on his death and were sold by the next taker, duty would not be payable in respect of the death of the original testator but in respect of the death of the legatee.

That was the state of the law when *In re Scott* [2] came before the courts. Sir John Murray Scott, who was domiciled in this country but was possessed of an extremely valuable collection of objects of art in his apartment in Paris which were worth about £300,000, bequeathed those objects to Lady Sackville free of legacy duty. A large part of those chattels was exempted from immediate payment of legacy duty and also estate duty, under the statutory provisions to which I have referred. Lady Sackville in fact sold all those chattels, or the greater part of them, before she was put into possession of them by the executors, and estate duty and legacy duty thereupon became payable. One question which arose, the only question which is material for the decision of this case, was whether or not the gift of the chattels free of legacy duty exempted Lady Sackville from the liability, which she would otherwise be under, to pay the legacy duty which became payable, not on the death of the testator, but on her sale of the chattels. The Court of Appeal distinguished *In re Leconfield.* [3] They held that a bequest of chattels free of duty is apt to cover duty payable in respect of the death, though not payable immediately on the death, viz., duty which is contingently payable on a sale of the chattels in question by the legatee and is different from a direction to pay duties payable on or as a

[2] [1916] 2 Ch. 268; 31 T.L.R. 227, C.A.

[3] 90 L.T. 399.

1960

Bedford, decd., *In re.*

Cross J.

result of the death, which was the phrase which the Court of Appeal had to construe in *In re Leconfield*.[4] In *In re Scott*[5] it was put to the Court of Appeal by Sir Robert Finlay, on behalf of the residuary legatees,[6] that so to decide might in other circumstances cause very great administrative inconvenience, because no one could say at the date of the testator's death, when his residue was ascertained, whether or not the duty in question would eventually become payable. In that case there was no inconvenience, because Lady Sackville sold the chattels very shortly after the death, but she might have retained them for many years and, if that had been done, it would have been necessary for the executors to hold up a sufficient part of the residue to meet the legacy duty contingently payable. It is, however, to be observed that they would, as the law then stood, have known the maximum sum which they had to retain, because the duty was payable by reference to the value of the chattels at the death and by reference to the rate which was then ascertained. Despite that argument of inconvenience which was put to them, the court arrived at the decision that a general bequest free of duty covered the legacy duty contingently payable.

The law now applicable to exempted chattels is to be found in section 40 of the Finance Act, 1930, which repealed the earlier legislation and, in re-enacting it, amended it in this respect, that the duty is now not payable on the value of the chattels at the death of the testator, but on the proceeds of their sale when they come to be sold, a figure which at the date of the testator's death is quite uncertain. Section 40 provides: "(1) Where there pass on the death of a person dying "after the commencement of this Act any objects to which this "section applies,"—that is, objects of national, scientific, historic or artistic interest—"the value of those objects shall not be "taken into account for the purpose of estimating the principal "value of the estate passing on the death or the rate at which "estate duty is chargeable thereon, and those objects shall, while "enjoyed in kind, be exempt from death duties. (2) In the "event of the sale of any objects to which this section applies, "death duties shall, subject as hereinafter provided, become "chargeable on the proceeds of sale in respect of the last death "on which the objects passed . . . and the person by whom or "for whose benefit the objects were sold shall be account-"able. . . ."

In that state of the law, *In re Oppenheimer*[7] came before Roxburgh J. in 1948. There, the testator had made bequests from his collection of various objects which were exempt from duty as being of national or historic interest, and by clause 5 he directed that "all pecuniary and specific bequests given by this "my will or any codicil hereto shall be free from all duties in "respect of my death." The question arose whether that

[4] 90 L.T. 399.
[5] [1916] 2 Ch. 268.
[6] Ibid. 268, 280.
[7] [1948] Ch. 721.

general direction for payment of "all duties in respect of my "death" covered the duty which would be contingently payable in the event of any legatee of the chattels in question selling them. It was argued that as a result of the change made in the law by the 1930 Act the case could be distinguished from *In re Scott*,[8] but Roxburgh J. held [9] that it made no difference that the duty was now charged on the proceeds of sale and not on the chattels themselves. It is to be observed that the words used in the will, "all duties in respect of my death," were the very words used in section 40 (2) of the Finance Act, 1930. I do not know what decision Roxburgh J. would have come to had the direction been for payment of "all duties payable on or as a "result of my death," which were the words in *In re Leconfield*.[10] It may be that there is a distinction to be drawn between the two phrases.

Since the decision in *In re Oppenheimer* [11] the law has been once more amended, by section 48 of the Finance Act, 1950, which provides, as a condition of the exemption of chattels of historic or artistic interest, that the beneficiary shall give an undertaking to the Treasury that the objects will be kept permanently in the United Kingdom, that reasonable steps will be taken for the preservation of the objects, and that reasonable facilities for examining them will be afforded to persons authorised by the Treasury. The section goes on to provide that, in the event of a breach of that undertaking, duty will become payable in the same way as it would become payable if the objects were sold by the legatee.

A question has been raised in the summons as to whether, assuming that this future duty will be payable out of residue, it will be payable not only if the legatees sell the chattels but also if they break the undertaking which they will have to give. But it is not necessary for me to determine that question, because counsel for the specific legatees does not seek to argue that if duty should become payable by reason of a breach of undertaking by his clients they could claim to throw the duty then payable on residue. He confines his claim to the duty which will become payable in the event of their selling the chattels during their lifetime. Of course, if they retain the chattels during the whole of their lives and they pass on their deaths, then there will be no question of any duty being payable in respect of the death of the testator.

That being the state of the law and the authorities, I come back to the will. I think that counsel for the residuary legatees really conceded that if clause 2 of the will stood alone, and was the only relevant provision in the will, the case would be indistinguishable from *In re Scott* [12] and the freedom from duty would include the duty contingently payable in the event of a

[8] [1916] 2 Ch. 268.
[9] [1948] Ch. 721, 726.
[10] 90 L.T. 399.
[11] [1948] Ch. 721.
[12] [1916] 2 Ch. 268.

1960

Bedford, decd., *In re.*

Cross J.

sale of chattels by the legatee. As he pointed out, that construction leads to an even greater inconvenience now than it could have led to in 1916, because the duty is now payable on the proceeds of sale, the amount of which is totally uncertain and may be vastly greater than the probate value of the chattels. Nevertheless, I think he concedes that if one simply had the words "free "of duty," the result would be that the contingent duty would be payable out of residue. But he says, rightly, that the will must be construed as a whole, and argues that reading clause 2 and clause 14 together, the words "free of duty" in clause 2 really mean "free of duty payable on the death of the testator," as opposed to duty payable at some other date. He says that, had clause 2 contained the words "free of duty payable on my death," those words, having regard to the decision in *In re Leconfield*,[13] would not have covered duty which was payable on another date, namely, on a sale, and he submits that, reading clause 2 and clause 14 together, that is the proper construction to put on the words "free of duty" in clause 2.

In aid of that submission, counsel for the residuary legatees, says that if I am in any doubt on the matter, if I feel that the arguments are evenly balanced, I ought to incline to the construction which would confine the words "free of duty" in clause 2 to duties payable on the death, because of the great administrative inconvenience of the other construction which will result in a great part, if not the whole, of the residue having to be retained for an indefinite time to meet this contingent claim. As an analogy in support of his argument, he referred me to *In re Wedgwood*,[14] which is the leading case on the question whether, where a settled legacy is given free of all duties, future estate duty payable on the death of a tenant for life is payable out of residue or falls on the legacy. He says that in that case one of the arguments which weighed with the court in confining the words "free of all death duties" to duties payable in consequence of the death of the testator, as opposed to future estate duty payable on the death of a life tenant of a settled legacy, was the great inconvenience which would be caused by the other construction. Counsel for the specific legatees, on the other hand, points out that in *In re Wedgwood*,[15] although the court held that future estate duty payable on the death of some other person was not prima facie included in a gift free of all death duties, they did hold that legacy duty which might become payable on the death of a life tenant of a settled legacy, where the rates of duty payable by the life tenant were different from those payable by the reversioner and, therefore, the legacy duty could not be paid as a whole at the date of the testator's death, was payable out of residue under a gift free of all death duties, notwithstanding that it was not payable until the death of the life tenant. He contended that it would be wrong to attribute such force to clause 14 as counsel for

[13] 90 L.T. 399.
[14] [1921] 1 Ch. 601, C.A.
[15] Ibid.

the residuary legatees said should be attributed to it since it is merely an administrative direction to the trustees to make certain payments out of the net proceeds of sale of the testator's residuary estate and does not on the face of it profess to be making any disposition in favour of anybody.

In my judgment, the argument presented by counsel for the specific legatees on that point is right. I think it would be wrong to read a clause such as clause 14 as cutting down what I think is the prima facie meaning of the phrase "free of duty" in clause 2. It may be that the testator had not in mind the fact that some duty payable in respect of his death would not be payable on his death but would only be payable contingently at some future date. If he had been aware of that, he might have made a different disposition. But, reading the two clauses together, I do not think that I can give effect to the submission of counsel for the residuary legatees. I therefore declare that the duty contingently payable on a sale by a legatee—I say nothing about a breach of undertaking—will be payable out of residue.

Declaration accordingly.
Question 2 of the summons stood over with liberty to apply in the event of no agreement being reached. Costs of plaintiff on the trustee scale and defendants on the common fund basis to be paid out of the estate in due course of administration.

Solicitors: *Taylor & Humbert; Bell, Brodrick & Gray.*

V. A. M.

[COURT OF APPEAL.]

C. A.
1960
Oct. 21, 24, 25, 26, 27.
Lord Evershed M.R., Harman and Donovan L.JJ.

* ALMOND (VALUATION OFFICER) *v.* HEATHFIELD LAUNDRY (BIRMINGHAM) LTD.

[LVC/1805/1958.]

CUSHING (TRADING AS FAKENHAM STEAM LAUNDRY) *v.* WEBBER (VALUATION OFFICER).

[LVC/1772/1957.]

Rating—Industrial hereditament—Laundry—Whether retail shop or "premises of a similar character where retail trade or business . . . "carried on" — Shop — Rating and Valuation (Apportionment) Act, 1928 (18 *&* 19 *Geo.* 5, *c.* 44), *s.* 3 (1), (4).

In the first appeal the valuation officer had appealed against a decision of a local valuation court that a hereditament at which a

C. A.

1960

Almond v. Heathfield Laundry (Birmingham) Ltd.

laundry business was carried on was an industrial hereditament and should be transferred to Part II of the valuation list. The second appeal had been against a decision by another valuation court that a laundry business should be included in Part I of the list, not being an industrial hereditament. The issue in both cases was whether the hereditament was excluded from being derated as an industrial hereditament because it was "primarily occupied and used for . . . "the purposes of a retail shop," defined to include "premises of a "similar character where retail trade or business . . . is carried "on," within the proviso to section 3 (1) of the Rating and Valuation (Apportionment) Act, 1928, as expanded by section 3 (4).[1]

In both cases the greater part of the laundry was collected and delivered by the laundry employees, but individuals could, if they wished, take their laundry to the hereditament and collect it, and a few customers did so. The Lands Tribunal held that each of the hereditaments was not an industrial hereditament:—

Held, (1) that on the facts, and applying the everyday meaning to the words used in the definition, no part of either of the hereditaments was used or occupied for the purposes of a retail shop. Although customers could and did resort to each hereditament, that was not conclusive in favour of the hereditament being a shop, and on the facts, the public were not invited to resort to the hereditament (post, pp. 1351, 1352).

Dolton Bournes and Dolton Ltd. v. *Osmond* [1955] 1 W.L.R. 621; [1955] 2 All E.R. 258, C.A. applied.

(2) That even if any part of either hereditament had been used or occupied for the purposes of a retail shop, the premises were not primarily so occupied and used. The hereditaments were used for the single unified business of a laundry, which was, admittedly, retail trade or business, but it was not in ordinary language conducted as a retail shop—nor was the laundry work ancillary to the part of the premises to which the public were allowed to come.

Toogood & Sons Ltd. v. *Green* [1932] A.C. 663; 48 T.L.R. 463, H.L. applied.

Ritz Cleaners Ltd. v. *West Middlesex Assessment Committee* [1937] 2 K.B. 642; 53 T.L.R. 588; [1937] 2 All E.R. 368, C.A. and *Finn* v. *Kerslake* [1931] A.C. 446, 485; 47 T.L.R. 308, H.L. distinguished.

Decision of Lands Tribunal in both appeals reversed.

Appeals from the Lands Tribunal (Mr. Erskine Simes Q.C. in the first appeal and Sir William Fitzgerald Q.C. in the second) on cases stated.

In the first appeal Kenneth Roger Almond (hereinafter called "the valuation officer") appealed from a decision of a local valuation court for Birmingham given on August 13, 1958, transferring to Part II of the valuation list for the City of Birmingham rating area a hereditament described as "laundry and premises, 15A,

[1] Rating and Valuation (Apportionment) Act, 1928, s. 3: "(1) In "this Act the expression 'industrial "'hereditament' means a heredita- "ment . . . occupied and used . . . "as a factory or workshop: Provided "that the expression 'industrial here- "'ditament' does not include a "hereditament occupied and used "as a factory or workshop if it is "primarily occupied and used for the "following purposes or for any com- "bination of such purposes, that is to "say . . . (b) the purposes of a retail "shop. . . . (4) . . . 'Retail shop' "includes any premises of a similar "character where retail trade or "business (including repair work) is "carried on."

"Finch Road, Handsworth," occupied by the Heathfield Laundry (Birmingham) Ltd. (hereinafter called "the laundry") with net annual value and industrial net annual value £215, industrial and total rateable value £54.

The ground of appeal was that the hereditament was not an "industrial hereditament" within the meaning of section 3 of the Rating and Valuation (Apportionment) Act, 1928, and should be transferred to Part I of the list and assessed therein at £262 gross value and £215 rateable value. The decision of the Lands Tribunal (Mr. Erskine Simes Q.C.) was given as follows on September 21, 1959: The hereditament was situated in a residential road and access was obtained by a private drive about 66 feet in length between two private houses on the wall of one of which were the words "Heathfield Laundry." At the end of that drive and in rear of the house were two offices which were entered from a lobby with a door opening onto the drive, on which was a plate with the words "registered office." One of these offices numbered 3 on the plan [produced at the hearing] had a sliding glass panel, which could be operated only from the office, forming a hatchway onto the lobby. The drive led into a yard, around three sides of which were what might be called the laundry buildings, including rooms for receiving, sorting, packing and checking and dispatch. . . . The hereditament was occupied and used as a laundry carried on by way of trade and for the purpose of gain, and was, accordingly, a "factory" within the meaning of section 149 (1) of, and the Sixth Schedule to, the Factory and Workshop Act Act, 1901, as amended by section 1 of the Factory and Workshop Act, 1907, and is registered as such. The laundry had also a receiving office at 249, Rookery Road, Handsworth, and employed two vans which collected and delivered not only to the receiving office but also to customers direct. The van-drivers delivered the articles collected by them to the receiving room in the laundry and collected the clean laundry for delivery from the dispatch room therein. Except in a few cases where customers had monthly accounts, they collected the money for the clean laundry when they delivered it to customers direct and handed the money so collected with their receipt books to the office numbered 3 through the hatchway. All moneys for laundry left at and collected from the receiving office at Handsworth were dealt with in that office and sent to the other office on the hereditament numbered 1 on the plan. There was a basket placed in the yard adjoining the rear door to the office numbered 3 and customers could and did bring dirty laundry and deposited it in this basket without seeing anyone. After washing, such laundry was collected by the customer at the hatchway in the office numbered 3 and paid there the money due. It was agreed between the parties that the percentages of total turnover attributable to the different ways of dealing with the goods dealt with at the hereditament were as follows: collected and delivered by van-men, 65 per cent.; received from customers calling at the receiving office at

C. A.
1960
ALMOND
v.
HEATHFIELD
LAUNDRY
(BIRMINGHAM) LTD.

Handsworth, 17 per cent.; received from customers calling at the hereditament, 18 per cent.

There was no display of goods at the hereditament and no notice was displayed there indicating that laundry could be left. A director of the laundry expressed the view that he would rather have the dirty laundry dealt with by the van-men than left and collected by the customers, though he admitted that he would not get their work at all if they could not deliver and collect personally. The total staff employed at the laundry numbered 23, of whom one only was employed in the office numbered 3. She acted as book-keeper for the whole business, but was also required to hand out clean laundry and collect money there from customers who called. She had nothing to do with the dirty laundry left by them, which was collected by the laundry staff from the basket where it was left and went straight to the receiving office in the laundry. After washing, the laundry was packed and checked in the laundry and taken to the office numbered 3 to await collection by the customer. . . . After referring to the submissions of counsel, Mr. Simes Q.C. said that there was no doubt that, as in *Dolton Bournes & Dolton Ltd.* v. *Osborne*,[2] applying the ordinary use of words and looking merely at the physical characteristics and appearance of the premises and their size, no one would say that the hereditament was a shop or of the character of a shop. He then said[3] that it was "a place where the public resort for the purpose of having their "particular wants supplied"; but as Lord Evershed M.R. had pointed out, referring to *Toogood's* case,[4] "the vital point" was not "whether they do resort in fact but whether they really are "invited to come." In the present case there was no display to entice or attract prospective customers; there was no displayed invitation to them to use the premises, and the only indication of its use were the words "Highfield Laundry" at the entrance. But the same state of affairs existed, for example, in some tailors' establishments which were clearly retail shops and it was obvious from the figures that resort by the public was not negligible, and there was no question in the present case, as there was in *Dolton Bournes'* case,[5] that it was the general public, the man in the street, who constituted the public who did so resort. There was, moreover, what Lord Thankerton in *Toogood's* case[6] described as "the true element," namely, provision of accommodation in the premises for the public who might so resort, in the shape of the basket and the lobby with hatch to the office numbered 3. That office might be compared with the space behind the counter in the normal shop to which the public were not admitted but which provided storage space for the goods which the customers were seeking.

The tribunal held that it was bound by *Toogood's* case[6]

[2] [1955] 1 W.L.R. 621.
[3] Ibid. 628.
[4] [1932] A.C. 663, 672.
[5] [1955] 1 W.L.R. 621.
[6] [1932] A.C. 663, 674.

and the *Ritz Cleaners* case [7] to find that there was a retail shop on the hereditament within the definition of that expression in section 3 (4) of the Act of 1928.

It was obvious that, looking at the area which could be said to fall within that definition, the proportion of the staff employed there and the proportion of the work brought to and collected by the public who resorted that, looking at the hereditament as a whole, its primary use was not that of a retail shop unless it could be said that this was a unified business as in *Finn* v. *Kerslake*,[8] interpreted by the Court of Appeal in *Ritz Cleaners Ltd.* v. *West Middlesex Assessment Committee*.[9]

In the present case the laundry, the factory, was ancillary to the "retail shop" and, applying the tests referred to by Greer L.J.,[10] it was impossible to distinguish the present case from *Finn's* case.[11] In that case and in the *Ritz Cleaners* case [12] there was something which looked like a shop, but having come to the decision that part of the present hereditament was a "shop" within the definition in section 3 (4), the tribunal was forced to the conclusion that there was a "unified business" and that *Finn's* case,[13] therefore, applied.

The appeal was, therefore, allowed and a direction given that the valuation list for the City of Birmingham rating area should be amended by transferring the hereditament to Part I of the list with gross value £262, net annual value £215 and rateable value £172, values which had been agreed between the parties as appropriate if the appeal was allowed. If the tribunal had taken the view that the appeal should be dismissed, it was agreed that the decision of the local valuation court should stand. The laundry company appealed.

In the second appeal, G. T. Cushing, trading as Fakenham Steam Laundry (hereinafter called "the appellant"), appealed from a decision of a local valuation court for West Norfolk given on September 26, 1957, reducing the assessment of a hereditament described as "laundry, garage and premises 54–56, Holt "Road, Fakenham" to £184 gross value, £150 rateable value. The ground of appeal was that the hereditament was an industrial hereditament as defined by section 3 of the Rating and Valuation (Apportionment) Act, 1928, and should be transferred to Part II of the valuation list.

At the hearing before the Lands Tribunal the following facts were proved or admitted and set out in the case stated: (a) The proposal from which these proceedings arose was made on September 19, 1956. . . . (c) The hereditament was situated on the outskirts of the town of Fakenham on the Holt Road; the property on the other side of the road was residential and on the laundry side it was partly industrial and partly residential, quite

[7] [1937] 2 K.B. 642.
[8] [1931] A.C. 446, 485.
[9] [1937] 2 K.B. 642.
[10] Ibid. 664.
[11] [1931] A.C. 446, 485.
[12] [1937] 2 K.B. 642.
[13] [1931] A.C. 446, 485.

C. A.
1960
Almond
v.
Heathfield
Laundry
(Birmingham) Ltd.

removed from the shopping centre. The hereditament had frontages of about 190 feet to Holt Road and 428 feet to Westmead Road. There was a sign board at the entrance to the hereditament inscribed with the laundry's name but no other advertisements or invitations to enter the premises were displayed. It was the only laundry in Fakenham or within about 15 miles of the town. (d) . . . The U.S.A.A.F. Base at Sculthorpe was about 4 miles from Fakenham, and in 1952 the laundry was granted a concession by the U.S. Air Force authorities to operate at the base, and a building there was put at his disposal. The American personnel delivered their laundry and dry cleaning work to the laundry's staff in that building. The laundry provided at the base a valet service and a quick washing service for shirts and maintained there the necessary staff and machinery for those services; this, however, represented a small proportion of the work from the base, and the bulk of such work was brought by the laundry's vans to the hereditament for washing or cleaning. After washing or cleaning, the articles were taken back in the laundry's vans to the base and redelivered there to the customers. Payments were made by the American personnel to the laundry's staff in token currency at the base, and banked there daily by the laundry's staff with the U.S.A.A.F. authorities. At the end of each month, the U.S.A.A.F. authorities paid to the laundry in sterling the accumulated takings, less 10 per cent. of the gross receipts retained in consideration of the concession. (e) Payments for laundry or dry cleaning work collected and delivered by the vans from and to private customers were made by the customers to the van-men, who handed in the money at the hereditament, normally at the office. (f) Dirty laundry brought to the hereditament by the vans (whether from the U.S.A.A.F. base or from private customers) was at the material time delivered into the hall-way. . . . Articles brought in by the vans for dry cleaning were delivered to [a different] building, in which all the dry cleaning work on the hereditament was done. (g) No receiving office was provided on the hereditament for customers who brought their laundry or dry cleaning work to the hereditament, and such customers did not go to the office [where the van-men handed in the money]. A number of such customers were regular callers. Customers who brought laundry to the hereditament took it to the dispatch bay and threw their bundles of dirty washing on the floor in one corner, often seeing no member of the staff; . . . No member of the staff supervised the intake of this laundry and no receipt or acknowledgment was given to these customers. The bundles of dirty washing were collected from the dispatch bay at irregular intervals by some member of the staff and taken to the sorting room, where they were added to the dirty washing brought in by the vans. Customers calling to collect clean laundry had to attract the attention of some member of the staff in the adjoining room . . . and ask her to find their bundle for them, and then pay her for the work done.

It was not the duty or function of any particular member of the staff to collect this dirty washing from [the dispatch bay] or to hand out the clean washing or to receive payment for it. There were not at any material time any notices or other directions indicating where customers should leave or collect laundry. (h) Customers bringing dry-cleaning work to the hereditament took it to and collected it from the building [where all dry cleaning was done, referred to under (f)]. This building had only one door, near which was a wooden table on which goods were folded and packed for dispatch by van, and on which calling customers could also deposit their goods. A receipt was given to customers calling personally. Customers calling to collect dry-cleaning work paid the member of the staff in that building from whom they collected it. (i) The laundry did not welcome the calling of customers at the hereditament, because of difficulties arising from lack of lists and names and from insecure bundling, and would have preferred to collect and deliver by van, but felt bound to accept this work, especially as this was the only laundry in or near Fakenham and some of these customers were unable to be at home when the vans called. Some of the customers also had special reasons for calling at the hereditament—for example, that they had been out when the van called, that they wished to have their laundry back sooner than the normal date of delivery by the van or that they wished to make some complaint. (j) The pricing of customers' laundry lists, keeping of ledgers and wages books, and all accounting for the whole of the business was done in the office. (k) The staff employed by the laundry at the hereditament and at the U.S.A.A.F. base in September, 1956, consisted of an adviser and supervisor and of six men and 46 women, of whom one man and 11 women were at the U.S.A. Air Force base and the rest were at the hereditament; of the latter, three were employed in the office, two men and one woman on the vans and the rest were process workers. . . .

On November 9, 1959, the tribunal (Sir William Fitzgerald, Q.C.) gave its decision as follows. The business of this laundry fell into three departments. Two of them were more or less usual to all laundries, that was van collection; and customers calling to leave their laundry at the premises and afterwards to collect it. There was a third department which arose out of a contract with the United States Air Force by which the Fakenham Laundry operated for the United States Air Force partly at the Air Force base and partly in the hereditament. The percentage of turnover of each department was: United States Air Force contract, 46·8 per cent.; van collection, 45·4 per cent.; dry cleaning and customers' collection, 7·8 per cent. It was agreed that the laundry was a "factory" within the meaning of section 149 (1) of the Factory and Workshop Act, 1901, as amended by the Factory and Workshop Act, 1907, and it was registered as such.

Two questions arose. First, was there a retail shop and was it primarily used as a retail shop? The laundry in this case

C. A.
1960
Almond v. Heathfield Laundry (Birmingham) Ltd.

were immediately confronted with a decision of this tribunal given on September 21, 1959, *K. R. Almond (V. O.)* v. *Heathfield Laundry (Birmingham) Ltd.* It could not be denied that the laundries were similar but the appellants contend that they can be distinguished in law. . . . The hereditament there was a laundry similar to this one. It also carried on business under different headings—collection and delivery by van and receiving their customers' laundry at the hereditament. . . . All the cases quoted in this case were considered by Mr. Erskine Simes in the case of the Heathfield Laundry, and following those decisions he felt himself bound to come to the conclusion that there was a retail shop on the hereditament and its primary use was that of a retail shop. . . .

After referring to the first appeal and to the differences between the two cases, the tribunal concluded the differences were insufficient to distinguish the two cases, and that, accordingly, the appeal should be dismissed.

Patrick Browne Q.C. for the laundries.

J. Ramsay Willis Q.C. and *J. Raymond Phillips* for the valuation officers.

In addition to the cases mentioned in the judgments, the following were cited in argument: *Pritchard* v. *William Lewis & Sons* [14]; *Barton* v. *Twining & Co. Ltd.*[15]

Lord Evershed M.R. These two cases have raised questions of difficulty which I hope I may not unfairly describe as in some respects artificial. But although the difficulties are there we have reached a clear conclusion and have, therefore, thought that we could with advantage deliver our judgments at once.

Both cases relate to laundry businesses, the one at Handsworth, Birmingham; the other at Fakenham, Norfolk. [His Lordship read section 3 (1) and (4) of the Rating and Valuation (Apportionment) Act, 1928, and continued:] Applying the expansion of subsection (4) to the original language of subsection (1), a hereditament which is used and occupied as a factory will cease to be an "industrial hereditament" for the purposes of the Act if it is primarily used for the purposes of a retail shop, including premises of a similar character, where retail trade or business, including repair work, is carried on. It is perhaps as well to observe at once that the rather elaborate formula which I have last read is not the same thing as though the subsection had said "if it is primarily occupied for the purposes of retail "trade or business," a point which is emphasised, as will later appear, by Lord Thankerton in *Toogood & Sons Ltd.* v. *Green.*[1] If that had been the intention nothing would have been easier than to say so.

[14] [1931] 1 K.B. 456, C.A.
[15] Ibid. 475, C.A.
[1] [1932] A.C. 663; 48 T.L.R. 463, H.L.

In order to discover what is meant by a "factory or workshop" one turns to the Factory and Workshop Act, 1901. The Sixth Schedule to that Act contains language which beyond any doubt covers premises used for a business such as this, namely, laundry work. It is, therefore, conceded that the hereditament here in question is one occupied and used as a factory or workshop. But that, of course, is not conclusive: it still remains to decide whether, being so occupied, it nonetheless is primarily occupied and used for the purposes of a retail shop, etc. I have now stated the problem which these cases present.

It seems that not long after the passing of the Act of 1928 there was a great number of cases to which it gave rise and a group of them came in the year 1931 before the House of Lords. Quite properly we have been referred to many of these cases and to passages from the speeches delivered in them, particularly speeches of Lord Dunedin. I take some comfort as a premise to what follows from two observations which Lord Dunedin made in those cases. The first is an observation made in *Sedgwick* v. *Watney, Combe, Reid & Co.*[2] and other cases: "Certain "decisions will, it is hoped, prove of very general application "and so be of service to the local rating authority. But, after "all, the question is an individual one as to each particular "hereditament." I add another citation, an expression of an oft-cited principle[3]: "My Lords, the matter seems to me simply "a question of attributing an everyday meaning to the words "used in the definition"; and the noble Lord is referring to the definition here in question. Those citations do not carry the matter very much further but they do at least justify an approach which I suggest is the right approach, namely, first to consider these cases upon their own facts and in deciding them to apply, so far as one is not prevented by some previous decision, everyday meanings to everyday words.

In the present case, Mr. Patrick Browne, for the appellant laundries, has conceded in this court (though I think I am right in saying he may wish to reserve the opportunity to take another view hereafter) that the conduct of this laundry business is a retail trade or business. That, however, is not the end of the matter, for I have already indicated that the definition introduces two characteristics or qualifications: first, the hereditament must be or contain a retail shop, so called and understood, or premises of a similar character thereto, and, secondly, the hereditament must be primarily occupied and used for the purposes of a retail shop. In these cases it is, I think, plain that there has at times been a conflict between what has been said to be a question of fact and what has been said to be a matter of law. An instance where that conflict was referred to is the tailors' case, if I may

[2] [1931] A.C. 446, 465; 47 T.L.R. 308, H.L.

[3] [1931] A.C. 446, 473 (*Turpin* v. *Middlesbrough Assessment Committee*).

C. A.
1960
Almond v. Heathfield Laundry (Birmingham) Ltd.
Lord Evershed M.R.

so describe it, *Wilkinson* v. *Sibley*.[4] That case quarter sessions had decided as one purely of fact by saying that the hereditament consisted in part of a workshop and in part a shop properly so called: that as a fact the former was preponderant in scope and dimensions and, therefore, that one could not say the premises were used primarily for the purposes of a retail shop. It was the view of this court, as expressed by Scrutton L.J., that the decisions in the cases to which I have already made a very brief allusion had made it necessary for the court in the circumstances of that case to hold, not as a matter of fact but as a matter of law, that there was one business carried on upon the hereditament and that it was what I will call a shop business, the workshop being ancillary to the shop premises more strictly so described. It is, of course, quite true that when the facts have been found it is a question of law to say whether they fall or do not fall within the scope of the definition which I have read. But it still remains a question of fact to decide what in truth is the nature or the character, as a matter of fact, of the business which is being carried on. It may be that had *Toogood's* case[5] been decided by the House of Lords before and not after Scrutton L.J. delivered the judgment I have mentioned, he might somewhat have qualified his language.

[His Lordship stated the facts and continued:] There was a certain part of the business done by customers calling personally at the laundry premises, leaving their belongings to be washed and later collecting them. It is not in doubt that it is the arrangements in relation to this last part of the business that constitute, if at all, a "retail shop" within the meaning of the definition. What has been the burden of the argument for the respondent valuation officer is that if the arrangements I have mentioned and the physical characteristics of the premises connected therewith qualify as a retail shop, then since this is one single uniform business we cannot dissect it, as is said in some of the cases, and we must conclude that the whole laundry is really part of the shop business; it is, in other words, one shop business. [His Lordship stated further facts, and continued:] It is at least true beyond a peradventure that in both the *Birmingham* and *Fakenham* cases the part of the business done for customers who personally call in order to leave and later collect their laundry is a small though not a purely minimal part of the whole. It is, I think, also clear that arrangements of that kind are done as a matter of practical business necessity. Not everyone can leave their house with staff in it to deal with the laundry van when it comes but, equally plainly (and as expressly found in the *Fakenham* case), I would say that though a business necessity, it is not something which the laundry welcome or encourage or make any sort of attempt to expand.

The question is twofold. The first problem is: can it be said

[4] [1932] 1 K.B. 194, C.A. [5] [1932] A.C. 663.

that any part of the premises of these two laundries is being used and occupied for the purposes of a retail shop as those words have been expanded? It was pointed out by this court in *Dolton Bournes & Dolton Ltd.* v. *Osmond* [6] that, although it was not necessary that the premises should look like a shop as that phrase is used when applied to premises in an ordinary shopping street, still there must be the characteristic that the public do resort to it and are invited so to do. I will not take time by reading from the judgment of the court that I delivered in that case. *Dolton Bournes'* case [6] was perhaps an extreme one because it was made plain that the occupier discouraged the public from coming to the premises though the necessities of business prevented him from making it impossible that they should. The premises here, if you apply Lord Dunedin's phrase "the everyday meaning" of ordinary words, would not be thought by anybody to be in the least like a shop. Indeed, so far as the tribunal is concerned, it concluded the matter in the way I have indicated in very plain terms. I take the *Birminham* case, where Mr. Erskine Simes said: "There is no doubt that in this case, as in *Dolton Bournes* "*Ltd.* v. *Osmond*,[7] applying the ordinary use of words and looking "merely at the physical characteristics and appearance of the "premises and their size, no one would say that the hereditament "was a shop or of the character of a shop." But he then went on to say that he felt bound by authority, and particularly by *Ritz Cleaners Ltd.* v. *West Middlesex Assessment Committee*,[8] to which I must later make greater reference, to conclude not only that it was a shop but that this was a case in which the premises were occupied and used primarily for the purposes of a retail shop. There is no doubt that the addition in the definition of the words "including repair work" has necessarily expanded the meaning of the word "shop" so as to cover premises which are not at all like the ordinary shop in a shopping street where you go in to buy cigarettes or books or whatever it may be.

The group of cases which came before the House of Lords in the year 1931 included one case called *Turpin* v. *Middlesbrough Assessment Committee*,[9] which related to a hereditament used for the repair of motor-cars, and the language used by Lord Dunedin in that case showed that the words "retail shop" must include premises where such repair work was done and where the public was invited to come, and did come, with their motor-cars for repair. Lord Dunedin said [10]: "I do not pause to inquire "whether a person who does such repair work could not properly "be said to be carrying on a retail trade or business. It may be "that in strictness the words 'retail trade or business' are only "applied with complete accuracy to cases of selling goods."

[6] [1955] 1 W.L.R. 621; [1955] 2 All E.R. 258, C.A.
[7] [1955] 1 W.L.R. 621.
[8] [1937] 2 K.B. 642; 53 T.L.R. 588; [1937] 2 All E.R. 368, C.A.
[9] [1931] A.C. 446, 470; 47 T.L.R. 308, H.L.
[10] [1931] A.C. 446, 473.

C. A.

1960

ALMOND v. HEATHFIELD LAUNDRY (BIRMINGHAM) LTD.

Lord Evershed M.R.

Then he says that in the case before the House all doubt is removed by the express inclusion of the repair work, and he went on thus [11]: "Nor do I agree with the view that has prevailed as "to the effect of the words 'of a similar character.' For myself, "I am unable to state what are the physical features the exist-"ence of which is essential to or distinctive of a retail shop. "I am familiar with many physical features which are frequently "and even commonly found in retail shops, such as counters and "shop windows; but I am equally familiar with retail shops "where no such features exist. In my opinion it is not possible "to say that the words 'of a similar character,' even if they "include, are limited to physical features of the premises. They "must, as I read them, include also similarity of character in "other respects. The character of the premises must be similar "to the character of a retail shop. Now if we compare the "hereditament here in question with a retail shop, do we find "any common characteristics? My Lords, I think we do; for "they are both buildings to which the public can resort for the "purpose of having particular wants supplied and services "rendered therein."

I have read that passage because it has been much relied upon by the valuation officer to support a proposition put sometimes as broadly as this: that if on the premises in question there is a place to which the public can resort for the purpose of having particular services rendered, there is a retail shop. I venture to recall what Lord Dunedin had said only nine pages earlier,[12] that one must treat these decisions as relating to the particular facts of the particular cases. It is no doubt established in *Turpin's* case [13] (and is later followed in another case recently before this court, *Meriden Rural District Council* v. *Standard Motor Co. Ltd.*[14]), and it is now clear that premises where the public are invited to go and do go with their motor-cars for repair will be treated as a retail shop. But I am unwilling and quite unable as a matter of the sense of the statutory language to say that it follows that if once one finds on a hereditament a place, room, open space or what one will to which the public can resort for services rendered, it therefore follows of necessity that there is a shop.

Having referred to what Lord Dunedin said in *Turpin's* case,[15] it will be convenient, though I do not wish to elaborate this judgment by too much citation, to refer to another case decided at the same time, *Finn* v. *Kerslake*,[16] which is of more direct importance undoubtedly to the present case. The precise facts in *Finn* v. *Kerslake* [16] remain to my mind still a little obscure and it seems to me that judges in later cases have not always taken entirely the same view as to what were in truth the facts.

[11] [1931] A.C. 446, 473.
[12] Ibid. 465.
[13] Ibid. 470.
[14] [1957] 1 W.L.R. 958; [1957] 3 All E.R. 222, C.A.
[15] [1931] A.C. 446, 470.
[16] Ibid. 485.

But broadly this much is clear. The hereditament was that of a baker. He had on the hereditament and as part of it a baker's shop well set up—a baker's shop in the ordinary everyday acceptance of that word. He also had behind it a bakery where he baked his bread and cakes, and it appears from what is stated in the lower courts that there was no direct access between the bakery and the shop. The question which we are now debating arose in that case: was this hereditament primarily used for the purposes of a retail shop? The House of Lords, reversing the view taken in this court, said that it was, and again (because this is so much relied upon by the Crown) I shall read a short passage from Lord Dunedin's speech [17]: "In the present case "the hereditament is all occupied and used for the one trade "or business—namely, a retail trade or business in bread and "confectionery,"—then Lord Dunedin continues with a phrase which, with the utmost possible respect, somewhat surprises me—"for it cannot be doubted that the sale to hotels, clubs, "restaurants, etc., is typical retail trade, and these sales, as also "the orders given to roundsmen, are just part of the ordinary "business of a retail shop. Similarly the bakehouse at the back "of the shop, which makes the goods for the retail business, is "an ordinary part of a retail baker's shop and, in my opinion, "is merely ancillary to the trade or business carried on in the "shop. I have no doubt, on the facts of this business, that the "whole hereditament is used and occupied for the purposes of a "retail baker's shop, and that there is no need to pray in aid "any extended meaning given to 'retail shop' by the special "definition." In my judgment it cannot be said as a matter of law to follow from that passage, or that we are bound in this case to hold, that the mere fact of the presence on these two laundries of places to which the public can and in some degree do resort leads to the conclusion that all the laundry in each case is a retail shop within the expanded definition. I think, without in any way qualifying what Lord Dunedin said in the passage I have read, that it is a question of fact to decide: Is any part of this laundry at Heathfield used as a retail shop at all and to pose and answer the same question as regards Fakenham.

As regards the latter case, I have no doubt that no part of the Fakenham laundry can, with any justice to the language used, be described as used for the purposes of a retail shop. From the passages I have read it is quite plain not only that the laundry proprietor by no means welcomes customers calling, but it is equally plain that there is nothing whatever which could be called an invitation to the public. You could only acquire the means of having your laundry dealt with by personally calling as a result of experience or of being told by somebody how to do it. In my judgment the same is true of the Heathfield laundry, though I agree in that case that there is perhaps a little more to be said

[17] [1931] A.C. 446, 487.

C. A.
1960
Almond v. Heathfield Laundry (Birmingham) Ltd.
Lord Evershed M.R.

for the view that the basket plus the passage and the window which is opened by a particular lady on being called, has some of the characteristics which would be similar to a retail shop. But again I find a singular absence of anything which could be reasonably or sensibly called an invitation. One would, I should have thought, inevitably have to inquire from somebody else in order to find out how you went about it if you wanted to leave your laundry and later to collect it. I, therefore, take the view that nothing in any of the authorities cited before us compels us to hold that in either case there is here any part of the hereditament used for the purposes of a retail shop. Applying the ordinary sense of ordinary language I do not think any part is so used.

If that is right, it is conclusive of the case. But if I am wrong, there still remains the second problem posed by the definition—are the premises *primarily* occupied and used for the purposes of a retail shop? And, since the matter has been fully argued, I think it right that I should also express my conclusion on the second problem. Let me take now the Birmingham case; and if in truth the right answer is that this little passageway and its adjuncts should properly be treated, being part of the hereditament, as occupied and used for the purposes of a retail shop, still the exclusion from derating benefit applies only if the hereditament as a whole is primarily occupied and used for the purposes of a retail shop. The argument for the Crown has gone the length of saying that when one has, as here, a single uniform or unified business (namely, that of a laundry), and when there is upon part of the premises a shop or its equivalent, then one can no longer dissect the subject-matter one is dealing with; the conclusion is inevitable as a matter of law that the whole hereditament is occupied and used for the purposes of a retail shop, and it is submitted that even though the conclusion appears entirely to make nugatory the use of the adverb "primarily," still the decisions which bind this court compel the conclusion. Particularly it is suggested that the result follows from the *Ritz Cleaners* case,[18] to which I have briefly alluded already, and further reliance is placed on *Finn's* case,[19] which I have also mentioned, and the tailors' case, *Wilkinson* v. *Sibley*.[20] It is perfectly true that in those cases there are statements which at first blush seem to support the argument. I have mentioned that Scrutton L.J. said that once one has got a single business one cannot dissect it and that the workshop must, to use his language, be treated as ancillary to the trade or business. My first qualification on the prima facie effect of those words shall be based on the decision of the House of Lords in *Toogood & Sons Ltd.* v. *Green*,[21] which was later than *Wilkinson* v. *Sibley*.[22] It related to a business, admittedly a retail business, of selling

[18] [1937] 2 K.B. 642.
[19] [1931] A.C. 446, 485.
[20] [1932] 1 K.B. 194.
[21] [1932] A.C. 663.
[22] [1932] 1 K.B. 194.

seeds which had to be prepared in various ways before sale. From the facts of the case it seems that the bulk of the business was done direct with the customer by correspondence, the seeds being dispatched through the post; but that there was an arrangement and a place at which customers could call and buy their seeds from the hereditament, and it was said that one or two such persons called every week. Nevertheless the House had no difficulty in concluding that, looked at sensibly, broadly and according to the facts of the case, it could not properly be said, notwithstanding the presence of this place of public resort, that the business, this single business, was conducted upon premises which was a hereditament primarily used and occupied for the purposes of a retail shop. Reliance had been placed on *Finn's* case [23] and on the conclusion expressed in the passage in Lord Dunedin's speech which I have read. But Lord Thankerton, who delivered the leading opinion in the House and delivered it, let me say, in the presence and with the assent of Lord Dunedin, said [24]: "I may pause here to point out, first, that the test as "laid down in *Moon* v. *London County Council* [25] "—that was another of the 1931 cases—"is as to what is done on the here-"ditament in question, irrespective of what is done outside the "hereditament, and, secondly, that the test is not whether the "hereditament is mainly occupied and used for the purposes of "'a retail business,' but whether it is mainly occupied and used "for the purposes of a 'retail shop.'" Then a little later he takes up the argument presented on *Finn's* case [26]: "I observe "a tendency in certain of the judgments in the courts below to "put a wider construction than is justified on the views expressed "in this House in *Finn's* case [26]; those views—e.g., as to dissec-"tion of a unified business—are expressly confined to the facts "of that case. Admittedly, there was a retail shop on the "hereditament in that case through which the whole production "was disposed of."

I think if that passage is read in conjunction with the passage in *Finn's* case [26] from Lord Dunedin's speech that the conclusion is clear. The House was there dealing with a retail baker's shop, what Lord Dunedin called an ordinary retail baker's shop, and, once that conclusion had been reached, it followed that the place where the bread was actually baked was part of the shop, an ancillary part of it. The House applied the ordinary standard and said: here is an ordinary retail baker's shop and, as pointed out by Lord Dunedin, through that shop the whole production was disposed of, and the fact that much and, if you will, the majority of the bread was sent by van to the customers and not actually disposed of over the counter of the shop no more derogated from the general proposition than would the fact, for example, that you may, as all the world knows, order from Harrods' stores

[23] [1931] A.C. 446, 485.
[24] [1932] A.C. 663, 671.
[25] [1931] A.C. 151.
[26] [1931] A.C. 446, 485.

C. A.
1960
Almond v. Heathfield Laundry (Birmingham) Ltd.
Lord Evershed M.R.

something which will be sent in Harrods' van to your premises but which does not in the least derogate from the fact that the whole of the business of Harrods in Knightsbridge is that of a retail shop. I think that is fundamental to the conclusion in *Finn's* case [26] and the deductions which ought to be drawn from it and it does not mean and cannot involve the result that the mere presence on the hereditament of a place to which the public may resort inevitably converts the whole of the hereditament into a retail shop or its equivalent because the business is a single business.

I turn again to the present case and, for simplicity, to the Birmingham laundry. It is not in doubt that this is one single uniform business, a laundry in the ordinary sense. But it would be, I should have thought, an absurdity and an offence against the language to say when the facts of this laundry are borne in mind that you have got here an ordinary laundry "shop." You have, it is true, a place where the public can, if they are instructed or find out, personally call and leave their laundry. But that does not (it seems to me) make this at all analogous to the ordinary baker's shop, which is what Lord Dunedin said was the subject-matter in *Finn's* case.[27] In the passage already read from Scrutton L.J., there is left for consideration the case where one has got a single business which may have on part of the hereditament and as an adjunct of the business a retail shop in the sense of being a place to which the public can go and buy goods or services if they want; but, as he said, what the result would be if the facts were as I have stated them is a question for further decision when it arises. And unless one is going entirely to disregard and treat as no longer present the word "primarily," one must, it seems to me, in a case such as this still ask the question: is the presence of this place of public resort, this so-called shop, such as to give the shop colour and character to the whole premises or is it a case in which one can fairly ask: looking at the business as a whole, is it primarily one conducted for the purposes of that shop or is it not? And in my judgment on the facts of this case the answer plainly is: it is not primarily conducted as a retail shop and it is quite wrong to suggest that all that goes on on these premises, the laundry work and the rest of it (and particularly in the Fakenham case the United States Army Air Force work) is ancillary in any sort of sense to those parts of the premises where the public can call and can leave and collect their washing.

It only remains for me to refer, as I should do, to *Ritz Cleaners Ltd.* v. *West Middlesex Assessment Committee* [28] because it was so much relied upon. It is stated as part of the facts in that case [29]: "The respondents, Ritz Cleaners Ltd., were cleaners and "dyers, and they had entered into occupation of the hereditament

[26] [1931] A.C. 446, 485.
[27] Ibid.
[28] [1937] 2 K.B. 642.
[29] Ibid. 643.

"situate at No. 48, High Street, Uxbridge, on July 14, 1934, under "a lease for 21 years from March 25, 1934, at a yearly rental of "£215. The hereditament in question was situated in a busy "shopping street in Uxbridge and had the external appearance "of a shop." The Divisional Court concluded that quarter sessions had been justified in finding as a fact that what I will call the shop part of the business conducted through these premises in High Street, Uxbridge, was the less part of the business as a whole and therefore that the hereditament was not primarily used for the purposes of a retail shop. This court came to a different conclusion and there is undoubtedly to be found in the judgments in this court some support for this view, that once you have got a uniform business you cannot dissect it. But to my mind, when you study the case and the judgments, it is fundamental to the decision of this court in the *Ritz Cleaners* case [30] that the subject-matter, the business with which the court was dealing, was a shop business in its totality, and that if one asked what business Ritz Cleaners Ltd. were carrying on at 48, High Street, Uxbridge, one would say a dyers' and cleaners' shop; and that was supported by the view that apparently all the dyeing and cleaning material, the subject-matter of the business, the clothing which had to be dyed and cleaned which had to be collected by vans (and it was a considerable proportion), still went through the shop in the ordinary sense of that word in 48, High Street, Uxbridge. Greer L.J., in the leading judgment, said [31]: "The essential fact which, in my opinion, determines "this appeal in favour of the assessment committee lies in the "statement that the respondents deal direct with members of "the public, and do not work for any other firm. It seems to "me immaterial whether the customers' goods come direct to "the shop in the respondents' vans or whether they are delivered "in depots or agencies on their way to the shop. The determin-"ing fact is that the order comes from a customer, and not from "any merchant or distributing firm, and the delivery is made to "the customer." That passage was relied upon by the tribunal as compelling him, in spite of his own conclusion of fact, to hold that here there was the same result—a place for the public to come, a retail business, a uniform business and, therefore, incapable of dissection. But, as is apparent from what follows, what Greer L.J. was considering was whether this was retail trade or business at all; because he goes on [32]: "I think this is "just as much a retail trade or business as was the business of "the baker's shop in *Finn's* case.[33]" Then later he said [34]: "In *Finn's* case [35] it was decided that the fact that the vans in "many cases took the products of the ancillary factory direct "from that part of the hereditament which was a factory within "the Factories Acts, did not cease to make it merely ancillary

[30] [1937] 2 K.B. 642.
[31] Ibid. 664.
[32] Ibid.
[33] [1931] A.C. 446, 485.
[34] [1937] 2 K.B. 642, 665.
[35] [1931] A.C. 446, 485.

C. A.
1960
Almond v. Heathfield Laundry (Birmingham) Ltd.
Lord Evershed M.R.

"to the work of the baker's shop," and later again[36]: "As they "found that part of the premises constituted a retail shop, they "ought to have gone on to consider whether the factory was "used for any other purposes than supplying the cleaned and "mended goods to the shop for re-delivery to the customers." He concluded that the factory was used for no other purpose than supplying the cleaned and mended goods to the shop. That test, if applied to the present case, could not possibly be accepted. It would be quite untrue to say that the laundry premises as a whole were used for no other purpose than supplying the cleaned laundry to that part of the premises where customers could, if they wished and had been directed, go and collect it.

Similarly, as I think, Slesser L.J. says[37]: "So in the "present case on the facts, seeing that all the goods to be "treated by way of cleaning or repair are brought to and dis-"patched through the shop either by or to customers direct or "by the agency of vanmen, as in *Finn's* case,[38] and receiving "stations, the business of cleaning and repairing is as much "ancillary to the purposes of the shop as was the cleaning and "repairing in the case of the garage in *Turpin's* case.[39]" After citing the language of the section, Greene L.J. said[40]—and I think this is a useful passage: "It is not sufficient that retail "business is carried on upon the premises if the premises are "not a shop or similar to a shop. Now the essential element "in a shop is that people can shop in it. If a concern conducts "its business entirely by mail order and does not invite the public "to come to its premises to buy or provide accommodation for "them, the premises from which its business is conducted are "not a shop, even though its business be entirely retail in "character," and then he refers to *Toogood's* case.[41] He continued[42]: "This is not a case where a defined portion of the "hereditament is allocated to one user exclusively. The user of "the whole hereditament is user for the purposes of a retail "shop since every part of it is used for those purposes." Finally at the very end[43]: "The whole of the business is shop "business conducted from and by the shop, and that in my "judgment disposes of the matter."

So, as I read the real ratio of this court's decision in the *Ritz Cleaners* case,[44] it can be stated thus: that when one looked at it and heard the facts found as to how the business was done the truth was that the hereditament was a hereditament used for the purposes and only for the purposes of a retail dyers' and cleaners' shop, just as the hereditament in *Finn's* case[45] was used and used exclusively as an ordinary bakery shop. And if that is right, then it follows no doubt that the dyeing and

[36] [1937] 2 K.B. 642, 666.
[37] Ibid. 669.
[38] [1931] A.C. 446, 485.
[39] Ibid. 470.
[40] [1937] 2 K.B. 642, 671.
[41] [1932] A.C. 663.
[42] [1937] 2 K.B. 642, 673.
[43] Ibid. 674.
[44] [1937] 2 K.B. 642.
[45] [1931] A.C. 446, 485.

cleaning machines become necessarily ancillary to the main purpose, namely, that of the shop. In this case those tests cannot by any possibility be sensibly applied in the same sense. On the facts of the case it would appear to me quite impossible to say that these laundries, either of them, could be sensibly described as laundry shops and that the business of them could be so called. The most that one can say is that there is available means for the public at some part to resort though without any real invitation. But it is no less clear to my mind that the laundry business carried on is not carried on as part of a shop conducted from and by the shop or, in the language of Greer L.J. in the *Ritz Cleaners* case,[46] used for no other purpose than supplying cleaned goods to what I will assume to be the shop part of the laundry premises.

For those reasons, in my judgment, this appeal succeeds and with all respect to the Lands Tribunal—I refer now particularly to Mr. Simes' decision—I do not think he was compelled by the *Ritz Cleaners* case[46] and the other cases to hold contrary to his own expressed view that here the hereditament was used primarily and indeed exclusively for the purposes of a retail shop.

HARMAN L.J. The practice of these two laundries is typical of the normal type of business of their kind: they send out vans which collect washing from householders up and down the neighbourhood, convey it to the laundry and deliver it again when washed. But in modern conditions people are not always in their houses; nor do they have any domestic help and therefore each of the laundries found it as a matter of business necessary to suffer such persons to come to the laundry premises and dump, so to say, their washing there instead of putting it on the van, and similarly instead of receiving it by the van when clean, to go to the premises and find someone to let them have their washing back. I cannot see that there was any invitation to the public in either case. Business conducted as last described was merely a commercial necessity, but this fact has been seized upon by the valuation officers in the two cases to suggest that though these laundries are on the face of them "industrial here-"ditaments" being workshops within the meaning of the Factory and Workshops Act, as they clearly are, yet they are excepted by the proviso as being primarily used for the purposes of retail shops. As the member of the tribunal who decided the Heathfield case observed, no one would say that the hereditament was a shop or of the character of a shop, but then sliding slowly down the slippery path of authority, though well aware that it is not of the character of a shop, still less primarily used for that purpose, he feels constrained to reach a conclusion which his common sense tells him is ridiculous. Now this is an abuse of authority. I do not say we have not all found ourselves constrained by authority to come to

[46] [1937] 2 K.B. 642.

C. A.
1960
Almond v. Heathfield Laundry (Birmingham) Ltd.
Harman L.J.

conclusions which we distrust, but when authority leads a man to such a conclusion, he ought to pause and say: Is there not something wrong? The law cannot, as Serjeant Snubbin said, be such "a hass" as that.

Of course all these cases in the end depend upon facts which are slightly different. None of them, therefore, should be used as a kind of bed of Procrustes into which you thrust the facts and if some facts do not fit you lop them off. Authority is not meant to be that kind of instrument; it is meant to be a guide. Get the facts right and you will usually find that the law fits in. The essential difference between this case and the two authorities which are said to point the other way, so it seems to me, is one which in the end depends entirely on the facts. Both in *Finn's* case [47] and in the *Ritz Cleaners* case [48] the court reached this conclusion in the end, that on the facts of the case the whole hereditament was used for the purposes of a retail shop. If that were so the fact that there were parts of it behind which had no immediate connection with the shop in front but which existed for supplying the needs of the shop did not of course, make the whole hereditament an industrial rather than a commercial hereditament, and the question about the word "primarily" did not arise because there was only one business, namely, a shop business to which the whole hereditament was devoted.

I do not venture on the dissection of the authorities which my Lord has made. I agree with his analysis, but I do enter my small protest against the artificiality which seems to affict, particularly in rating cases where amongst a sandstorm of authorities words may be found which can be constrained to support almost any broad proposition. What you need to do, if I may say so, is to look very carefully at the particular facts of the particular case and the result will usually, though not perhaps always, be found consonant with the dictates of common sense. Jenkins L.J. in *Dolton Bournes & Dolton Ltd* v. *Osmond* [49] had these words to say, after stating what the question was and citing the definition of retail shop: "The question, therefore, is whether the hereditament is prima-"rily used for the purposes of a retail shop or for the purposes of "any premises of a similar character where retail trade or busi-"ness is carried on. These words, relatively simple and "ordinary words as they are, have been the subject of much "judicial discussion, and various attempts have been made to "arrive at definitions or expositions of their meaning; but I hope "I will not be disrespectful to the learned authors of various obser-"vations upon the meaning of this language if I say that to my "mind the most helpful observation, in all the wealth of authority "to which our attention has been directed, appears in the speech "of Lord Dunedin in *Turpin* v. *Middlesbrough Assessment*

[47] [1931] A.C. 446, 485.
[48] [1937] 2 K.B. 642.
[49] [1955] 1 W.L.R. 621, 632.

"*Committee*[50] in the passage to which my Lord has already "referred, where he said: 'My Lords, the matter seems to me "'simply a question of attributing an everyday meaning to "'the words used in the definition.' One must, therefore, con- "sider the facts and apply an everyday meaning to the words used "in the definition, and see whether that everyday meaning, "applied to those facts, results in the conclusion that the heredi- "tament is being 'primarily occupied and used for the purposes "'of a retail shop,' including in that expression what is included "by the definition clause."

In that case the court reached a conclusion on the facts which, if I may say so, was consonant with reason. The Lands Tribunal in these cases in my judgment has reached conclusions contrary to reason and I am glad to think that the authorities do not compel any such lamentable upshot. I would allow the appeals.

DONOVAN L.J. I agree. In the case of a unified retail business (which I take to mean the same thing as a single retail business) where the whole of such business is physically done in the shop or otherwise done through the medium of the shop, it is easy to see that no question can arise whether the hereditament is primarily occupied and used for the purposes of a retail shop. Ex hypothesi it will be wholly so occupied and used. And this hypothesis in my opinion is the foundation of the decision in *Finn's* case[51] and the *Ritz Cleaners* case.[52] It does not exist here because, even assuming there was a "shop" in either of these two cases, only a small fraction of the business is done in the supposed shop or otherwise done through the medium of it. I think these two cases are of the kind that Scrutton L.J. envisaged in *Wilkinson* v. *Sibley*[53] as still to be decided, namely, a factory where a small portion of the output is sold in a small shop upon the same hereditament, but the bulk of it is disposed of otherwise. In such a case the primary purpose of the occupation and use falls to be determined, I think, as a question of fact. In both the present cases the answer would clearly be that the premises were not primarily occupied and used for the purposes of a retail shop.

I, therefore, concur in the conclusion that these appeals should be allowed.

Appeals allowed with costs of appeals and costs before the tribunal on the High Court scale.

Leave to appeal to the House of Lords.

Solicitors: *Linklaters & Paines; Solicitor of Inland Revenue.*

E. D.

[50] [1931] A.C. 446, 473.
[51] [1931] A.C. 446.
[52] [1937] 2 K.B. 642.
[53] [1932] 1 K.B. 194.

[QUEEN'S BENCH DIVISION.]

1960
July 11, 12.

Diplock J.

* PRICE *v.* ROMILLY.

Agriculture—Agricultural holding—Notice to quit—Partial failure to remedy breach of condition—Reference to arbitration whether partial compliance insufficient to justify notice—Validity of notice to quit—Agricultural Holdings Act, 1948 (11 *&* 12 *Geo.* 6, *c.* 63), *s.* 24 (2) (*d*).

The landlord of an agricultural holding served the tenant with a notice in writing dated April 21, 1959, requiring him to remedy seven specified breaches of covenant by October 31, 1959. On December 16, 1959, the tenant was served with a notice to quit. The notice purported to have been given pursuant to section 24 (2) (*d*) of the Agricultural Holdings Act, 1948.[1] The question whether this was a valid notice was referred to arbitration under the Act. By his award, the arbitrator found that the notice was valid as the tenant had not complied with paragraph 1 of the earlier notice of April 21, 1959, and so had broken his tenancy agreement by failing to farm in accordance with the rules of good husbandry. The arbitrator also found that, apart from this omission, the tenant had carried out the requirements of the earlier notice as far as it was possible for him to do. The tenant applied to set aside the award on the ground that a partial failure to comply with the terms of a notice to remedy breaches of covenant was not sufficient to bring the case within section 24 (2) (*d*) of the Act of 1948, the consent of the Agricultural Land Tribunal not having been obtained:—

Held, that, subject to the de minimis rule, if a tenant failed to comply fully with the requirements set out in the notice for remedying breaches of terms or conditions of his tenancy, which were not inconsistent with the fulfilment of his responsibilities to farm in accordance with the rules of good husbandry, the provisions of section 24 (2) (*d*) applied, and a substantial compliance with the notice was not sufficient; accordingly, the notice to quit was valid.

MOTION to set aside the award of an arbitrator.

The applicant, the tenant of an agricultural holding moved to set aside the arbitrator's award in an arbitration under the Agricultural Holdings Act, 1948, on the ground of error on the face of the award.

[1] Agricultural Holdings Act, 1948, s. 24, (1) (as amended by the Agriculture Act, 1958, s. 8 (1) and Sch. 1, para. 8): "Where notice to quit "an agricultural holding or part of "an agricultural holding is given to "the tenant thereof, and not later "than one month from the giving of "the notice to quit the tenant serves "on the landlord a counter-notice in "writing requiring that this subsec-"tion shall apply to the notice to "quit, then, subject to the provisions "of the next following subsection, "the notice to quit shall not have "effect unless the Minister consents "to the operation thereof."

S. 24 (2): "The foregoing subsec-"tion shall not apply where . . . "(*d*) at the date of the giving of the "notice to quit the tenant had failed "to comply with a notice in writing "served on him by the landlord requir-"ing him . . . within a reasonable "time or within such reasonable period "as was specified in the notice to "remedy any breach by the tenant "that was capable of being remedied "of any term or condition of his ten-"ancy which was not inconsistent with "the fulfilment of his responsibilities "to farm in accordance with the rules "of good husbandry, and it is stated "in the notice to quit that it is given "by reason of the matter aforesaid."

By a notice in writing, dated April 21, 1959, and served on the tenant by the landlord's agents, the tenant was requested to remedy alleged breaches of his tenancy agreement by October 31, 1959. The works required to be done were enumerated in seven items, item 1 being "Clean out the ditch between ordnance survey Nos. 885 and 918." On December 16, 1959, the landlord's agents served on the tenant a notice to quit the holding on March 25, 1961, or at the expiration of the year of his tenancy which should expire next after the end of twelve months from the date of service of the notice. The notice stated that it was given pursuant to the appropriate paragraph of section 24 (2) of the Agricultural Holdings Act, 1948, for the reason that the tenant had failed to comply with the notice, dated April 21, 1959, requiring him within a reasonable time, or within such reasonable time as was specified in the notice, to remedy all the breaches by him that were capable of being remedied of the terms and conditions of the tenancy not inconsistent with the fulfilment of his responsibilities to farm in accordance with the rules of good husbandry as set out in the notice. The tenant served a counter-notice under section 24 (1) of the Act of 1948, and the consent of the Agricultural Land Tribunal to the notice to quit had not been obtained.

The dispute having been submitted to arbitration under section 26 of the Act of 1948 (as substituted by the Agriculture Act, 1958, Sch. 1, para. 10), the arbitrator made his award as follows:

"1. I award and determine that the notice to quit the said "holding dated December 16, 1959 . . . was properly given.

"2. I award and determine that at the date of the giving "of the said notice to quit the . . . tenant had failed to comply "with a part of the notice in writing dated April 21, 1959, "requiring him to remedy the breach of the terms of his tenancy "not inconsistent with the fulfilment of his responsibility to "farm in accordance with the rules of good husbandry by cleaning "out the ditch between ordnance survey Nos. 885 and 918 "[item 1]."

The award went on to deal with all the other items in the notice of April 21, 1959, except two minor items, namely, item 5 (renewing a short length of fence) and item 7 (re-hanging a number of gates) with which the arbitrator did not deal. By paragraph 3 of the award the arbitrator found that at the date of the notice to quit the tenant had complied with the requirements of item 2 and part of item 4. In paragraph 4 he held that the breach referred to in item 3 was not capable of being remedied in the time stated in the notice. He further found, in paragraph 5 of the award, that one of the requests in item 4 was not in accordance with any term of the tenancy, and, in paragraph 6, that the request contained in item 6 had been varied by a later agreement and that the tenant had not failed to remedy that breach.

It was contended on behalf of the tenant that a partial failure

1960

Price
v.
Romilly.

to remedy breaches of covenant set out in the notice of April 21, 1959, was not sufficient for the purposes of section 24 (2) (*d*) of the Act of 1948, and that, as the consent of the Agricultural Land Tribunal had not been obtained, the notice to quit was not valid.

Brian T. Neill for the tenant.

Anthony Cripps Q.C. and *P. G. Langdon-Davies* for the landlord.

The following cases were cited in argument: *French* v. *Elliott* [2] and *Edwards* v. *Woollacott*.[3]

Diplock J. This is a motion to set aside the award of an arbitrator for an error of law apparent upon its face. It is not a case stated. It is for the applicant to show error in law upon the face of the award. [His Lordship referred to the relevant portions of section 24 of the Agricultural Holdings Act, 1948, and the terms of the two notices to the tenant, read the award, and continued:] Mr. Neill for the tenant put his case most strongly on the contention that a partial failure to fulfil or to comply with the requirements of a notice to remedy breaches of covenant was insufficient under section 24 (2) (*d*) of the Agricultural Holdings Act, 1948, and that, indeed, is the ground set out in the notice of motion. The point is a very short one and is not susceptible of any great elaboration. I have to ask myself whether a tenant, who has done part of the work set out in a notice, but has failed to do another part of it, has "... failed to comply with a notice "in writing ... requiring him ... within such reasonable period "as was specified in the notice to remedy any breach by the "tenant ... of any term or condition of his tenancy ..." It seems to me that, if he had not remedied it and remedied it completely, he has failed to comply with the notice. Mr. Neill contended that it was sufficient if there was a "substantial "compliance" with the terms of the notice. Those words are not in the Act, and I see no reason for reading them into the Act. No doubt, of course, the de minimis rule would apply, but the Act seems to me to be plain in its terms, and, if a tenant fails to comply fully with the requirements set out in the notice, being requirements for remedying breaches of terms or conditions of his tenancy which are not inconsistent with the fulfilment of his responsibilities to farm in accordance with the rules of good husbandry, the provisions of section 24 (2) (*d*) of the Act are fulfilled. The really substantial argument which has been put forward is that "substantial compliance" with the notice suffices; that argument fails.

Mr. Neill made other verbal criticisms of the award. It is not perhaps as elegantly phrased as it might be, but it seems to me that its meaning is perfectly plain, and there is nothing to suggest

[2] [1960] 1 W.L.R. 40; [1959] 3 All E.R. 866.

[3] Chartered Land Agents' Society Journal, Vol. 58 (March, 1959).

in it that the arbitrator has gone wrong in law. Counsel points out, and it is a fair criticism, that in paragraph 2 of the award the arbitrator refers to "a part of the notice in writing," whereas in subsequent paragraphs, where he is dealing with other items, he does not use the words "part of"; it is lacking in elegance, but nothing more, and it is perfectly plain what the arbitrator means. Counsel also contended that an arbitrator ought to set out all of the facts and make a specific finding as to each of the relevant facts. It does not seem to me that there is any statutory requirement that an award should be thus set out, and it seems to me that there are sufficient findings of fact in the award and nothing, indeed, to indicate that the arbitrator has not applied his mind to all the matters to which he should.

Another point made by Mr. Neill is that on the true construction of section 24 (2) (*d*) of the Act of 1948 the tenant has a locus poenitentiae and that, if, as in this case, the notice sets out a reasonable period in which the work should be done and the tenant does not do the work in that period but does it in between the end of that period and the service of the notice to quit, the requirements of section 24 (2) (*d*) are not fulfilled. There seem to me to be two difficulties in that argument in its application to this case. First, on the construction of section 24 (2) (*d*), I think that the construction submitted by counsel for the tenant is plainly a wrong construction in law; but there is the additional difficulty for counsel in the way in which this case comes before me, in that there is no indication in the award of what view the arbitrator has formed on that point of construction, and, therefore, it is impossible to say that, on the face of the award, he has formed a wrong view.

I think that I have dealt with the main points put before me by counsel for the tenant. I should perhaps add an additional point which was made, namely, that it was not apparent whether the arbitrator had considered whether or not the notice gave a reasonable time for doing the work. That point could not be raised in these proceedings if it were not apparent whether the arbitrator had considered the matter, because these are proceedings to set aside the award for an error on its face; but, in fact, it does appear from the terms of the award that the arbitrator has considered that matter, because, in paragraph 4 of the award, he expressly finds that one of the matters was not capable of being remedied in the time stated in the notice. I only mention that because it seems to be right, when the arbitrator's award has received such detailed criticism, to draw attention to the fact that he appears, in his award, to have considered all those matters which he ought to have considered in an arbitration which is obviously one of considerable importance to the tenant and, indeed, to the landlord. In the result, despite the most careful arguments of counsel for the tenant, I am unable to find that the

1960

Price v. Romilly.

award shows any error on its face, and, accordingly, this motion must be dismissed.

Application dismissed with costs.

Solicitors: *Ward, Bowie & Co. for Scobie & Beaumont, Hereford; Robbins, Olivey & Lake, for Burges, Salmon & Co., Bristol.*

J. D. P.

[QUEEN'S BENCH DIVISION.]

1960 *Oct.* 12, 19, 20; *Nov.* 8.

Lord Parker C.J., Ashworth and Elwes JJ.

* WARE URBAN DISTRICT COUNCIL *v.* GAUNT AND OTHERS.

Highway—Private street works—Footpath—Road made in 1885*—Laid out alongside section of public footpath repairable by inhabitants at large—Further section of footpath diverted to lie alongside new road —Unfenced—Whole of road including footpath used by public on foot—No repairs carried out by local authority except to footpath—Whether road a "street" not repairable by inhabitants—Whether footpath fronts on street—Whether private premises fronting footpath "front" or "adjoin" street—Highway Act,* 1835 (5 *&* 6 *Will.* 4, *c.* 50), *s.* 23*—Private Street Works Act,* 1892 (55 *&* 56 *Vict. c.* 57), *ss.* 5, 6, 8.

Highway—Private street works—Resolution by local authority to make good—Material defect in resolution—No reference to street lighting or sewering—Specification providng for new street lighting and surface water drainage—Limitation on power of justices to amend resolution — "Channel" — Meaning of — Whether apt to cover subterranean drainage.

In 1885 a road was laid out by T., part of it being laid alongside and undivided from a public footpath which was repairable by the inhabitants at large. In the same year, by a diversion order made by quarter sessions, another section of the footpath was diverted and made to lie open to the westerly side of the road. For the past 40 years not only the footpath but the whole road had been used by the public on foot and no repairs had been carried out by the local authority in whose district the road lay, except to the public footpath. In 1956 the local authority, under section 6 of of the Private Street Works Act, 1892,[1] passed a resolution, resolving that the road should be "levelled, paved, metalled, flagged,

[1] Private Street Works Act, 1892, s. 5: "In this Act, if not inconsistent with the context,— . . . . The expression 'street' means . . . a street as defined by the Public Health Acts, and not being a highway repairable by the inhabitants at large."

S. 6: "(1) Where any street or part of a street is not sewered, levelled, paved, metalled, flagged, channelled, made good, and lighted to the satisfaction of the urban authority, the urban authority may from time to time resolve with respect to such street or part of a street to do any one or more of the following works (in this Act called private street works); that is to say, to sewer, level, pave, metal, flag, channel, or make good, or to provide proper means for lighting such street or part of a street; and the expenses incurred by the urban authority in executing private street works shall be apportioned . . . on

"channelled and made good," and that the expenses should be apportioned upon the premises fronting, adjoining or abutting on the road. They approved a specification, estimates and provisional apportionments made by their surveyor. The specification included provision for new street lighting, which had not been specifically referred to in the resolution, and other works, including "surface "water drainage, gulley pots and connections to soakaways." The cost of the work on the public footpath was to be deducted from the charges made on the premises affected. The occupiers of the affected premises objected to the apportionment pursuant to section 7 (*a*) to (*f*) of the Act on the grounds, inter alia, that the road did not form part of a "street" within the meaning of the Act, was a highway repairable by the inhabitants at large, that certain of the works

"the premises fronting, adjoining, or "abutting on such street or part of a "street. . . . (2) The surveyor shall "prepare, as respects each street or "part of a street,—(*a*) a specification "of the private street works referred "to in the resolution, with plans and "sections (if applicable); (*b*) an "estimate of the probable expenses "of the works; (*c*) a provisional "apportionment of the estimated "expenses among the premises "liable to be charged therewith under "this Act. . . . (3) The resolution "approving the specifications, plans, "and sections (if any), estimates, "and provisional apportionments, "shall be published in the manner "prescribed . . . and copies thereof "shall be served on the owners of "the premises shown as liable to be "charged in the provisional apportionment within seven days after "the date of the first publication "During one month from the date "of the first publication the approved "specifications, plans, and sections "(if any), estimates, and provisional "apportionments . . . , shall be kept "deposited at the urban authority "offices, and shall be open to inspection at all reasonable times."

S. 7: " . . . any owner of any "premises shown in a provisional "apportionment as liable to be "charged with any part of the "expenses of executing the works "may, by written notice served on "the urban authority, object to the "proposals of the urban authority on "any of the following grounds; (that "is to say), (*a*) that an alleged "street or part of a street is not or "does not form part of a street within the meaning of this Act; (*b*) that "a street or part of a street is (in "whole or in part) a highway repairable by the inhabitants at large; "(*c*) that there has been some "material informality, defect, or "error in or in respect of the resolution, notice, plans, sections, or "estimate; (*d*) that the proposed "works are insufficient or unreasonable, or that the estimated expenses "are excessive; (*e*) that any premises "ought to be excluded from or inserted in the provisional apportionment; (*f*) that the provisional "apportionment is incorrect in respect "of some matter of fact to be specified in the objection or . . . in "respect of the degree of benefit to "be derived by any persons, or the "amount or value of any work "already done by the owner or "occupier of any premises."

S. 8 (1): "The urban authority ". . . may apply to a court of summary jurisdiction to appoint a time "for determining the matter of all "objections made . . . ; and . . . "The court may quash in whole or "in part or may amend the resolution, plans, sections, estimates, and "provisional apportionments, or any "of them, on the application either "of any objector or of the urban "authority. . . ."

S. 10: "In a provisional apportionment of expenses of private "street works the apportionment of "expenses against the premises "fronting, adjoining, or abutting on "the street or part of a street in "respect of which the expenses are "to be incurred shall, unless the "urban authority otherwise resolve, "be apportioned according to the "frontage of the respective premises; "but the urban authority may, if "they think just, resolve that in "settling the apportionment regard "shall be had to the following considerations; (that is to say), (*a*) "the greater or less degree of benefit "to be derived by any premises from "such works; (*b*) the amount and "value of any work already done by "the owners or occupiers of any such "premises."

1960

Ware Urban District Council v. Gaunt.

were not street works, and that there was a material defect in the resolution in that it contained no reference to street lighting so that such work could not be carried out. The county council, as occupiers of school premises included in the apportionment, also objected under section 7 (*b*) on the ground that the premises fronting, adjoining or abutting on the road were the public footpath and not their premises.

Justices decided that the proposed works were street works within the meaning of the Act, that they had power under section 8 of the Act of 1892 to amend the local authority's resolution to include street lighting, but quashed the resolution and provisional apportionment on the grounds that the whole road, including the public footpath, was a highway repairable by the inhabitants at large:—

Held, (1) that if after 1835 land was in fact laid out as a road or occupation way section 23 of the Highway Act, 1835,[2] was applicable to it even though the only public use made of it was as a footpath, and, as in the present case the steps required by section 23 to render the road repairable by the inhabitants at large had not been carried out either when the road was first laid out or since, the justices were wrong in concluding that it was repairable by the inhabitants at large and on that issue the appeal should be allowed (post, p. 1374).

Cababé v. *Walton-onThames District Council* [1913] 1 K.B. 481, C.A. and *Margate Corporation* v. *Roach*, post, p. 1380 applied.

Robinson v. *Richmond (Surrey) Borough Council* [1955] 1 Q.B. 401; [1955] 2 W.L.R. 333; [1955] 1 All E.R. 321, D.C. distinguished.

(2) That under section 6 of the Private Street Works Act, 1892, it was an essential step for an authority wishing to include street lighting in the works proposed under the section to pass a resolution expressing their dissatisfaction with the existing lighting, and the respondents were entitled to insist on the provisions of the section being strictly observed. In the absence of such a resolution, the justices had no power under section 8 to amend the resolution of the local authority to include street lighting, and therefore all references to street lighting in the specification must be struck out post, p. 1375).

Chester Corpn. v. *Briggs* [1924] 1 K.B. 239; 40 T.L.R. 85, D.C. applied.

(3) That the word "channel" which appeared both in section 6 and the local authority's resolution did not cover works of subterranean drainage and therefore, in so far as the works of surface

[2] Highway Act, 1835, s. 23: "... no road ... made or hereafter to be made by and at the expense of any individual ... shall be deemed or taken to be a highway which the inhabitants of any parish shall be compellable or liable to repair, unless the person ... proposing to dedicate such highway to the use of the public shall give three calendar months' previous notice ... of his intention ... and shall have made or shall make the same in a substantial manner and of the width required by this Act, and to the satisfaction ... of any two justices of the peace ... who are hereby required, on receiving notice from such person ... to certify that such highway has been made in a substantial manner, and of the width required by this Act, ... which certificate shall be enrolled at ... quarter sessions, ... and in such case, after the said highway shall have been used by the public, and duly repaired and kept in repair by the said person ... for ... twelve calendar months, such highway shall for ever thereafter be kept in repair by the parish in which it is situate: ..."

water drainage included in the specification involved subterranean drainage, they should be struck out (post, p. 1377).

Wandsworth Borough Council v. *Golds* [1911] 1 K.B. 60, D.C. and *East Barnet Urban District Council* v. *Stacey* [1939] 2 K.B. 861; [1939] 2 All E.R. 621, D.C. applied.

(4) That the "street" in which the works under section 6 of the Private Street Works Act, 1892, were to be carried out was the road laid out by T. in 1885 excluding the public footpath, and the premises fronting it were the footpath itself; and as not more than one parcel of land could front on a particular part of a street the premises occupied by the county council did not so front; but that they were premises "adjoining" the street within the meaning of section 6 although there was no physical contiguity therewith, and as section 10 did not preclude the charging under section 6 of premises which, though not fronting on the street could properly be said to adjoin it, in the present circumstances the expense of making good the street was chargeable on premises actually fronting on the street and on those adjoining it. Accordingly, the premises occupied by the county council had been properly charged (post, p. 1379).

Herne Bay Urban District Council v. *Payne and Wood* [1907] 2 K.B. 130; 23 T.L.R. 442, D.C.; *New Plymouth Borough Council* v. *Taranaki Electric Power Board* [1933] A.C. 680, P.C.; *Lightbound* v. *Higher Bebington Local Board* (1885) 16 Q.B.D. 577, C.A. applied.

CASE STATED by Hertfordshire justices sitting at Ware.

1. On October 6, 1959, a complaint was preferred by the appellants, the Ware Urban District Council, against the respondents, Ernest John Gaunt and twenty-six other occupiers of premises, and the Hertfordshire County Council, the occupiers of a school, in respect of objections made by them under section 7 of the Private Street Works Act, 1892, to street works proposed to be executed to Walton Road, a road within the local authority's district and charged to the respondents pursuant to section 6 of the Act.

2. The justices heard the complaint on October 19, 20 and 31, 1959, and found the following facts: (a) Prior to 1885 the road now called Walton Road did not exist, but there was a public footpath along what was now the westerly side of Walton Road from its junction with Hoe Lane to the north-eastern corner of Warner Road and then along an almost straight line in a northerly direction to London Road. (b) In 1885 Walton Road was laid out as a new road by one Arthur Tite. The southern section of the road, between the junction with Hoe Lane and the north-eastern corner of Warner Road, was laid out alongside and undivided from the public footpath. (c) In 1885, by a Diversion Order of the general quarter sessions of the peace at Hertford the northern section of the public footpath was diverted to follow and lie open to the westerly side of Walton Road, which had then been laid out, from its junction with London Road for a distance of 510 feet and then for 320 feet (the non-contiguous section) away from Walton Road in an almost straight line to the north-eastern corner of Warner Road.

1960

Ware Urban District Council v. Gaunt.

(d) On March 7, 1956, the local authority resolved that Walton Road, not being levelled, paved, metalled, flagged, channelled, or made good to their satisfaction, be levelled, paved, metalled, flagged, channelled and made good under and in accordance with the provisions of the Private Street Works Act, 1892, and that the expenses incurred in executing such works be apportioned upon the premises fronting, adjoining or abutting on the street according to the respective frontages of such premises and the greater or less degree of benefit to be derived by any premises from such works, and that the local authority's surveyor should prepare, in conformity with that resolution, and submit to the local authority, a specification, estimate, plans, sections and provisional apportionment. (e) On December 3, 1958, the local authority, by resolution, approved a specification, plan, sections, estimate and provisional apportionment relating to the works proposed to be done in sewering, levelling and making good Walton Road prepared by their surveyor pursuant to the resolution. (f) On January 15 and 16, 1959, the respondents served on the local authority notices of objection to the provisional apportionment under each of paragraphs (*a*) to (*f*) of section 7 of the Act of 1892. The Hertfordshire County Council, as occupiers of certain premises known as Ware Grammar School, also objected under paragraphs (*b*) and (*c*) of section 7. (g) On May 29 and June 5, 1959, a copy of the resolution of December 3, 1958, was published and copies were served on the owners of the premises shown as liable to be charged in the provisional apportionment. (h) The works comprised in the surveyor's specification in fact included the making up of the westerly footpath (other than the non-contiguous section), the provision of lighting, adjustment of cover levels, alterations to public utility undertakings' apparatus, filling in underground passage, works to private properties, such as adjustments to gates and path levels, and the provision of openings to private entrances. (i) The works relating to lighting, cover levels and public utility undertakings' apparatus included works on or under the westerly footpath (other than the non-contiguous section). (j) A credit of ten shillings per foot in respect of the estimated cost of making up the westerly footpath from London Road to the south-eastern corner of certain premises (but excluding the non-contiguous section) was allowed in the provisional apportionment against the amounts apportioned to the premises fronting, adjoining or abutting the western side of that part of the footpath. (k) The road ends of London Road, Warner Road, Windmill Fields, and Hoe Lane were not included in the provisional apportionment. (l) The expenses were apportioned according to frontage. (m) There was no evidence of the local authority's ever having repaired Walton Road other than the westerly footpath. (n) Walton Road was substantially developed along both sides and was in a bad state of repair. (o) There existed in Walton Road three lamp standards erected by the

local authority. (p) There was in the road a limited system of soakaways designed to carry off surface water. The soakaways were at present silted up and ineffective. The local authority could not tell, until the soakaways were cleared, whether they could be restored to use. (q) Ever since the road was laid out the whole length and breadth of it had been open to the public on foot and there was evidence before the justices (which they accepted) that for the last forty years at least the whole width of Walton Road had been used by the public on foot.

3. It was contended by the local authority, inter alia, that save as to the westerly footpath, Walton Road was a street within the meaning of the Act of 1892, and not a highway repairable by the inhabitants at large; that the works alleged not to be street works were street works or necessarily ancillary and incidental thereto; that although the resolution did not in terms provide for street lighting the justices were empowered to amend and should amend the resolution so to provide; that the proposed street works were not unreasonable; that the public footpath did not front, adjoin or abut the street but was in and part of the street; that the provisional apportionment by reference to frontage reflected the greater or less degree of benefit to be derived by any premises from the street works, having regard to the possibility of future additional buildings in those premises with longer frontages.

4. (i) It was contended by the respondents (other than the Hertfordshire County Council), inter alia, that the whole of Walton Road was a highway repairable by the inhabitants at large; alternatively, that the proposed street works were premature and therefore unreasonable; in the further alternative, that parts of the proposed works, namely, making up the westerly footpath, adjustment of existing cover levels, alterations to public utility undertakings' apparatus, works to private properties, filling in the underground passage, and the provisions of openings to private entrances, were not street works within the meaning of the Act; that the cost of street lighting, not being provided for in the resolutions and the appellant local authority not having otherwise proved their dissatisfaction with the existing street lighting, could not be charged as street works under the Act; that the provisional apportionment had not been made with regard to the greater or less degree of benefit derived. (ii) The Hertfordshire County Council contended that the westerly public footpath contiguous with Walton Road was repairable by the inhabitants at large; that the power of the appellant local authority under section 6 of the Act of 1892 to make a resolution with respect to a street to do any one or more of the private street works therein mentioned was a power to so resolve in respect of a street not repairable by the inhabitants at large; that the resolution made by the local authority under the section in respect of Walton Road was a resolution in respect of the whole of the road including the westerly public footpath; that

1960

Ware Urban District Council v. Gaunt.

the local authority had power to make a resolution under the section in respect of the whole of a street to do one or more but not all of the private street works in that street but the street in respect of which the resolution was made must be a street within the meaning of the Act and might not include a highway repairable by the inhabitants at large; that the justices had no power to amend the resolution of the local authority so as to enable that resolution as amended to take effect as a resolution in respect of the whole of Walton Road to do some only of the private street works, that was, to do such works in that part of Walton Road other than the westerly public footpath; that the resolution of the local authority must therefore be quashed or amended so as to be a resolution in respect of that part of Walton Road other than the westerly public footpath; the premises against which the expenses of the private street works must be apportioned were the premises fronting, adjoining or abutting on that part of Walton Road in respect of which the resolution as amended was made to take effect; that the westerly public footpath fronted, abutted and adjoined that part of Walton Road other than the westerly public footpath and were the premises to be included in the apportionment; that the Ware Grammar School, the property of the county council, fronted on to the westerly public footpath and did not front, adjoin or abut on that part of Walton Road other than the westerly public footpath; that if the local authority's resolution was so amended so as to be a resolution in respect of that part of Walton Road other than the westerly public footpath the resolution was in effect a resolution to make up that part as a street separate from the westerly public footpath and the Ware Grammar School could not front, adjoin or abut both on the footpath and on the part of Walton Road with respect to which the resolution as amended was made to take effect. . . .

6. The justices were of opinion that (a) all the works alleged not to be street works, with the exception of the provision of road name plates, were street works or necessarily ancillary and incidental thereto; (b) the proposed street works were not unreasonable; (c) the public footpath did not front, adjoin or abut the street but was in and part of the street; (d) certain road ends or junctions ought to have been included in the provisional apportionments; (e) the provisional apportionment by reference to frontage was in accordance with the resolution of the local authority in that it reflected the greater or less degree of benefit to be derived by the various premises from the street works; (f) the estimated costs of works for making up the westerly footpath ought to have been deducted from the total amount of the estimated expenses; (g) they had power to amend the resolution of the local authority to enable them to provide street lighting; (h) the local authority had power to make a resolution under section 6 of the Act of 1892,

in respect of Walton Road including the public footpath; (i) the Ware Grammar School, the property of the Hertfordshire County Council, fronted, adjoined or abutted on Walton Road including the westerly public footpath; and (j) the whole of Walton Road, including the westerly public footpath, was a highway repairable by the inhabitants at large, and accordingly they quashed in whole the resolution, plans, sections, estimates and provisional apportionments of the local authority and the surveyor.

C. E. Scholefield Q.C. and *Douglas Frank* for the local authority, the appellants.

P. M. Mottershead for the frontagers, the respondents.

Harold Parrish for the county council.

The following cases were cited in argument: *Cababé* v. *Walton-on-Thames Urban District Council*[3]; *Barry and Cadoxon Local Board* v. *Parry*[4]; *Attorney-General* v. *Esher Linoleum Co. Ltd.*[5]; *Cotterill* v. *Starkey*[6]; *Reg.* v. *United Kingdom Electric Telegraph Co. Ltd.*[7]; *Robinson* v. *Richmond (Surrey) Borough Council*[8]; *Kingston-on-Thames Corporation* v. *Baverstock*[9]; *Poole Corporation* v. *Blake*[10]; *In re Jesty's Avenue, Broadway, Weymouth*[11]; *East Barnet Urban District Council* v. *Stacey*[12]; *Williams* v. *Wandsworth Board of Works*[13]; *Leith Magistrates and Town Council* v. *Gibbs*[14]; *Herne Bay Urban District Council* v. *Payne and Wood*[15]; *Wakefield Local Board* v. *Lee*[16]; *Margate Corporation* v. *Roach*[17]; *Nicholas* v. *Penny*[18]; *Chester Corpn.* v. *Briggs*[19]; *Property Exchange Ltd.* v. *Wandsworth Board of Works*[20]; *Lightbound* v. *Higher Bebington Local Board*[21]; *In re Baroness Bateman and Parker's Contract*[22]; *Clacton Local Board* v. *Young & Sons*[23]; *New Plymouth Borough Council* v. *Taranaki Electric Power Board.*[24]

November 8. LORD PARKER C.J. Ashworth J. will give the first judgment.

[3] [1914] A.C. 102, H.L.; [1913] 1 K.B. 481, C.A.
[4] [1895] 2 Q.B. 110, D.C.
[5] [1901] 2 Ch. 647.
[6] (1839) 8 C. & P. 693.
[7] (1801) 31 L.J.M.C. 166, D.C.
[8] [1955] 1 Q.B. 401; [1955] 2 W.L.R. 333; [1955] 1 All E.R. 321, D.C.
[9] (1909) 73 J.P. 378, D.C.
[10] [1956] 1 Q.B. 206; [1955] 3 W.L.R. 757; [1955] 3 All E.R. 409, D.C.
[11] [1940] 2 K.B. 65; 56 T.L.R. 660; [1940] 2 All E.R. 632, D.C.
[12] [1939] 2 K.B. 861; [1939] 2 All E.R. 621, D.C.
[13] (1884) 13 Q.B.D. 211, D.C.
[14] (1882) 9 R.(Ct. of Sess.Cas.) (4th Series) N.S. 627.
[15] [1907] 2 K.B. 130; 23 T.L.R. 442, D.C.
[16] (1876) 1 Ex.D. 336, D.C.
[17] (1960) post, p. 1380.
[18] [1950] 2 K.B. 466; 66 T.L.R. (Pt. 1) 1122; [1950] 2 All E.R. 89, D.C.
[19] [1924] 1 K.B. 239; 40 T.L.R. 85, D.C.
[20] [1902] 2 K.B. 61; 18 T.L.R. 464, C.A.
[21] (1885) 16 Q.B.D. 577, C.A.
[22] [1899] 1 Ch. 599.
[23] [1895] 1 Q.B. 395, D.C.; sub nom. *Clacton Local Board* v. *Harman*, 11 T.L.R. 118.
[24] [1933] A.C. 680, P.C.

1960

Ware Urban District Council v. Gaunt.

Ashworth J. stated the facts, read the definition of "street" in section 5 of the Private Street Works Act, 1892, and continued: The appellants contend that Walton Road, excluding the footpath, was a street not repairable by the inhabitants at large and they naturally rely on section 23 of the Highway Act, 1835, one object of which was to protect ratepayers from being saddled with liability to repair roads laid down by private persons and dedicated to the public, unless the conditions prescribed in that section were complied with. In *Cababé* v. *Walton-on-Thames District Council*,[1] Hamilton L.J. said[2]: "Upon the face of it section 23 of the Highways Act, 1835, is "enacted in relief of the public. It severs that connection "between the right of the public to use a road as a highway and "the obligation of the public to repair the road, which at common "law was inseverable. It does so by annexing a statutory con-"dition to repairability (see *per* Blackburn J. in *Reg.* v. "*Dukinfield*[3]) while leaving untouched the acquisition of a right "of highway by the public against the owner of the soil. The "occasion which brought before the attention of the Legislature "the need of some enactment was the practice of building "owners who dedicated ways across their building estates with "an eye to the development of the estate irrespective of public "needs, and thereby cast on the parish or its successors in "obligation the cost of repairs which enured almost exclusively "to the advantage of themselves and their tenants or pur-"chasers." It has not been suggested that the conditions prescribed in section 23 were complied with when Walton Road was first laid out in 1885 or since that date, so as to render it repairable by the inhabitants at large. Prima facie, therefore, Walton Road (excluding the public footpath on its westerly side) would appear to fall within the definition of "street" in the Act of 1892.

The respondents concede that if Walton Road (excluding the footpath) is properly to be regarded as a road, the conditions prescribed in section 23 of the Act of 1835 have not at any time been complied with, but they contend that, in spite of its name and in spite of the description given to it in quarter sessions' Order of 1885, Walton Road is and has been for over forty years a footpath, and therefore not within the mischief of section 23. It is argued that for the purposes of that section and the ascertainment of the true character of a public way one must have regard to the rights exercised by the public over it, and that in the present case there was no evidence before the justices of any greater public right than that of walking on Walton Road on foot. In other words, even if a strip of land is dedicated to the public as a road, its legal character is that of a footpath if

[1] [1913] 1 K.B. 481.
[2] Ibid. 494.
[3] (1863) 4 B. & S. 158.

use as a footpath is the only use which the public choose to make of it.

The respondents' contentions were said to derive support from the decision of this court in *Robinson* v. *Richmond (Survey) Borough Council*,[4] but, in my judgment, that case is plainly distinguishable from the present. In that case the strip of ground was not laid out as a road and such dedication of it as was proved or presumed was dedication as a footpath. Moreover, it is clear from the later decision of this court in *Margate Corporation* v. *Roach*[5] that if the land in question was in fact laid out as a road or occupation way the provisions of section 23 of the Act of 1835 would be applicable to it, even though the only public use made of it was as a footpath. It is only right to mention that the decision in the *Margate* case[5] was given after the justices' decision in the present case, and therefore could not have been brought to their notice. In my judgment, in spite of Mr. Mottershead's persuasive efforts to suggest the contrary, the decision in the *Margate* case[5] is binding on this court, and should be followed.

The justices appear also to have been influenced by the decision in *Kingston-on-Thames Corporation* v. *Baverstock*.[6] At first sight that case has a similarity to the present case in that an existing footpath was diverted to run along a new road lately made, but in my view there is an important distinction between the two cases. In the *Kingston* case[6] the justices found that the whole of the new road including the new footpath was taken and agreed to by the public authorities in lieu of the old diverted footpath only and that that then became a highway which was to be repairable by the parish as distinguished from the single strip along the side. This court held that there was sufficient evidence to justify the justices' finding. In my view, not only is there no evidence to justify a similar finding in the present case, but such evidence as there is points in the opposite direction, in particular the evidence as to the precise width of the new footpath alongside Walton Road.

Reliance was also placed by the respondents on the decision in *Attorney-General* v. *Esher Linoleum Co. Ltd.*[7] The headnote reads as follows: "Where there is a public footway, and "adjacent land along the same line as the footway, but increas-"ing the width, is laid out by the owner of the soil as a way "for carriage traffic, even for private carriage traffic, the pre-"sumption of law, in the absence of evidence to the contrary, "is that the owner has dedicated to public use as a footway all "the space that he has devoted to traffic in fact." It is to be noted that no question of repairability arose in that case, and it is further to be noted that the new carriageway was laid out

[4] [1955] 1 Q.B. 401; [1955] 2 W.L.R. 333; [1955] 1 All E.R. 321, D.C.

[5] (1960) post, p. 1380.

[6] (1909) 73 J.P. 378.

[7] [1901] 2 Ch. 647.

1960

Ware Urban District Council v. Gaunt.

Ashworth J.

alongside an existing public footpath. In his judgment Buckley J. emphasises that the owner of the land who laid out the new carriageway might have taken steps by fencing or otherwise to keep the public to the footpath. In the present case, so far as the northern section of Walton Road is concerned, the diversion order and certificate provided that the diverted footpath should be open to the new road which was already in existence, so that there was no possibility of the footpath being fenced. So far as the southern section is concerned, it is true that the public footpath was in existence before the new road was made and that in the absence of any fence separating the footpath from that section of the new road, it might have been impossible for Arthur Tite or his successors in title to prevent the public from walking over that section. But, in my view, so far as repairability goes, that section of the road retained the character with which it started, namely, that of a road, and remained subject to the provisions of section 23 of the Act of 1835, that is to say, it was not repairable by the inhabitants at large even up to the standard appropriate for a footpath.

For these reasons, I am of opinion that the justices' conclusion, expressed in paragraph 6 (j) of the case, that the whole of Walton Road including the westerly public footpath is a highway repairable by the inhabitants at large, was wrong in law, and it follows that, so far as that issue is concerned, the appellants' resolution, plans, sections, estimates and provisional apportionments should not have been quashed.

The remaining issues in the case relating to matters of detail were in substance decided by the justices in favour of the appellants. The respondents were, however, dissatisfied with some of the decisions and (there being no objection to this course by the appellants) submitted that those particular decisions should be reversed or varied.

In the first place, it was submitted that parts of the proposed works were not street works within the meaning of the Act of 1892. In paragraph 4 (1) (*c*) of the case stated, the works in question are set out, but I do not think it necessary to describe them in detail, as counsel for the appellants agreed that they should be excluded.

It is convenient to deal next with the question of street lighting. The justices' conclusion expressed in paragraph 6 (g) of the case stated was that they had power to amend the appellants' resolution to enable them to provide street lighting notwithstanding the absence of any reference to it in the originating resolution dated March 7, 1956. Under section 8 (1) of the Act of 1892, a court of summary jurisdiction hearing objections to proposed street works is undoubtedly given power to amend a local authority's resolution, but the extent to which that power may be exercised is not unlimited. In *Chester*

Corpn. v. *Briggs* [8] it was held in this court that in the absence of a resolution under section 15 of the Act of 1892, justices had no power to insert by way of amendment to a resolution under section 6 of the Act a resolution that the urban authority should contribute in whole or in part to the expenses of private street works. For my part, I see no difference in principle between a request to amend a resolution under section 6 by inserting a matter which should have been the subject of a resolution under section 15 and a request such as was made in the present case, namely, to amend a resolution under section 6 by inserting a matter which under the same section could have been but was not included in the resolution. Section 6 expressly refers to lighting and, in my view, if an authority wishes to include lighting in the works proposed under that section, an essential step is a resolution expressing its dissatisfaction with the existing lighting. That step was not taken in the present case, and I am not prepared to accept the contention that, by approving a surveyor's specification which included proposals regarding lighting, an authority must be taken by implication to have resolved that the existing lighting was unsatisfactory. It is quite possible that the authority's attention was not specifically directed to the question of lighting and, in my view, the respondents, whom it is sought to charge with the expense of (inter alia) new lighting, are entitled to insist that the provisions of section 6 are strictly observed. Accordingly, in my judgment, all references to lighting in the specification and estimate should be struck out.

A somewhat similar point arises in regard to surface water drainage, except that in this instance the justices do not appear to have reached a specific conclusion about it; there is no reference to the point in paragraph 6 of the case stated in which the justices' decisions are set out. The point was, however, argued before them and before us and counsel asked us to deal with it. The appellants contend that these particular works are comprised in the word "channelled" which appears both in section 6 and in the appellants' resolution. The respondents contend that the appropriate word to cover works of the type now under consideration is "sewered," which appears in section 6 but does not appear in the appellants' resolution. I confess that if it were open to me to do so I should give effect to the appellants' argument, on the footing that the works in question, described in the specification as "Provide surface water drain-"age, gulley pots and connections to soakaways," are necessarily or at least reasonably incidental to the channelling and making good of a road. As counsel for the appellants said, there is not much point in channelling a road unless means are provided for taking away such water as flows along the channels. Difficulty, however, arises owing to two decisions of this court,

[8] [1924] 1 K.B. 239; 40 T.L.R. 85, D.C.

1960

Ware Urban District Council v. Gaunt.

Ashworth J.

Wandsworth Borough Council v. *Golds*[9] and *East Barnet Urban District Council* v. *Stacey*.[10] In the latter case the following passage occurs in the judgment of Lord Hewart C.J.[11] "It seems to "me that light is thrown upon the matter by the view which was "expressed—not indeed approved and confirmed, but not dis-"sented from by the other members of the court—by Lord "Alverstone C.J. in the case of *Wandsworth Borough Council* "v. *Golds*.[12] Lord Alverstone C.J. said[13] 'The second point "'relied on by Mr. Danckwerts was that the expense of pro-"'viding the gulleys which formed part of the system of sub-"'terranean drainage'—that is a useful phrase, if I may "respectfully say so—'did not come under the head of paving "'or forming the road, and consequently was not properly "'chargeable to the owners. Speaking for myself, I should "'have great difficulty in coming to the conclusion that the "'construction of a gully, that is to say, of the connection of "'the channel with the sewer, is part either of the paving or "'the formation of the road. The paving of the road is one "'thing. The making of improved drainage to take away water "'which will require to be taken away more rapidly in conse-"'quence of that paving is another.' In that particular case "Lord Alverstone C.J. refrains from expressing a decided "opinion on the point. Pickford J. mentions the point, but "without dealing with it. I think Lord Alverstone C.J.'s "observations throw light upon this case, and I think the true "difference which we have to bear in mind is a difference between "what may be called the system of subterranean drainage on "the one hand and the paving of the road and matters "immediately connected with it on the other hand."

In the *East Barnet* case[14] the respondent frontagers appear to have relied to a large extent on the fact that the existing gullies and connecting pipes had been approved by the urban authority and that improvements and additions to them could not be charged to frontagers under the Act of 1892. In the present case it is found as a fact in paragraph 2 (p) of the case stated that there is in Walton Road a limited system of soakaways designed to carry off surface water, but the respondents have not raised the same contention as was upheld in the *East Barnet* case[14]; their case is founded on the absence of any reference to sewering in the appellants' resolution.

One of the matters which causes me some concern is the lack of any description of the works actually involved in the item in the specification: "Provide surface water drainage, "gully pots and connections to soakaways." Although it is almost certain that this item involves subterranean drainage, there is nothing in the case stated to establish this, and it may

[9] [1911] 1 K.B. 60, D.C.
[10] [1939] 2 K.B. 861; [1939] 2 All E.R. 621, D.C.
[11] [1939] 2 K.B. 861, 867.
[12] [1911] 1 K.B. 60, 67.
[13] Ibid.
[14] [1939] 2 K.B. 861.

be said against the respondents that, if they wished to challenge this point in this court, it was their responsibility to ensure that the relevant material is fully set out. Alternatively, it would be possible to remit the case to the justices so that they could state additional facts, but it was made clear by all the counsel concerned in the case that this course would not be welcomed by them or their clients. Not without some misgiving, I have come to the conclusion that in principle and in the light of the judgments to which I have referred, the respondents are right, but I do not think that it would be right to strike out the whole item, since it may include some works which can legitimately be charged. In my view it is sufficient to say that in so far as the works included in the item involve subterranean drainage they should be struck out.

The remaining issue is, in a sense, the most troublesome of all, namely, whether it is open to the appellants to apportion part of the expense on premises situate on the westerly side of Walton Road but separated from it by the public footpath. This issue involves as an ancillary problem the question whether part of the expense should in any event be apportioned on the public footpath. Section 6 of the Act of 1892 provides (inter alia) that "The expenses incurred by the urban authority in "executing private street works shall be apportioned (subject "as in this Act mentioned) on the premises fronting, adjoining "or abutting on any such street or part of a street." The respondents, the Hertfordshire County Council, are the owners of premises known as the Ware Grammar School, and those respondents contend that such premises front on the public footpath and do not front, adjoin or abut on Walton Road itself. The premises of the other respondents or some of them are situated, so far as the public footpath and Walton Road itself are concerned, in a similar position to Ware Grammar School, and although those respondents did not expressly put forward the contention advanced on behalf of the county council, Mr. Mottershead on their behalf contrived to include in his able argument a measure of support for that contention. Mr. Frank, for the appellants, argued that although the public footpath is repairable by the inhabitants at large, and therefore not of itself a street within the meaning of the Act of 1892, its existence did not prevent one from treating it and Walton Road together as a street within the meaning of section 5. This argument involves construing section 5 as if it read "'Street' means a street in "so far as it is not a highway repairable by the inhabitants at "large." For my part, I am quite unable to give effect to this argument and, in my view, the problem must be considered on the footing that the street in which the works are to be carried out under the Act of 1892 is Walton Road itself excluding the public footpath.

Assuming that the street for the purposes of the Act of 1892 is Walton Road itself, the next problem is to ascertain what

1960

Ware Urban District Council v. Gaunt.

Ashworth J.

premises front, adjoin or abut on the westerly side of that street. In my view, only one answer is possible so far as the word "front" is concerned, namely, the public footpath. The fact that the fronting premises are a public footpath and not private property creates no difficulty. (Cf. *Herne Bay Urban District Council* v. *Payne and Wood.*[15]) For my part, I agree with the submission of Mr. Parrish for the county council that if the premises fronting on Walton Road are the public footpath, it follows that Ware Grammar School does not so front. In my view, not more than one parcel of land can front on a particular part of a street.

The question then arises whether Ware Grammar School can be said to "adjoin" Walton Road. In *Mayor of New Plymouth* v. *Taranaki Electric Power Board*[16] Lord Macmillan said[17]; "Their Lordships agree . . . that the primary and exact meaning of 'adjoining' is 'conterminous.' At the same time it cannot be disputed that the word is also used in a looser sense as meaning 'near' or 'neighbouring.'" In each case, as it seems to me, regard must be paid to the context in which the words appear and. quite apart from any decided cases, I am inclined to think that the context in the present case points to an enlarged rather than a restricted meaning of the word "adjoin." I think that the inclusion of the three alternative types of chargeable premises, namely, those "fronting, adjoining or abutting on," suggest that something more than mere physical contiguity was in the mind of the Legislature. This view is in accordance with that expressed by Bowen L.J. in *Lightbound* v. *Higher Bebbington Local Board*[18]: "In construing such words as 'front,' 'abut,' and 'adjoin,' in this Act of Parliament, actual contiguity is not necessary in order that the terms should be fulfilled. The case of *Wakefield Local Board* v. *Lee*[19] shows that. We have to go further and ascertain what is the true statutory meaning of this term as used in this section; and there is a broad rule of construction, of which the present case, so far as there is any law involved in it (which is very little), is to my mind an illustration. It is that in construing the words you must look at the subject-matter of the section and see what is its scope and object. Here one has a section which presumably is intended to charge persons who are benefited by the work done, and as soon as one finds that, one gets a kind of light shed on the words 'front,' 'abut,' and 'adjoin.' With regard to 'front' and 'abut,' it does not appear to me that these cottages in either plot can be said, in any fair use of language, to front or abut upon the part of the street which has been paved, and it seems to me, though it is not necessary to decide it, that the judgment of Cleasby B. in *Wakefield Local Board* v.

[15] [1907] 2 K.B. 130; 23 T.L.R. 442, D.C.

[16] [1933] A.C. 680, D.C.

[17] [1933] A.C. 680, 682.

[18] (1885) 16 Q.B.D. 577, 584, C.A.

[19] (1876) 1 Ex.D. 336.

"*Lee*[19] is preferable to that of Grove J. There is in this "statute a larger word, 'adjoin,' and we must see whether the "cottages do not fall within the term 'adjoin.' Now, you "cannot define adjoin as meaning benefit of access, or vice versa, "but in considering whether houses adjoin which are placed in "close proximity to the part of the street which is to be paved, "it is a most important fact, and, in many cases, a dominant "fact, to see whether there is a substantial access and advan-"tage which the houses enjoy from that portion of the street "which is to be paved, and a substantial access and advantage "of that kind, coupled with close proximity, may bring the case "within the word 'adjoin,' though there is no actual touch." That case was decided upon section 150 of the Public Health Act, 1875, but the material words are the same.

No doubt in many, if not most, cases where an authority seeks to apportion a share of the expense on premises which do not front on the street which is being made good under the Act of 1892, reliance is placed on the provisions of section 10 of the Act relating to premises having access to the street. But in my view those provisions do not preclude the charging under section 6 of premises which, though not fronting on the street, can properly be said to adjoin it: the circumstances in which such a course can be taken are not likely to occur often, but the present case is, in my opinion, a good illustration. When these circumstances do exist, it follows that the expense of making good the street is charged both on the premises actually fronting and on the premises adjoining, in this case the public footpath and Ware Grammar School. In my judgment, therefore, the premises known as Ware Grammar School adjoin Walton Road and are premises upon which the expenses may properly be apportioned.

ELWES J. I agree.

LORD PARKER C.J. I also agree.

Order that the determination of the justices be reversed in so far as it related to the resolution, plans and sections, and affirmed in so far as it related to the estimates and provisional apportionments and the case remitted to the justices for further consideration in the light of the judgment of the court. No order as to costs.

Solicitors: *Batchelor, Fry, Coulson & Burder* for *Gisby & Son*, Ware; *Russell & Arnholz* for *Chalmers, Hunt & Bailey*, Ware; *A. N. Moon*, Clerk, Hertfordshire County Council.

E. M. W.

[19] (1876) 1 Ex.D. 336.

[QUEEN'S BENCH DIVISION.]

NOTE.

1960
Jan. 29.

Lord Parker C.J., Cassels and Ashworth JJ.

* MARGATE CORPORATION *v.* ROACH.

Highway—Private street works—Footpath—Occupation way—Strip of land laid out as occupation way—Subsequent use by public for right of way on foot only—Whether a highway repairable by inhabitants at large—Highway Act, 1835 (5 *&* 6 *Will.* 4, *c.* 50), *s.* 23—*Private Street Works Act,* 1892 (55 *&* 56 *Vict. c.* 50), *ss.* 5, 7.

CASE STATED by Margate justices.

On October 14, 1958, the appellants, the Margate Corporation, by resolution under section 6 of the Private Street Works Act, 1892, approved a specification, estimate and provisional apportionment of private street works proposed to be done in part of a street, known as St. James's Terrace, Birchington, in the Borough of Margate. A frontager, Stanley D. Roach, the owner of premises shown in the provisional apportionment as liable to be charged with part of the expenses of executing the works, objected to the proposals on the grounds that the alleged street or part of a street was not and did not form part of a street within the meaning of the Act of 1892; and that the street or part of a street was (in whole or in part) a highway repairable by the inhabitants at large.

The following were among the facts found by the justices: The part of St. James's Terrace, Birchington, the subject of the proposed works, was a section 274 ft. in length and with a width between the front boundaries of the properties abutting thereupon varying between 24 ft. 6 ins. and 28 ft. That section was a street as defined by the Public Health Act, 1835. Part of that street, a strip 10 ft. in width running the full length of the street and situated to the west of its centre line, had been laid out as an occupation way at some date after the Highway Act, 1835, was passed, and had been used as an occupation way only at least until 1898. The houses fronting the west side of the street were built in 1898. Thereafter, the 10 ft. strip had been used by the public for a right of way on foot only, and it was now shown in the draft map and statement prepared by the Kent County Council under section 27 of the National Parks and Access to the Countryside Act, 1949, as a public footpath. The corporation had never repaired or maintained the street or any part of it.

The corporation proposed by their specification, estimate and provisional apportionment to make up the full width of the street including the 10 ft. strip at the expense of the frontagers, subject to a contribution by the corporation under section 15 of the Act of 1892.

It was contended by the corporation that the dedication to the public as a highway of the former occupation way was a dedication to which section 23 of the Highway Act, 1835, applied, notwithstanding that the highway was a footpath only; that *Robinson* v. *Richmond* (*Surrey*) *Borough Council* [1] was to be distinguished on its facts in that the path there in question had not been made or set out as an occupation way, private driftway or horsepath, but had been trodden down by public user from which the presumption of dedication as a public footpath arose; and that, accordingly, the 10 ft. strip had only become repairable by the inhabitants at large by virtue of section 47 of the Act of 1949, and that section 50 of that Act preserved the right of the corporation to carry out works to the whole street including the 10 ft. strip and recover the expenses thereof under the Act of 1892.

[1] [1955] 1 Q.B. 401; [1955] 2 W.L.R. 333; [1955] 1 All E.R. 321, D.C.

It was contended by the frontager that *Robinson* v. *Richmond (Surrey) Borough Council* [1] established that section 23 of the Highway Act, 1835, did not apply to the dedication of a highway as a public footpath and governed the determination of the present case; and that, accordingly, the 10 ft. strip was a highway repairable by the inhabitants at large independently of the operation of section 47 of the Act of 1949, so that section 50 of that Act did not apply, and the 10 ft. strip was not within the definition of a street in the Act of 1892.

The justices were of opinion that they were bound to follow and apply the authority of *Robinson* v. *Richmond (Surrey) Borough Council* [1]; that section 50 of the Act of 1949 did not, therefore, apply, and that the appellants had no power to make up the 10 ft. strip under the Act of 1892, and, accordingly, they quashed the corporation's resolution.

The corporation appealed.

Nigel Bridge for the corporation.

The frontager did not appear and was not represented.

The following cases were cited in argument: *Robinson* v. *Richmond (Surrey) Borough Council* [2] and *Reynolds* v. *Barnes*.[3]

LORD PARKER C.J. This is an appeal by way of case stated by justices for the Borough of Margate, who heard an objection by a frontager to a resolution of the Margate Corporation under section 6 of the Private Street Works Act, 1892. The justices' decision, given on April 10, 1959, was that the land to which the resolution applied had become land repairable by the inhabitants at large, and they quashed the resolution.

The circumstances were these. The corporation's resolution related to a section of St. James's Terrace, Birchington, 274 ft. in length, and varying between 24 ft. 6 ins. and 28ft. in width. Included in this section was a strip of land 10 ft. in width which had been laid out a long time ago as an occupation way, and had been used as such until 1898. In 1898 a housing development took place with houses fronting the west side of the street, and thereafter the 10 ft. strip had been used by the public for a right of way on foot only. It is now shown in the draft map and statement prepared by the Kent County Council under the provisions of section 27 of the National Parks and Access to the Countryside Act, 1949, as a public footpath. The corporation had never repaired or maintained the street or any part of it, and the resolution approving specifications, estimates and provisional apportionment was for the purpose of making up the full width of the street, including the 10 ft. strip at the expense of the frontagers. The respondent, who was one of those frontagers, objected, as he was entitled to do, under section 7 of the Private Street Works Act, 1892, on two grounds, both being grounds within section 7. The first was that the alleged street or part of a street was not and did not form part of the street within the meaning of the Act of 1892; secondly, that the street or part of the street was in whole or in part a highway repairable by the inhabitants at large.

Section 5 of the Private Street Works Act, 1892, defines streets to which that Act applies in this form: "In this Act, if not inconsistent "with the context, . . . the expression 'street' means (unless the con- "text otherwise requires) a street as defined by the Public Health Acts, "and not being a highway repairable by the inhabitants at large."

There is a finding here that the section in question was a street as

[1] [1955] 1 Q.B. 401.
[2] Ibid.
[3] [1909] 2 Ch. 361.

1960

Margate Corporation v. Roach.

Lord Parker C.J.

defined by the Public Health Act, 1875, and the sole question, accordingly, is whether it had become a highway repairable by the inhabitants at large. That the public acquired rights over the strip from 1898 onwards is perfectly clear, and, accordingly, there is a presumption of a dedication to the public. But the real question here is whether the public, although they acquired such rights, became responsible for the repair of the strip by reason of section 23 of the Highway Act, 1835. That section, so far as it is relevant here, is in these terms: "... no road or occupation way made or hereafter to be made by and "at the expense of any individual or private person, body politic or "corporate, nor any roads already set out or to be hereafter set out as "a private driftway or horsepath in any award of commissioners under "an Inclosure Act, shall be deemed or taken to be a highway which "the inhabitants of any parish shall be compellable or liable to repair, "unless the person, body politic or corporate, proposing to dedicate "such highway to the use of the public ..." broadly speaking, shall have made the same up to a certain standard.

It is said by the corporation that that section applies in the present case. It is said that here was an occupation way laid out a long time ago and after the passing of this Act of 1835. There is an express finding to that effect in the case. Accordingly, if the public thereafter, as they did in 1898, got rights over that occupation way, albeit only for persons on foot, it is said that section 23 prevents the inhabitants at large being liable for its repair.

I confess that, prima facie, it seems to me that the facts of this case come fairly and squarely within section 23. What troubled the justices is clear, and that is the decision of this court in *Robinson* v. *Richmond (Surrey) Borough Council.*[1] The justices took the view that that case governed the facts of the present case, that the facts of the present case were indistinguishable, and, accordingly, they felt bound to quash the resolution and to hold that the case did not come within section 23.

In *Robinson* v. *Richmond (Surrey) Borough Council*[1] it is to be observed that there never was any form of road or occupation way made at the expense of the individual or private person within section 23. What happened there was that when land was divided into plots a strip was left abutting on to the plots, and at once that strip was used not only as access to the plots which were being developed but was, as was found, trodden down and used as a footpath by the public.

In that state of facts this court held that section 23 did not apply, and, accordingly, there having been a dedication to the public, that the strip had become repairable by the inhabitants at large, and being so repairable, was not a street within the meaning of that term in the Private Street Works Act, 1892. Be it observed that the facts here are very different because, whereas in the *Richmond* case[2] there had been no previous laying out at all, in the present case this strip with which we are concerned was originally an occupation way. Accordingly, this case, unlike the *Richmond* case,[2] does come within section 23 unless it can be said that the mere fact that the subsequent dedication is in respect of a footpath makes a difference. In my judgment it makes no difference. I have come to the conclusion that, while the *Richmond* case[2] is binding on this court, the facts here are entirely different, and that, on the facts in this case, section 23 applies. The conditions of section 23 have never been fulfilled. Accordingly, this strip has never become repairable by the inhabitants at large and is, therefore, a street within the Act of 1892. I would allow this appeal and the case should go back with a direction that the justices' conclusion was wrong in law.

Cassels J. I agree. I was a party to the decision in *Robinson* v. *Richmond (Surrey) Borough Council,*[2] and I agree that that case is

[1] [1955] 1 Q.B. 401. [2] Ibid.

distinguishable for the reasons set out in the judgment which has just been delivered by my Lord, that the facts of this case are very different from the facts in that case.

1960

MARGATE CORPORATION v. ROACH.

ASHWORTH J. I agree.

Appeal allowed.

Solicitors: *Sharpe, Pritchard & Co. for T. F. Sidnell, Margate.*

J. F. L.

[COURT OF APPEAL.]

* PIDDOCK v. CLIFFORD PRODUCTS LTD. INDUSTRIAL GUARDING EQUIPMENT LTD. (THIRD PARTY). BALDWIN INSTRUMENT CO. LTD. (FOURTH PARTY). B.A.L. LTD. (FIFTH PARTY).

C. A.

1960 *Nov.* 8, 9.

Sellers, Pearce and Devlin L.JJ.

[1956 P. No. 362.]

Practice—Parties—Joinder—Third party procedure—Third, fourth and fifth parties—Application by third party to serve fourth party notice on fifth party—Supreme Court of Judicature (Consolidation) Act, 1925 (15 *&* 16 *Geo.* 5, *c.* 49), *s.* 39 (1) (*b*)—*R.S.C., Ord.* 16A, *rr.* 1, 11—*Ord.* 16, *r.* 11.

The third party to an action was given leave to issue a fourth party notice, and the fourth party was given leave to issue a fifth party notice. The issues between plaintiff, defendant and third party only were then tried. The fourth and fifth party notices having been served, the third party took out a summons (as the third party contended) under R.S.C., Ord. 16A, r. 11,[1] asking for leave to serve a fourth party notice on the fifth party:—

Held, (1) that the proposed fourth party proceedings under Order 16A, r. 11, were misconceived, since the fifth party was already a party to the proceedings.

(2) (*per* Sellers and Pearce L.JJ.), that the appropriate procedure in the circumstances was for the third party to proceed by way of original writ against the fifth party and apply to consolidate that action with the proceedings already in existence.

[1] R.S.C., Ord. 16A, r. 1 (1): "Where in any action a defendant claims as against any other person not already a party to the action (in this Order called the third party) (*a*) that he is entitled to contribution or indemnity, or (*b*) that he is entitled to any relief or remedy relating to . . . the original subject-matter of the action . . . or (*c*) that any question or issue relating to or connected with the said subject-matter is substantially the same as some question or issue arising between the plaintiff and the defendant . . . the court or judge may give leave to the defendant to issue and serve a 'third party notice.'"

R. 11: "Where a third party makes as against any person not already a party to the action such a claim as is defined in rule 1 of this Order, the provisions of this Order regulating the rights and procedure as between the defendant and third party shall apply mutatis mutandis as between the third party and such other person, and the court or judge may give leave to such third party to issue a third party notice. . . ."

C. A.
1960

Piddock
v.
Clifford
Products
Ltd.

Semble, that the third party could have applied under Order 16, r. 11,[2] to join the fifth party as an additional fourth party.

Appeal from Elwes J.

An action brought by the plaintiff, Mrs. Ada May Piddock, against the defendants, Clifford Products Ltd., was commenced on September 13, 1957, and the statement of claim was delivered on October 1, 1957. Leave was given to the defendants on November 14, 1957, to serve a third party notice on Industrial Guarding Equipment Ltd. On January 6, 1958, the third party was given leave to serve a fourth party notice on Baldwin Instrument Co. Ltd., and on December 9, 1958, leave was given to the fourth party to serve a fifth party notice on B.A.L. Ltd.

On December 15, 1958, judgment was given for the plaintiff against the defendants, and for the defendants against the third party; the issue between the third and fourth parties had been adjourned and the fourth party notice was only served on the fifth party after that. On April 20, 1960, the third party took out the present summons to issue a fourth party notice against the fifth party, which would have had the effect of making the fifth party a co-defendant of the fourth party. The application was refused by Master Lawrence on June 14, 1960, and on appeal his decision was reversed by Elwes J. on July 27, 1960. The fifth party appealed from that decision.

Bernard Caulfield for the fifth party.
E. Ryder Richardson Q.C. and *Ian Fife* for the third party.

The following cases were cited in argument: *Birmingham and District Land Co. Ltd.* v. *London and North Western Railway Co.*[3]; *Caister* v. *Chapman*.[4]

Sellers L.J. One of the complaints which appealed to the master was that the interval of time was so long that no order should be made. That is a factor which also has a bearing in this court, which has to consider all the circumstances of the case. It appears (and this is how the appeal was advanced before us) that, although not in terms so stated, the summons was taken out under, and reliance was placed on, R.S.C., Ord. 16a, r. 11. [His Lordship read R.S.C., Ord. 16a, r. 11, and continued:]

[2] Ord. 16, r. 11: "No cause or matter shall be defeated by reason of the misjoinder or nonjoinder of parties, and the court may in every cause or matter deal with the matter in controversy so far as regards the rights and interests of the parties actually before it. The court or a judge may, at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court or a judge to be just, order that the names of any parties improperly joined . . . be struck out, and that the names of any parties . . . who ought to have been joined, or whose presence before the court may be necessary in order to enable the court effectually . . . to adjudicate upon and settle all the questions involved in the cause or matter, be added."

[3] (1887) 56 L.T. 702.

[4] [1884] W.N. 31.

Notwithstanding the argument advanced by Mr. Caulfield that this rule could not be applied because here there was no action having regard to the termination of the proceedings as between the plaintiff, the defendants, and the third party, I have come to the conclusion that that argument does not require any detailed consideration because on the facts of this case the rule is not applicable at all as the fifth party against whom these proceedings have been taken was already a party to the proceedings and to the action to which reference is made in that regulation.

The argument against that was really to accept that the summons was wrongly issued if that order and rule had to be relied on, that it was not expressly relied on, and that the right claimed to join the fifth party as a fourth party, or a co-defendant to the third party's proceedings in effect, was to be derived from section 39 (1) (*b*) of the Supreme Court of Judicature (Consolidation), 1925.[1] It may well be that the proceedings could have been taken under Order 16, r. 11, which seems to embrace, together with Order 16a, the rules to carry out the provisions of the section of the Act to which reference is made. But the procedure in reliance of Order 16, r. 11, in order to join the fifth party in the way that is intended, has not been followed, and in my view the method adopted has been misconceived and the appeal should be allowed on that ground—that whilst the rights of the third party against the fifth party might have been achieved in this particular way, the procedure has not been adopted. I would accede to the submission of Mr. Caulfield that in all the circumstances of this case it would be more appropriate, having regard to the state of this procedure at the present time, to leave the third party to proceed by way of original writ and to consolidate the proceedings, if it is so desired, with those that are already in being.

I do not think it an appropriate occasion to deal in greater detail with the submissions which were made with regard to the rules as to whether or not there is any lacuna or gap in them (which I very much doubt) or as to whether they could properly have been called to the aid of the claim which is made by the third party to exercise its rights against the fifth party. On the facts of this case a writ is the appropriate remedy.

I would allow the appeal.

[1] Supreme Court of Judicature (Consolidation) Act, 1925, s. 39 (1): "The court or judge shall have "power to grant to any defendant in "respect of any equitable estate or "right or other matter or equity, and "also in respect of any legal estate, "right or title claimed, or asserted "by him . . . (*b*) all such relief "relating to or connected with the "original subject of the cause or "matter, claimed in like manner "against any other person, whether "already a party to the cause or "matter or not, who has been duly "served with notice in writing of the "claim pursuant to rules of court or "any order of the court, as might "properly have been granted against "that person if he had been made a "defendant to a cause duly instituted "by the same defendant for the like "purpose."

C. A.
1960
Piddock v. Clifford Products Ltd.

Pearce L.J. I agree. In my view, since the fifth party are already a party, the proposed fourth party proceedings against them cannot properly be allowed under Order 16a, r. 11. It appears that section 39 of the Judicature Act, 1925 (to which my Lord has referred) gives to the third party the rights which, under the proposed fourth party notice, they seek to assert against the fifth party. It may well be that they could apply under Order 16, r. 11, as Sellers L.J. has suggested during the argument, to add the fifth party as a defendant in the existing third party proceedings, although that course would create certain difficulties under the later rules of Order 16. But, be that as it may, there has been great delay in starting these fourth party proceedings and no hardship will be caused if they are refused to the third party: they can at any time issue a writ against the fifth party and apply to consolidate that action with the third party proceedings that are already in existence against the fourth party; and in the end that course may well save costs.

I agree with what my Lord has said.

Devlin L.J. Order 16a, r. 3 provides that "The third party "shall, as from the time of the service upon him of the notice, "be a party to the action with the same rights in respect of his "defence against any claim made against him and otherwise as "if he had been duly served in the ordinary way by the defen-"dant." That rule, therefore, expressly gives to the third party all the rights of a defendant. It seems to me that it must, by necessary implication, give to the defendant in the action all the rights of a plaintiff in the third party proceedings. You cannot have a defendant without a plaintiff, and you cannot give to the defendant all the rights of a defendant without letting the plaintiff have all the rights of a plaintiff.

Rule 11 of Order 16a allows a third party to bring in a fourth party, and says that " . . . the preceding Rules of this order "shall apply mutatis mutandis . . . ," and accordingly the position is that, under Order 16a, r. 3, if the third party brings in a fourth party, the fourth party has all the rights of a defendant and the third party has all the rights of a plaintiff. One of the rights of a plaintiff is to be able to apply under Order 16, r. 11, to join another defendant. It follows from that, in my view, that one of the rights of a third party who has joined a fourth party must be to be able to apply to the court for leave to join an additional fourth party. In my judgment, that is the course which the third party ought to have taken in this case when they wished to join Mr. Caulfield's clients as an additional fourth party. They did not, however, do so: they applied (as if there were no fourth party in existence) under Order 16a, r. 11, for leave to serve a fourth party notice. Now the inherent vice in that is that, whether Order 16a, r. 11 applies or not (and I shall deal with that in a minute), it is not the right procedure if there is a fourth party, with the rights of a defendant, already in

existence; for when a plaintiff applies to join another defendant, the existing defendant has a right to be heard and therefore the procedure is that a summons should be taken out as against him under Order 16, r. 11. He may object that it is unnecessary for the trial of his action and that it would embarrass him if another defendant were joined, and his objection may be sustained. If it is not sustained, then the order is that the writ should be amended and served on the additional defendant. Just the same procedure ought, in my judgment, to be followed if a third party wants to add another fourth party. It was not followed in this case.

Apart from that, another objection has been raised to the course taken by the third party here—an objection which is based on what I may call the incidental fact that Mr. Caulfield's clients happen to be fifth parties. It is not, as it were, inevitable that they should be. A third party might well want to join as an additional fourth party someone who is not in the action at all. But, as it happens, Mr. Caulfield's clients are in the action—if "the action" is given the broader meaning of including the whole set of proceedings—as a fifth party. Therefore, it is said that Order 16a, r. 11 cannot apply because it says "Where a "third party makes as against any person not already a party "to the action. . . ."

This emphasises that Order 16a, r. 11 is intended to apply only to a notice which takes the place of an originating writ and not to one which is sought to be used as an alternative to amending a writ. But I think it is sufficient to say that the third party, having failed to take the proper step of issuing a summons under Order 16, r. 11, cannot now succeed in his application.

I appreciate that that is a very technical ground upon which to defeat the application, because although the third party did not take out his summons under Order 16, r. 11, it so happened that the fourth party was a party to all the hearings, and was heard, and presumably had the opportunity of raising any objection, if he desired to raise it, against the joinder of a co-fourth party with him. It is, therefore, a technical ground. But, for the reasons which my Lords have given, in the circumstances of this case I think it is right that the technical argument should prevail and that no relief should be given to the third party in this case such as might have been given if the nature of his application had been more meritorious.

I agree that the appeal should be allowed.

Appeal allowed with costs.

Solicitors: *Clifford-Turner & Co.; A. D. Vandamm & Co. for Hewitt & Walters, Birmingham.*

I. G. R. M.

[HOUSE OF LORDS.]

H. L. (E.)†
1960
Nov. 30.

* ROUTH'S TRUSTEES . . . . . PETITIONERS;

AND

CENTRAL LAND BOARD . . . . . RESPONDENTS.

ROUTH . . . . . PETITIONER;

AND

SAME . . . . . RESPONDENTS.

PETITION for leave to appeal to the House of Lords from decision of the Court of Appeal.[1]

The APPEAL COMMITTEE dismissed the petition.

F. C.

[1] [1960] 1 W.L.R. 737; [1960] 2 All E.R. 436.

† *Present*: VISCOUNT SIMONDS, LORD REID and LORD TUCKER.

[CHANCERY DIVISION.]

1960
Nov. 29.

Cross J.

* *In re* TRUNDLE, DECD.

[1960 T. No. 265.]

Will—Construction—"Money in bank"—Whether confined to credit balance—Whether inclusive of travellers' cheques.

By his will a testator bequeathed to his two godchildren "any "monies that I have in the bank." He then bequeathed a cottage and its contents and the contents of his flat and his car to his executrix to dispose of as she thought fit. The will contained no residuary gift. At the date of his death the testator had a credit balance on a drawing account at his bank and there were deposited at the bank in his name (inter alia) some national savings certificates, some share certificates, a pass book showing the testator's title to some shares in a building society and some post-war credit certificates. Some uncashed travellers' cheques bought from the bank were found in the testator's flat.

On a summons to determine what assets were comprised in the gift to the testator's godchildren:—

Held that, on the true construction of the will, the bequest of "any monies that I have in the bank" must be given its prima facie meaning and referred simply to the testator's credit balance on his drawing account at the bank, but that it included the uncashed travellers' cheques bought from the bank with part of that credit balance. Accordingly, the cash in the drawing account at the bank and the travellers' cheques passed under the gift to the godchildren but the other items did not.

In re Prater (1888) 37 Ch.D. 481; 4 T.L.R. 249, C.A. applied.

Perrin v. *Morgan* [1943] A.C. 399; 59 T.L.R. 134; [1943] 1 All E.R. 187, H.L. considered.

ADJOURNED SUMMONS.

By his will, dated September 26, 1956, the testator, Guy Marcus Trundle, appointed Vera Emanuel to be his executrix and directed that all his just debts, funeral and testamentary expenses should be paid as soon as conveniently might be after his decease. The will continued "I give and bequeath unto "Sonya Paynter . . . and Penelope Bray . . . [his godchildren] "any monies that I have in the bank to be divided between them. "My cottage in Cornwall and contents—the contents of my flat "at 816, Chelsea Cloisters and my car I leave to [the executrix] "to dispose of as she considers fit." The will contained no residuary gift. The testator died on December 3, 1958, and his will was proved by the executrix on January 21, 1959.

At the date of his death the testator had a credit balance on his drawing account at Lloyd's Bank Ltd. of £336 3s. 1d. and there were deposited at the bank in his name 1,000 national savings certificates, some certificates of shares in various companies, a pass book showing his title to some shares in the Leeds Permanent Building Society, some post-war credit certificates and a diamond ring. His estate also included, inter alia, arrears of salary and sick pay due from his employers, the General Electric Co. Ltd., a sum of £1,507 11s. 10d. representing the repayment of contributions to a pension scheme of his employers, a Hillman Minx car, personal effects and uncashed travellers cheques worth £50 bought by the testator from the bank and found, at his death, in his flat.

By an originating summons dated February 23, 1960, the executrix asked that it might be determined which of the assets were comprised in the gift to the testator's godchildren.

S. W. Templeman for the executrix.
John Brightman for the testator's next-of-kin.
Martin Jacomb for the testator's godchildren.

The following case, not referred to in the judgment, was cited in argument: *In re Lowe's Estate.*[1]

CROSS J. referred to the will of the testator and his death and continued: There is no doubt that the car and the other personal chattels go to the executrix. They are worth about £675. Some property cannot on any footing come under the gift to the godchildren. The principal item which is undoubtedly undisposed of is the sum of £1,507 representing the repayment of the testator's contributions under the pension scheme of the General Electric Co. Ltd. by whom he was employed. He died in employment, and, therefore, that sum became due to him. Then there were some other relatively small sums of money that were due to him from various sources which were also, without doubt, undisposed of.

[1] [1938] 2 All E.R. 774.

1960

TRUNDLE, DECD., *In re.*

CROSS J.

The difficulty arises with regard to a number of assets which were, to use a neutral phrase, connected with his bank. First there were 1,000 national savings certificates deposited in the bank. There were certificates of shares in various companies worth together a few hundred pounds which were also deposited in the bank. Then there was his Leeds Permanent Building Society passbook showing his title to some shares in that society, and some post-war credit certificates, which are simply a record of the liability of the state to pay a sum of money to the holder in the future, which were deposited at the bank. He had a credit balance on his drawing account of £336 3s. 1d. There was a diamond ring also deposited in the bank, and, finally, there were some travellers' cheques which he had bought from the bank which were not in the bank but were in his flat. It is agreed by Mr. Brightman, who appears for the next-of-kin, that the cash balance on the drawing account passes to the godchildren under the gift. It is also conceded by Mr. Jacomb, who appears for the godchildren, that the diamond ring does not pass under the gift because it cannot in any sense be said to be an investment of money. The contest between them is with regard to the other items which I have mentioned.

Apart from authority, I should say that a phrase such as "my "money at the bank" or "my money in the bank" prima facie refers simply to the credit balance which the testator may have in his account at the bank. If authority is needed it is to be found in *In re Prater*,[1] where the Court of Appeal drew a distinction between the gift of "half my property at R's bank" which they held, differing from Chitty J. to include shares, the certificates of which were deposited in the bank, and a gift "of my "money at the bank," which they plainly thought would only cover bank balances.

I do not think that there is anything in *Perrin* v. *Morgan*[2] which tells against this view. *Perrin* v. *Morgan*[2] laid down that the word "money" by itself has no prima facie meaning, whereas before that decision it had been laid down in a number of cases that "money" meant prima facie only cash and debts due, and that in order to extend it beyond that you had to find a particular context. But what Lord Simon said[3] indicates that he accepted the view that "money in the bank" has a prima facie meaning. He said[3]: "Again, . . . it is a matter of common speech to refer "to one's 'money at the bank,' although in a stricter sense the "bank is not holding one's own money and what one possesses is "a chose in action which represents the right to require the bank "to pay out sums held at the call of its customer." That suggests that Lord Simon would not have thought that the phrase "money "at the bank" prima facie covered anything beyond bank balances. But the context of a particular will may show that the

[1] (1888) 37 Ch.D. 481; 4 T.L.R. 249, C.A.

[2] [1943] A.C. 399; 59 T.L.R. 134; [1943] 1 All E.R. 187, H.L.

[3] [1943] A.C. 399, 407.

words "money at the bank" are equivalent to such a phrase as "property at the bank" which the Court of Appeal was dealing with in *In re Prater*.[4]

Mr. Jacomb, who has put the case very persuasively for the godchildren, submitted that here there is sufficient context to show that these words "any monies that I have in the bank" ought to be construed in this will as including all choses in action the documents of title to which are at the bank. The grounds on which he suggested that are that a gift of a bank balance is a somewhat capricious disposition because of its fluctuating character and that the court should incline against a construction which would confine the words to a fluctuating gift of that sort, especially in a case where there is no residuary gift and any property not covered by the disposition would be undisposed of. He argued that the property which is undoubtedly undisposed of by this will all consists of items which the deceased may well not have had in mind as belonging to him when he made his will. As I said, the largest item is the £1,500 which became due at his death in respect of his contributions under the pension scheme. It is likely enough that the testator would not expect to die while still in employment and would not have been thinking of that sum or the other relatively small sums which are undisposed of as being likely to form part of his estate. Mr. Jacomb pointed out if you exclude those items, then, on his construction, everything that the testator had would be disposed of, and he suggested that the scheme of the will was to give the real property and personal effects to his executrix and to give the rest of the personal property to the godchildren. He went on to point out that the words used are not "my money at the bank" or "my "money in the bank" but are "any monies that I have in the "bank." He said that is a vaguer phrase and, in the particular circumstances, can reasonably be held to include all investments the documents of title to which were at the bank and even the future debt from the Government, the record of which was in the bank in the form of post-war credit certificates. It may very well be that this testator did intend this phrase "any monies that "I have in the bank" to include all those items. On the other hand, it is not my function to guess at what he meant. I must construe the words he has used; and, as I have said, I think that "any monies that I have in the bank" mean, naturally, simply the credit balance and I cannot find here any context which would justify me in giving them a wider meaning.

I must now deal with the travellers' cheques which stand on a different footing. Mr. Brightman argued that there is a distinction to be drawn between a credit balance on a drawing account and travellers' cheques, and that, although travellers' cheques undoubtedly represent a debt due from the bank, they are really more like banknotes. He said, therefore, that as the cheques

[4] 37 Ch.D. 481.

1960

TRUNDLE, DECD., *In re.*

Cross J.

themselves were not deposited at the bank but were found in the testator's flat they were not included in the gift. I cannot accept that argument. I think that if a man asks himself what money he has at the bank he may reasonably include in his answer not only his credit balance but also any uncashed travellers' cheques which he has bought from the bank with part of that credit balance.

I therefore propose to declare that the cash in the drawing account and the travellers' cheques pass under the gift to the godchildren but that the other items in dispute are undisposed of.

Declaration accordingly.
Costs and expenses of the executrix as trustee and costs of the defendants on the common fund basis to be paid in due course of administration.

Solicitors: *Moon, Gilks & Moon; Sydney Morse & Co.*

V. A. M.

[QUEEN'S BENCH DIVISION.]

1960 *Nov.* 10, 11.

Lord Parker C.J., Ashworth and Elwes JJ.

* LEACH *v.* LITCHFIELD.

National Insurance — Contribution — Failure to pay — Conviction for failing to pay one contribution—Order for payment of arrears—Whether justices have power to mitigate payment of arrears—"Recoverable as a penalty"—National Insurance (Contributions) Regulations, 1948 (*S.I.* 1948, *No.* 1417), *reg.* 19 (5)—*Magistrates' Courts Act,* 1952 (15 *&* 16 *Geo.* 6 *&* 1 *Eliz.* 2, *c.* 55), *s.* 27 (1).

Justices—Fine or penalty—National Insurance contribution—Failure to pay—Order for arrears—Jurisdiction to mitigate payment of arrears—"Recoverable as a penalty"—National Insurance (Contributions) Regulations, 1948, *reg.* 19 (5)—*Magistrates' Courts Act,* 1952, *s.* 27 (1).

The defendant was summoned before justices for failing to pay a contribution which he was liable to pay under the National Insurance Acts, 1946 to 1957, as a self-employed person, contrary to section 2 (6) of the National Insurance Act, 1946. A notice was also served on the defendant, together with the summons, under regulation 19 of the National Insurance (Contributions) Regulations, 1948,[1] that, in the event of his being convicted of the offence,

[Reported by A. D. RAWLEY, Esq., Barrister-at-Law.]

[1] National Insurance (Contributions) Regulations, 1948 (S.I. 1948, No. 1417), reg. 19: "(1) In any case "where . . . an insured person has "been convicted of the offence under "subsection (6) of section 2 of the "Act of failing to pay a contribu-"tion, he shall be liable to pay to "the National Insurance Fund a sum "equal to the amount which he failed "to pay. . . . (3) On any such con-"viction as is mentioned in [para-"graph (1)], if notice of intention to "do so has been served with the sum-

it was intended to give evidence of his failure to pay other contributions, which together with the contribution, the subject of the summons, amounted to £19 16s. The defendant pleaded guilty to the offence and the justices found that he had failed to pay contributions which he was liable to pay amounting to £19 16s. The justices imposed a fine and, taking into consideration the defendant's financial circumstances, reduced the sum of £19 16s. to £5 and ordered the latter sum to be paid at the rate of 5s. a week, purporting to do so by virtue of powers conferred on them by section 27 (1) of the Magistrates' Courts Act, 1952.[2] On appeal by the prosecutor against the reduction of the order:—

Held, allowing the appeal, that the words "shall be recoverable "as a penalty" in regulation 19 (5) of the regulations did not mean that the arrears ordered to be paid were a penalty, but that they were to be recovered in like manner as if they were a penalty. Accordingly, the order for arrears in no sense being a penalty or a fine, section 27 (1) of the Magistrates' Courts Act, 1952, did not apply and the justices had no power to reduce the order.

CASE STATED by the justices for the petty sessional division of Godalming sitting at Guildford.

The following facts and summary of the case stated are taken from the judgment of Lord Parker C.J. On December 9, 1959, an Information was preferred by the prosecutor, Maurice Albert Leach, an inspector of the Ministry of Pensions and National Insurance, against the defendant, Harry Leonard Litchfield, that he did fail to pay a certain contribution in respect of the week commencing on October 5, 1959, which he was liable to pay under the National Insurance Acts, 1946 to 1957, as a self-employed person, contrary to section 2 (6) of the National Insurance Act, 1946.

The justices found the offence proved and inflicted a fine, upon which nothing turns, but the prosecution, at the same time as the summons was served, had given notice under regulation 19 of the National Insurance (Contributions) Regulations, 1948 (S.I. 1948, No. 1417) that in the event of the defendant being convicted of the offence, it was their intention to give evidence of his failure to pay certain other contributions. The total of those other contributions, together with the contribution in respect

"mons or warrant, evidence may be "given— . . . (*b*) in the case of an "insured person (other than an employed person), of the failure on his "part to pay other contributions . . . "and on proof of such failure . . . "the insured person shall be liable to "pay to the National Insurance Fund ". . . a sum equal to the total of all "the contributions under the Act . . . "which he is so proved to have failed "to pay. . . . (5) Any sum ordered to "be paid to the National Insurance "Fund . . . under this regulation "shall be recoverable as a penalty. ". . . (8) Nothing in this regulation "shall be construed as preventing the "Minister from recovering any sums "due to the National Insurance Fund ". . . by means of civil proceedings."

[2] Magistrates' Courts Act, 1952, s. 27 (1): "Where under any enactment passed before the commencement of this Act a magistrates' court "has power to sentence an offender to "imprisonment for a period specified "by the enactment, or to a fine of an "amount specified by the enactment, "then, except where an Act passed "after the thirty-first day of December, eighteen hundred and seventy-"nine, expressly provides to the contrary, the court may sentence him "to imprisonment for less than that "period or, as the case may be, to "a fine of less than that amount."

1960

Leach
v.
Litchfield.

of which he was prosecuted, amount to £19 16s. Those arrears of contributions were proved, but when the justices came to sentence the defendant they purported to exercise powers unedr section 27 of the Magistrates' Courts Act, 1952, to mitigate, not merely the fine that had been imposed as a result of the conviction, but also the arrears of contributions, on the basis that they were a penalty which under that section they had power to mitigate, and they mitigated the order for arrears to £5, to be paid at the rate of 5s. a week, having regard to the defendant's financial circumstances. The question on the appeal was whether section 27 of the Magistrates' Courts Act, 1952, empowered the justices to mitigate the arrears of contributions.

J. R. Cumming-Bruce for the prosecutor.

The defendant did not appear and was not represented.

In addition to the cases referred to in the judgment, the following were cited in argument: *Reg.* v. *Master*[3]; *Shilvock* v. *Booth*[4]; *Reg.* v. *Marlow (Bucks) Justices, Ex parte Schiller.*[5]

Lord Parker C.J. stated the facts, summarised the case stated and continued: To decide this question it is necessary to look at the relevant legislation. We are here concerned with the National Insurance Act, 1946, alone, and not the National Insurance (Industrial Injuries) Act, 1946. Section 2 (1) of the former Act provides that contributions shall be payable by insured persons. I interject that I leave out all references to "employers" because this respondent was self-employed. Subsection (6) of that section provides: "If any . . . insured person fails to pay any contribu-"tion which he is liable under this Act to pay, he shall be liable "on summary conviction to a fine not exceeding £10." Section 54 (1) provides: "All sums due to the National Insurance Fund "shall be recoverable as debts due to the Crown, and without "prejudice to any other remedy may be recovered by the Minister "summarily as a civil debt." Be it observed that that is providing for civil proceedings to recover sums due.

As long ago as 1913, however, it had been found convenient that, where a man was being prosecuted for failure to pay a contribution, the justices at the same time should be able to deal with arrears, and it was provided that notice might be given that he had failed to pay other contributions, leaving it to the justices to find out what was due and to order payment. Accordingly, in the Act of 1946, by section 8 (1), it was provided that: "Regu-"lations may provide— . . . (*e*) (without prejudice to any other "remedy) for the recovery, on prosecutions brought under or by "virtue of this Act, of contributions under this Act or under the "Industrial Injuries Act."

[3] (1869) L.R. 4 Q.B. 285.

[4] [1956] 1 W.L.R. 135; [1956] 1 All E.R. 382, D.C.

[5] [1957] 2 Q.B. 508; [1957] 3 W.L.R. 399; [1957] 2 All E.R. 783, D.C.

Pursuant to that power, regulations were made, and are now in force, entitled The National Insurance (Contributions) Regulations, 1948 (S.I. 1948, No. 1417). Regulation 19 deals with the matters for which power had been given under section 8 (1) (*e*), to which I have referred. Paragraph (1) provides: "In any case "where . . . an insured person has been convicted of the offence "under subsection (6) of section 2 of the Act of failing to pay a "contribution, he shall be liable to pay to the National Insurance "Fund a sum equal to the amount which he failed to pay." Paragraph (3) provides: "On any such conviction as is mentioned "in [paragraph 1], if notice of intention to do so has been served "with the summons or warrant, evidence may be given— . . . "(*b*) in the case of an insured person (other than an employed "person),"—in other words, a self-employed person—"of the "failure on his part to pay other contributions as such an insured "person during those two years"—that is, the preceding two years. Then it goes on: "and on proof of such failure . . . the "insured person shall be liable to pay to the National Insurance "Fund . . . a sum equal to the total of all the contributions under "the Act . . . which he is so proved to have failed to pay." Paragraph (5) then provides: "Any sum ordered to be paid to "the National Insurance Fund . . . under this regulation shall "be recoverable as a penalty." Paragraph (8) provides: "Nothing in this regulation shall be construed as preventing the "Minister from recovering any sums due to the National Insur-"ance Fund . . . by means of civil proceedings."

Pausing there, the vital question is as to the effect of paragraph (5) when it provides that any sum ordered to be paid shall be recoverable as a penalty. Quite shortly, the point is whether those words "shall be recoverable as a penalty" mean that the sum ordered to be paid is a penalty, or whether it is merely saying that the sum ordered to be paid shall be recoverable in like manner as if it was a penalty, which penalty it is not.

It is convenient to consider the matter first in the light of the position before there was any such paragraph as paragraph (5) providing that any sum ordered to be paid shall be recoverable as a penalty. The matter was fully considered by this court in *Fishwick* v. *Gyani*,[1] the headnote of which reads: "Where orders "are made against an employer under section 34 (3) of the "National Insurance Act, 1913, and section 22 (3) of the Un-"employment Insurance Act, 1920, for the payment by him to "the Insurance Commissioners and the unemployment fund "respectively of sums equal to the total amount of his unpaid "contributions in respect of an employee, the sums so ordered to "be paid are recoverable only as a civil debt." In other words, it was there held that under this procedure for giving notice in regard to failure to pay arrears the justices had no power to deal with the matter of the arrears, except in the course of civil proceedings as a civil debt. The argument had been that there

[1] [1925] 1 K.B. 617; 41 T.L.R. 253, D.C.

1960

Leach
v.
Litchfield.

Lord Parker C.J.

was a link, if I may put it in that way, between the provision for the collection of arrears, which prima facie were merely matters of civil debt, and the prosecution, the whole matter was therefore a criminal matter, and could be dealt with by the justices in the criminal proceedings.

Lord Hewart C.J., in his judgment, went into the matter very fully, and he came to the clear conclusion, with which the other members of the court concurred, that throughout, and notwithstanding that the matter arose in criminal proceedings, these arrears were merely a matter of a civil debt. I find it unnecessary to go through the judgment in detail. His view can be summed up in the last few words of his judgment, where he said [2]: "In the statutes we are considering there is no such "mixing or binding together [of civil and criminal procedure]. "That which is civil remains civil, that which is criminal "remains criminal; there are no words linking them together and "stamping them with one and the same character." That, as I have said, was before there was any such paragraph as paragraph (5) stating that the arrears were recoverable as a penalty.

What, then, is the meaning of those words "recoverable as a "penalty"? Approaching this apart from authority altogether, and as a matter of construction, I take the view that those words are clearly saying not that the arrears are a penalty, but that they are to be recoverable in like manner as if they were a penalty, the whole basis of it being that they are not a penalty. There is, however, some authority on the matter. In *Fishwick's* case,[3] Lord Hewart referred to *Reg.* v. *Kerswill.*[4] There the court was considering the effect, in section 66 of the Town Police Clauses Act, 1847, of words which provided that the fare for a hackney carriage might be recovered before a justice "as a "penalty." Mathew J. held that those words did not stamp the arrears, or the fare, in that case, with any criminal character. He said [5]: "But it is said that the last words of the section, "'as a penalty,' stamp the non-payment with a criminal "character. The words are, 'to be recovered as a penalty'— "that is, to be recovered in the same way as a penalty. Those "words do not, in my opinion, alter the nature of the obligation "itself, which remains a purely civil obligation, . . ."

Finally on this point, one cannot shut one's eyes to the fact that it was as a result of the decision of this court in *Fishwick's* case [6] that the words now under consideration were introduced. In other words, the object of the draughtsman was to cure the position which arose as a result of *Fishwick's* case,[6] that the justices were unable to deal with the arrears at the time of the prosecution. The draughtsman, with *Fishwick* [6] in mind, and with *Kerswill* [7] in mind, inserted the words which are now to be

[2] [1925] 1 K.B. 617, 625.
[3] Ibid. 624.
[4] [1895] 1 Q.B. 1; 11 T.L.R. 8, D.C.
[5] [1895] 1 Q.B. 1, 6.
[6] [1925] 1 K.B. 617.
[7] [1895] 1 Q.B. 1.

found in paragraph (5) providing that the arrears "shall be "recoverable as a penalty." In my judgment, as I have said, it seems to be perfectly clear that those words are not making the arrears a penalty.

One comes then, finally, to section 27 of the Magistrates' Courts Act, 1952. That section provides, in subsection (1), so far as it is material: "Where under any enactment passed before "the commencement of this Act a magistrates' court has power "to sentence an offender to imprisonment for a period specified "by the enactment, or to a fine of an amount specified by the "enactment, then [except in certain circumstances] the court "may sentence him to imprisonment for less than that period or, "as the case may be, to a fine of less than that amount."

As I have already said, I take the view that the arrears are in no sense a penalty or a fine, at any rate in the ordinary sense of the word.

There being nobody representing the respondent in this case, Mr. Cumming-Bruce quite rightly has thought it proper to draw our attention to certain provisions upon which an argument to the contrary might be based. He refers us to the definition section, section 126 (1) of the Act, under which: "'Fine' includes "any pecuniary penalty or pecuniary forfeiture or pecuniary "compensation payable under a conviction." It might be argued that those words are at any rate extending the ordinary meaning of the word "fine," and I suppose it might be said that "pecuniary compensation" was apt to cover an order for the payment of the arrears, albeit it was in the nature of a civil debt. For my part, I do not think that the arrears come within any part of that definition. The reference to "pecuniary compensation" is clearly necessary to deal with the case, not uncommon, where under the relevant legislation a court is empowered, in the case of damage, to make an order for compensation to be paid by the prisoner to third parties. It seems to me that the reference to "pecuniary compensation" there is designed and designed only to deal with such a case.

Finally, reference was made to section 126 (3) [8] upon which it was said that some argument might be based. I find it unnecessary to deal with that subsection. It is enough for me to say that I can see no argument that could be based on that subsection, which in any way would alter the opinion I have already expressed.

For those reasons, which I have endeavoured to state shortly, I would allow this appeal, and remit the case to the justices, with a direction that they have no power to mitigate any part of the sums ordered to be paid, other than the fine itself.

[8] Magistrates' Courts Act, 1952, s. 126 (3): "Any reference in this "Act to a sum adjudged to be paid "by a conviction or order of a magis-"trates' court shall be construed as "including a reference to any costs, "damages or compensation adjudged "to be paid by the conviction or order "of which the amount is ascertained "by the conviction or order."

1960

LEACH v. LITCHFIELD.

ASHWORTH J. I agree.

ELWES J. I agree.

Appeal allowed. No order for costs.

Solicitors: *Solicitor, Ministry of Pensions and National Insurance.*

[CHANCERY DIVISION.]

1960 *Nov.* 29, 30; *Dec.* 2.

Pennycuick J.

* PARKER AND OTHERS *v.* EALING BOROUGH COUNCIL.

[1959 P. No. 656.]

Rating — Playing field — Intermittent use by sports club — Whether "occupied for purposes of" club—"Occupied"—"For the purposes of"—Rating and Valuation (Miscellaneous Provisions) Act, 1955 (4 *&* 5 *Eliz.* 2, *c.* 9), *s.* 8 (1) (*c*).

Rating—Rateable occupation—Intermittent use—Playing field used by sports club.

A friendly society on October 18, 1950, entered into an agreement with the officers of its sports club whereby it granted them leave and licence exclusively to use and occupy its sports ground, which had on it a pavilion and other appurtenances, for a term determinable on three months' notice by the society for the sum of £400 for the first year and thereafter of £500 a year. The agreement provided that the ground should only be used as a sports ground and for no other purpose and only from 4.30 p.m. on weekdays and all day on Saturdays, Sundays and bank holidays, and at no other time without the consent of the society. On March 18, 1951, the society entered into a written agreement with a county council whereby it granted to the council a licence to use and occupy the sports ground during the morning and early afternoon on Mondays to Fridays inclusive, to provide a playing field for schools in the area: that licence was for five years from June 1, 1950, for the yearly sum of £530; and by another written agreement made on January 25, 1955, it was followed by another similar licence for five years from July 23, 1955, for the yearly sum of £365. By each agreement the society agreed to pay the rates. From May, 1955, until December, 1957, the society granted a licence to a school to use the ground for one or two hours a week for sums amounting to between £11 and £13 a term.

On a summons taken out by the trustees of the society to determine whether, inter alia, on the true construction of section 8 (1) (*c*) of the Rating and Valuation (Miscellaneous Provisions) Act, 1955,[1]

[1] Rating and Valuation (Miscellaneous Provisions) Act, 1955, s. 8 (1): "This section applies to the following "hereditaments, that is to say— . . . "(*c*) any hereditament consisting of "a playing field (that is to say, land "used mainly or exclusively for the "purposes of open-air games or of "open-air athletic sports) occupied for "the purposes of a club, society or "other organisation which is not "established or conducted for profit "and does not (except on special "occasions) make any charge for the "admission of spectators to the playing field: Provided that this section

the hereditament was one to which section 8 of that Act had applied from and including the rating year 1955–56:—

Held, that on the true construction of section 8 (1) (*c*) of the Rating and Valuation (Miscellaneous Provisions) Act, 1955, the word "occupied" bore its ordinary significance in a rating Act and referred to rateable occupation, and that the words "for the "purposes of" a "club" meant in carrying on the activities of the club, denoting continuous use by the club coterminous in time with the rateable occupation, and that, therefore, the intermittent use of the sports ground by the club was not an "occupation for "the purposes of a club" within the meaning of section 8 (1) (*c*).

Royal London Mutual Insurance Society Ltd. v. *Hendon Borough Council* (1958) 51 R. & I.T. 285, D.C. distinguished.

ADJOURNED SUMMONS.

The following statement of facts is taken substantially from the judgment: In 1921 the Liverpool Victoria Friendly Society acquired a property at Gunnersbury Lane, in the borough of Ealing, which then represented some 11 acres and comprised a sports ground with a pavilion and other appurtenances usually attached to playing grounds. Some time in 1946 the society caused a block of flats to be erected on the western part of the property, leaving something over eight acres for use as a playing field. In 1947 the Middlesex County Council made certain proposals to the society suggesting an intention to acquire the property compulsorily. That threat was repelled on the terms that the county council should have the use of the ground on certain terms, except at week-ends. In 1949 the society spent some £8,000 to £9,000 on the rehabilitation of the ground. On October 18, 1950, the society entered into a licence agreement with certain individuals as the officers of the Liverpool Victoria Sports and Social Club (the "tenants"). By that agreement the society granted to the tenants from June 1, 1950, leave and licence "exclusively to use and occupy their sports ground . . . "for the purposes and during the periods hereinafter mentioned "or such other times as may be mutually agreed" between the society and the club. The licence was determinable on three months' notice by the society, and the tenants agreed to pay £400 per annum during the first year of the licence and £500 per annum thereafter. The agreement provided that neither the ground nor any part thereof should be used for any purpose "other than that of a sports ground for the purpose of playing "football cricket tennis hockey netball and other outdoor games "and athletic sports and for no other purpose from 4.30 p.m. on "weekdays and all day on Saturdays Sundays and bank holidays "and at no other times except with the consent of the [society] "in writing." There was a provision that "The groundsman of "the landlords shall have the right to decide whether play is

"shall not apply to any hereditament "to which section seven of this Act "applies, or to any hereditament occupied by an authority having, within "the meaning of the Local Loans "Act, 1875, power to levy a rate."

1960

Parker v. Ealing Borough Council.

"possible owing to the state of the ground." The society agreed to pay all rates in respect of the premises.

On March 18, 1951, the society entered into a written agreement with the Middlesex County Council under which the society granted to the council a licence to use and occupy the sports ground for the purpose of providing playing fields for schools in the area during periods specified in the schedule "excluding all "Saturdays, Sundays and bank holidays or such other times as "may be mutually agreed between the Council's Chief Education "Officer" and the society: the schedule set out in detail the hours during which the ground might be used, and those hours were, broadly, in the morning and early afternoon on the days from Monday to Friday inclusive. That licence was for five years from June 1, 1950, at the rent of £530 per annum; it also contained a provision that the society's groundsman should have the right to decide when play was possible owing to the state of the ground, and again the society agreed to pay the rates.

That agreement was superseded by another agreement in broadly, similar terms, between the society and the Middlesex County Council dated January 25, 1956, granting a licence to the county council to use the playing fields for five years from July 23, 1955: the amount payable by way of rent was £365 a year after the first six months, and the schedule set out in detail periods, similar to those contained in the first agreement, during which the county council might use the ground, which, again, were certain hours in the morning and early afternoons of the days from Monday to Friday inclusive.

The evidence showed that the combined rents payable by the club and the county council were such as to result in a substantial loss to the society as landlords of the ground. The only other licence given by the society in respect of the ground was to Beacon House School, which used the ground from May, 1955, to December, 1957, for one or two hours a week for sums amounting to between £11 and £13 a term.

The trustees of the society took out a summons to determine whether, on the true construction of section 8 (1) (*c*) of the Rating and Valuation (Miscellaneous Provisions) Act, 1955, the hereditament was one to which section 8 of the Act had applied from and including the rating year 1955–56, and, if so, whether the failure of the rating authority to give the relief provided by section 8 (2) in making and levying their rate for the years 1956–57 and 1957–58 precluded the trustees from the benefit of section 8 (2) in subsequent years.

G. A. Rink Q.C. and *Michael Browne* for the plaintiffs.
Patrick Browne Q.C. and *J. M. Shaw* for the defendants.

The following cases, in addition to those referred to in the judgment, were cited in argument: *Skegness Urban District*

Council v. *Derbyshire Miners' Welfare Committee*[2]; *Harry Ferguson Research* v. *Dawkins*[3]; *Isaacs* v. *Market Bosworth Rural District Council*[4]; *Inland Revenue Commissioners* v. *Forrest.*[5]

Cur. adv. vult.

December 2. PENNYCUICK J. read the following judgment: This is an originating summons which raises certain questions under section 8 of the Rating and Valuation (Miscellaneous Provisions) Act, 1955. The plaintiffs are the trustees of the Liverpool Victoria Friendly Society, and the defendants are the mayor, aldermen and burgesses of the borough of Ealing. The question, summarily, is whether a certain hereditament used as a sports ground qualifies for partial exemption under section 8 of the Act as being occupied for the purposes of a club.

[His Lordship stated the facts and continued:] I need not read the whole of section 8, but for present purposes the part directly in point is section 8 (1): "This section applies to the "following hereditaments, that is to say . . . (*c*) any hereditament "consisting of a playing field (that is to say, land used mainly "or exclusively for the purposes of open-air games or of open-air "athletic sports) occupied for the purposes of a club, society or "other organisation which is not established or conducted for "profit and does not (except on special occasions) make any "charge for the admission of spectators to the playing field." Then there follows a proviso which I shall read later. Subsection (2) provides for partial relief from rates in the case of hereditaments to which subsection (1) applies. It is conceded for the present purpose that the society is the rateable occupier of the ground: that the ground is a playing field within the meaning of section 8 (1) (*c*); and that the club is an organisation "which "is not established or conducted for profit and does not (except "on special occasions) make any charge for the admission of "spectators to the playing field."

The question, therefore, is: Is the ground occupied for the purposes of this club? It seems to me that in paragraph (*c*) the word "occupied" must bear its ordinary significance in a Rating Act and refer to rateable occupation. I think that the words "for the purposes of" in this paragraph must in their context refer to the mode of use of the hereditament and may be paraphrased as "in carrying on the activities of." For example, a hereditament is occupied for the purposes of a shop, factory or school, if its use is in the carrying on of the activities of a shop, factory or school. The same expression "occupied for the "purposes of" appears in subsection (1) (*a*), where it must, I think, have that meaning.

[2] [1959] A.C. 807; [1959] 2 W.L.R. 711; [1959] 2 All E.R. 258, H.L.

[3] [1960] 1 W.L.R. 639; [1960] 2 All E.R. 283, C.A.

[4] [1960] 1 W.L.R. 277; [1960] 1 All E.R. 433, D.C.

[5] (1890) 15 App.Cas. 334; 6 T.L.R. 456, H.L.

1960

Parker
v.
Ealing
Borough
Council.

Pennycuick J.

A simple construction of paragraph (*c*) would be that the paragraph only applies where the club, society or other organisation in question is itself, or a trustee for it is the rateable occupier of the hereditament. That simple construction is excluded, as Mr. Patrick Browne for the corporation admits, by the decision of the Queen's Bench Divisional Court in *Royal London Mutual Insurance Society Ltd.* v. *Hendon Borough Council.*[1] In accordance with that decision is must be at least possible where a hereditament is used under licence by an organisation other than the rateable occupier for the hereditament to be occupied for the purposes of the licensee.

It remains to consider where a hereditament is used for the purposes of a licensee organisation, whether in order to come within paragraph (*c*), the use by the organisation during any given period must be continuous throughout that period, or whether it is sufficient that the use should take place intermittently during the period. On its natural meaning the expression "occupied for the "purposes of" an organisation appears to me to indicate continuous use by the organisation. The occupation by the occupier is from its nature continuous and the whole expression "occupied "for the purposes of an organisation" seems to me to denote, and to denote only, use by the organisation coterminous in time with the occupation by the occupier. Equally, the expression seems to me inapt to denote whole-time occupation by the rateable occupier coupled with the part-time use by the organisation.

The only logical alternative would be to say that use by the licensee during any stretch or stretches of time, however short or discontinuous, is sufficient, for example, the paragraph would apply where the field is licensed for one day during the year to an organisation for the purposes of a show. On the face of it this is an absurd result, and Mr. Rink for the society does not attempt to support it. On the other hand, Mr. Rink has, it seems to me, been unable to suggest any line of demarcation which is logically tenable.

Apart from authority, my conclusion is that the use of this ground for the purposes of the club limited to evenings during the first five days of the week and to Saturdays, Sundays and bank holidays cannot be regarded as constituting occupation of the hereditament by the society for the purposes of the club.

It has, however, been contended by Mr. Rink with much force that the point is concluded in his favour by *Royal London Mutual Insurance Society Ltd.* v. *Hendon Borough Council,*[1] to which I have referred. The headnote to that case is as follows: "A sports ground with pavilion was owned and was rated as "being occupied by an insurance society. It was managed and "controlled by a committee formed jointly by two clubs of "employees of the society on behalf of the society and of the two "clubs. The clubs were not established or conducted for profit.

[1] (1958) 51 R. & I.T. 285, D.C.

"It was used solely by employees of the company and was used "for open-air games, no other activity taking place there. It "was financed by contributions from subscriptions of members of "the clubs, by an annual grant from the society, and by the "society's payment of rates, water rates, insurance and Schedule "A tax." The case stated shows that in respect of the ground occupied by the club under licence no rent had been payable to the society: it further appears that "there was no evidence of "actual occupation of the ground by the society." On those facts the society contended that the ground was within paragraph (*c*). The local authority resisted the claim on grounds which are important in considering the judgment. The contentions of the rating authority were, inter alia: "(ii) that 'for the purpose of a club, "'society or other organisation' within the meaning of section 8 "(1) (*c*) of the Act meant 'wholly or exclusively for the purposes "'of a club, society or other organisation'; (iii) that the "ground was occupied partly for the purposes of the society in "that: (a) the inception and the continuing use of the ground by "employees of the society depended on the financial grant to the "committee made by the society; (b) the payment of the grant "could only be intra vires the society if covered by its purposes "or objects; (c) the purpose of the grant was, inter alia, to "facilitate the recruitment and retention of staff, to maintain "good staff relations and to promote the health and welfare of "the staff; (d) further or alternatively, the rules of the committee and in particular the rule that the stated object of "the committee was to manage the ground partly on behalf of the "society provided for the direct interest of the society in the "occupation of the ground." It is against those facts and those grounds of argument that the judgment of the Divisional Court must be read.

Lord Goddard C.J., after summarising the issues, said [2]: "The "whole point that is raised here is this: It is said that this is one "of the schemes by which the society seeks to attract and benefit "its staff, and, if it benefits its staff with a view to making them a "contented and efficient staff, it shows it is occupied for the purposes of the society. Quarter sessions have said that considerations of that sort are too remote, and I agree with them. I think "the only thing we have to consider here is: "Is the ground being "used as a playing field? Is it occupied for the purposes of a club? "The argument of counsel for the rating authority really asks us to "read into the section 'occupied exclusively for the purposes of "'the club,' or 'occupied substantially for the purposes of the "'club.' I do not think we can read in those words, though for "myself, I am not satisfied that if that word 'exclusively' had "been put in it would have made any difference in this case. It "seems to me that this is a sports ground."

Hilbery J. said [3]: "The argument apparently is that, because a

[2] 51 R. & I.T. 285, 286, D.C. [3] Ibid.

1960

Parker
v.
Ealing
Borough
Council.

Pennycuick J.

"purpose of the society becoming the occupier of the land in question was the formation of such a club, which might be of benefit to its staff who joined it, the occupation of the premises of that club was not exclusive occupation for the purposes of the club but was partly for the purposes of the society. In my view, that is far too remote and this is exactly the sort of case that this sub-section was intended to cover. I agree with the conclusion arrived at by quarter sessions that the suggested purposes or advantages to the respondent society were too remote." Donovan J. said[4]: "I agree. I think quarter sessions were clearly right, because this ground is admittedly occupied for the purposes of such a club as is described in section 8 (1) (*c*). But the rating authority want the words read as 'occupied 'exclusively for the purposes of the club.' The word 'substantially' would not do. What the rating authority must have read in if they want to succeed is the word 'exclusively,' and they support that contention on these grounds: they say that this land was bought by the insurance society. It was bought to fulfil a commercial purpose, namely, a contented, healthy staff, and it is conceded that that is so. Obviously, in order to spend this money the society had to fulfil some purpose within the four corners of its memorandum of association, but of itself that does not justify the court writing in the word 'exclusively' where the rating authority want it written into this section, that is, as qualifying the words 'occupied for the 'purposes of the club,' which is admittedly the case here. Another argument against writing in that word 'exclusively' is this, that in the earlier sub-paragraph of the section dealing with the use of the hereditament the words are: 'any heredita-'ment consisting of a playing field (that is to say, land used 'mainly or exclusively for the purposes of open-air games,' and so on. If Parliament had meant the word 'exclusively' also to govern the expression 'purposes of a club,' it clearly would have said so. Quarter sessions have taken the view that the alleged purpose or advantage to the insurance society is too remote, and I agree, but I would prefer to put it in this way, that this case is within the expression 'occupied for the pur-'poses of the club,' and that is enough. Furthermore, although the land was bought and equipped in the first place to fulfil the purposes of the society, the actual occupation seems to me to be for the purposes of the club, and the benefit to the society is really a by-product of their occupation, albeit a by-product that no doubt was envisaged from the outset."

It seems to me that the ratio decidendi of that case was that the hereditament was occupied for the purposes of the club within the natural meaning of those words, and that the hereditament was not taken out of the paragraph by the concurrent purpose in favour of the society, assuming that those purposes existed at all.

[4] 51 R. & I.T. 285, 286, D.C.

In order to have taken the hereditament out of the paragraph, a qualification of the words would have been required, for example, as suggested by the court, the word "exclusively." The decision was not at all addressed to the position where the use by the organisation is intermittent, and I do not think that there is anything in the decision which is inconsistent with the view which I have taken here, namely, that in such circumstances this intermittent use of the hereditament is not an occupation for the purposes of the club organisation within the natural meaning of the words in paragraph (*c*). If the hereditament is not so occupied within the natural meaning of the words, then, so far from express words being required to take it out of the paragraph, express words would have been required to bring it into the paragraph. Mr. Rink suggested the introduction of such words as "main" or "dominant" before the word "purposes" in order to get the hereditament within the paragraph, but those words are not there.

Before leaving this case I desire to add that I respectfully share the doubts expressed by Lord Goddard C.J. when he said [5]: "I am not satisfied that if that word 'exclusively' had been put "in it would have made any difference in this case," and by Donovan J.[5]: " . . . the actual occupation seems to me to be for "the purposes of the club, and the benefit to the society is really a "by-product of their occupation"; in other words, the so-called purposes which were relied upon by the local authority in that case were not purposes in the sense that that word bears in paragraph (*c*).

For the reasons which I have endeavoured to give, it seems to me that this ground is not within paragraph (*c*) of section 8 (1).

In the course of the argument Mr. Rink at one point suggested that the test of whether a hereditament was occupied for the purposes of a club might be a subjective one depending in effect on the motive of the rateable occupier, namely, here, the society; but Mr. Rink gave up that contention, rightly as it seems to me, and I need not deal with it further.

For the purposes of this judgment, I have treated the use by the club as if it were a gratuitous user having regard to the fact that the society is out of pocket in respect of the ground. It seems to me that different questions would arise where the occupier received a profitable rent from the licensee, but those questions do not arise here, and it is not necessary to consider them.

Mr. Browne advanced an alternative contention under the proviso to subsection (1). The proviso is in these terms: "Pro-"vided that this section shall not apply to any hereditament to "which section seven of this Act applies, or to any hereditament "occupied by an authority having, within the meaning of the "Local Loans Act, 1875, power to levy a rate." The Middlesex County Council is such an authority. The argument was that in

[5] 51 R. & I.T. 285, 286, D.C.

1960

Parker v. Ealing Borough Council.

Pennycuick J.

the present case both the licensee, that is, the club, and the Middlesex County Council, can be treated as occupying the ground and, therefore, the proviso applies. It seems to me, for the reasons which I have already given, that the ground is occupied by the society, and neither by the club nor by the county council, and therefore that argument would fail.

Turning now to the originating summons, the question asked is: "Whether on a true construction of section 8 (1) (*c*) of the "said Act the hereditament aforesaid is one to which section 8 "has applied at all material times from and including the rating "year 1955–1956 until the date hereof." That question I answer in the negative. The second question: "Whether the failure of "the defendant rating authority to give the relief from rates "provided by section 8 (2) in making and levying their rate for "the rating years 1956–1957 and 1957–58 precludes the plaintiffs "from such benefit of section 8 (2) in subsequent years" does not arise on the view which I have taken of the first question: in any event I have heard no argument on it for the reason that I understand the point is decided in this court against the local authority by the decision of Salmon J. in *Waterson* v. *Hendon Borough Council*[6] but Mr. Patrick Browne has mentioned the point in order to keep it open in case this case goes further.

Order accordingly.
Plaintiffs to pay defendant's costs.

Solicitors: *Tickle & Co; Town Clerk, Ealing.*

M. G. T.

[6] [1959] 1 W.L.R. 985; [1959] 2 All E.R. 760.

[COURT OF APPEAL.]

C. A.

1960
Nov. 6, 7, 22.

Ormerod, Willmer and Upjohn L.JJ.

* TICKNER and Another *v.* HEARN and Another.

[Plaint No. P. 355.]

Landlord and Tenant—Rent restriction—Personal occupation—Mental illness—Prolonged absence therefrom—Animus revertendi—Test—Onus of proof.

An elderly lady, the statutory tenant of a rent-controlled house in which she lived with her unmarried daughter, went on a temporary visit to another daughter in July, 1954. While there, she had a breakdown and was admitted to a mental hospital under a summary reception order, suffering from paranoid schizophrenia. She remained in the hospital continuously thereafter, though by November, 1959, when she was 73, she had so far improved as to be regraded to voluntary status and became entitled to discharge herself at short notice. Her unmarried daughter continued to maintain the house as their home.

In December, 1959, landlords, who had purchased the house in January of that year, brought proceedings against the tenant and her daughter, claiming that in view of her long absence the tenant was no longer entitled to the protection of the Rent Restriction Acts, and as the daughter's right to occupation depended on that of her mother, she was similarly disentitled from remaining in possession.

The county court judge found that, though it was unlikely in view of the tenant's age and condition that she would ever leave the hospital, she had always regarded the house as her home and frequently expressed the hope of going back there, and that in view of the advances in medical treatment and her own improvement the possibility of her return to her home one day could not be ruled out. He held that the evidence was just sufficient to discharge the onus on the tenant, and had satisfied him that there had been no real abandonment of possession. On the landlords' appeal:—

Held, dismissing the appeal, that there was evidence on which the judge could find an intention to return to live in the house.

Per Ormerod L.J. In such cases there must be a real hope of return coupled with the practical possibility of its fulfilment within a reasonable time (post, p. 1410).

Per Willmer L.J. Once the tenant's absence is explained by proof of facts which do not of themselves involve an actual intention on his part to abandon possession, the landlord must prove affirmatively that the tenant has in fact abandoned possession (post, p. 1413).

Per Upjohn L.J. After a long absence the onus lies on the tenant of establishing an intention to return. Whether he has abandoned possession is not the relevant test (post, pp. 1415, 1416).

Brown v. *Brash and Ambrose* [1948] 2 K.B. 247; 64 T.L.R. 266; [1948] 1 All E.R. 922, C.A. applied.

APPEAL from Judge Sir Donald Hurst, sitting at Aylesbury County Court.

On January 22, 1959, a house known as "Quetta," Buckland, near Aylesbury, was bought by Albert Edward Tickner and his wife from its previous owner, one Thorne, who had become the owner on November 3, 1957. The house had been occupied for many years on a weekly tenancy by a Mr. and Mrs. Hearn and their family. In January, 1954, Mr. Hearn died and Mrs. Hearn and her daughter, Miss Daisy Blanche Hearn, continued to live in the house, Mrs. Hearn remaining in occupation as a statutory tenant protected by the Rent Restriction Acts.

In June, 1954, Mrs. Hearn, who had nursed her husband through a long illness, went to visit her married daughter in Devizes for a rest and a change. While she was at Devizes she had a mental breakdown, and on August 4, 1954, she was admitted to Devizes Mental Hospital under a summary reception order, suffering from schizophrenia, and remained there up to and including the date of the present proceedings. In November, 1959, she was regraded to voluntary status. It was not in dispute that up to the time of her illness, Mrs. Hearn had every intention of returning to "Quetta."

In December, 1959, the new landlords, the Tickners, applied to the county court for an order for possession of the house, the defendants to the action being Mrs. Hearn by her guardian ad

C. A.
1960
TICKNER v. HEARN.

litem, Miss Daisy Blanche Hearn, and Miss Hearn herself. The landlords alleged that as Mrs. Hearn had left the premises in 1954 and never returned her possession had ceased. It was not in dispute that her daughter had no independent right of her own.

The only medical evidence called at the hearing was that of Dr. Russell, the medical superintendent of the hospital at Devizes, who was called on behalf of the landlords. His evidence as recorded in the judge's notes was that the first defendant, Mrs. Hearn, was a patient admitted on August 4, 1954: "summary "reception order—schizophrenia—73 years. Date of birth "November 25, 1886. Regraded to voluntary status November, "1959; not because cured—present condition, still schiz. while "some degree improvement there is no question of cure. Form "23; not recommended she leave—90 per cent. females voluntary "or informal under new Act. Most unlikely that she will ever "leave hospital—bearing in mind status. Voluntary patient—"this means she can leave in 72 hours; she has not mentioned to "me intention to leave. She requires constant psychiatric care—"day and night nurses. This will continue unless remission of "symptoms—which I do not anticipate." The evidence then discussed the visits paid by the daughters regularly to see their mother. In cross-examination the medical superintendent said: "Patients have home address on record—names, address in case "of necessity. Many times talked to her; she regards 'Quetta' "as her home. She has said like to go back if gets better. "She has spoken about getting better, she has genuine hope of "getting better—remarkable strides in treatment, one cannot say "that there will not be development in treatment to help, but "there is her age to consider. Her age is factor in assessing "chances of recovery." In re-examination he said: "Fair "physical condition—does not mean she is breaking up." Then, in reply to question by the court: "Have had radical cure after "30—ages 40, 50. She has been slightly better in six years—"not fundamental—better behaviour in relationship with other "people and staff. Not able to make decisions as to management "of affairs—if asked to consent to any proposition I would not "allow her to do so. Interviewed her prior to this case—said, "'Do you understand I have to go to court?' She understood "and gave consent. She appreciated that this house was being "considered. She expressed hope she would one day leave "hospital, but appreciated she was not well enough at that time. "She showed a little anxiety; difficult to say whether this was "relative to proceedings—suffers from personal delusions of "persecution."

The judge rgarded the case as one very near the borderline. He said in his judgment on February 3, 1960: "The onus has "been on the defendant in this trying case to establish that there "has been an intention to return or conversely no intention to "leave." After careful consideration of the medical evidence, the judge said: "The evidence is just sufficient in this case to

"discharge the onus and has satisfied me that there has been no "real abandonment of possession"; and he refused to make an order for possession in favour of the plaintiff landlords.

The landlords appealed, asking for that judgment to be set aside or, alternatively, for a new trial. The defendants entered a notice of cross-appeal asking for the affirmation of the county court judgment on other grounds, namely, that the burden of proof was on the plaintiffs to show abandonment of possession.

Andrew P. Leggatt for the landlords.
Peter R. Pain for the defendants.

The following cases, in addition to those referred to in the judgments, were cited in the course of the argument: *Hallwood Estates Ltd.* v. *Flack* [1]; *Wigley* v. *Leigh* [2]; *Stratford* v. *Syrett* [3]; *Welch* v. *Nagy* [4]; *Langford Property Co.* v. *Goldrich* [5]; *Solle* v. *Butcher* [6]; *Territorial and Auxiliary Forces Association of the County of London* v. *Nichols.* [7]

Cur. adv. vult.

Nov. 22. ORMEROD L.J., reading his judgment, stated the facts set out above, and said that the question in the appeal was whether Mrs. Hearn was now entitled to the protection of the Rent Restriction Acts. If she was still the occupying tenant, she was protected. The right of Miss Hearn to continue to live in the premises depended on whether her mother was still a statutory tenant. His Lordship continued: It was submitted on behalf of the landlords by Mr. Leggatt that if Mrs. Hearn was to be allowed to remain as tenant there must be shown to be present not only corpus possessionis but also animus revertendi. Having herself been away from the house for so long a time the burden was on her to establish a positive intention to return. It was argued that the effect of the medical evidence was that she was incapable of forming an intention and therefore it was impossible for her to discharge the burden which her long absence from the house had caused to be laid on her. Mr. Leggatt went further. He argued, on the authority of Asquith L.J.'s definition of "intention" in *Cunliffe* v. *Goodman*, [1] that the intention must be one which could reasonably be carried out, and the medical evidence in this case was that it was extremely unlikely.

On behalf of the respondents [Mrs. Hearn and her daughter] it was argued that once the absence was explained, as it had been

[1] (1950) 66 T.L.R. (Pt. 2) 368, C.A.
[2] [1950] 2 K.B. 305; [1950] 1 All E.R. 73, C.A.
[3] [1958] 1 Q.B. 107; [1957] 3 W.L.R. 733; [1957] 3 All E.R. 363, C.A.
[4] [1950] 1 K.B. 455; 66 T.L.R. (Pt. 1) 278; [1949] 2 All E.R. 868, C.A.
[5] [1949] 1 K.B. 511; [1949] 1 All E.R. 402, C.A.
[6] [1950] 1 K.B. 671; 66 T.L.R. (Pt. 1) 448; [1949] 2 All E.R. 1107, C.A.
[7] [1949] 1 K.B. 35; 64 T.L.R. 438; [1948] 2 All E.R. 432, C.A.
[1] [1950] 2 K.B. 237, 253–254; 66 T.L.R. (Pt. 2) 109; [1950] 1 All E.R. 720, C.A.

C. A.
1960
TICKNER
v.
HEARN.
Ormerod L.J.

in this case, the burden was again cast on the landlord to establish that Mrs. Hearn had abandoned the tenancy, and in view of the fact that she had been unable to form any intention the burden in consequence could not be discharged. Put in a simple form, the argument is that up to the time of being taken ill Mrs. Hearn had every intention of returning. By reason of her infirmity she has at no time since then been capable of changing that intention and therefore has not abandoned the tenancy. This is an attractive argument but cannot, I think, be the right approach to the problem. Otherwise the same reasoning would apply if Mrs. Hearn was in such a hopeless condition that there was no possible chance of her ever being able to leave the hospital. It cannot, I think, be the intention of the Rent Restriction Acts that in such circumstances the statutory tenancy should be allowed to continue. The judge appears to have accepted this argument at one stage of his judgment when he said: "On the "evidence her intention is to return and she has never been in a "position mentally to alter that intention." There cannot be an intention if the mind is no longer capable of forming one. I cannot see the difference between being unable mentally to alter an intention and being unable to form or to have an intention, and if that were the real foundation of the judge's judgment I should be in serious doubt whether it could stand.

Asquith L.J. in *Brown* v. *Brash and Ambrose*,[2] where the question was whether the tenant had in the circumstances retained any corpus possessionis, said: "The question is one of "fact and of degree." It must first be determined, of course, what the question is. I think there must be evidence of something more than a vague wish to return. It must be a real hope coupled with the practicable possibility of its fulfilment within a reasonable time. The judge has said this, and it appears to be in accordance with the medical evidence: "Her hopes are all in "line with the intention not to go away from this home [namely, "'Quetta'] and return when she is better. People are "astonished at the strides that have been made in mental illness. "The doctors cannot rule out the possibility that there may be "something which will help this lady, and there is this to be "said: she is on the road in that direction, because it is no longer "thought necessary by the hospital authorities that she should "remain a compulsory patient, but she has recovered sufficiently "to be a voluntary patient and she could give 72 hours' notice "to the hospital authorities and she can leave the hospital if she "wishes. True, the authorities would probably try their best to "persuade her otherwise, but if she made up her mind she could "go. What is there to say that she won't take a desire to try "and put it into action to go back into this house? And I must "take this fact into account: she is improving her relations with "other people and improving the state of schizophrenia which

[2] [1948] 2 K.B. 247, 254; 64 T.L.R. 266; [1948] 1 All E.R. 922, C.A.

"is the cause of her delusion of persecution by other people "with whom she comes into contact. Who am I to say that "the stage might not be reached within a reasonable time "when the authorities would say that her relationship had so "improved as to make it safe to let her out to the care of her "daughters? I cannot say that she is incurable. It is true that "the doctor very fairly said that this was unlikely in view of "her age but she is a voluntary patient. She has never been in "a position to alter that intention to have any legal consequences. "She likes to hear talk of home and what people are doing at "home and what her daughter is doing at home, and she would "like to return there, and she regards 'Quetta' as her home, "with the hope of going back."

He then goes on to say: "The evidence is just sufficient in "this case to discharge the onus and has satisfied me that there "has been no real abandonment of possession." Put the other way, I think the judge is saying that Mrs. Hearn has shown that she still looks on "Quetta" as her home, and has always done so and has a real hope of returning there, and this is an intention to which he should have regard. In view of the fact that she is now a voluntary patient, and of the advances that have been made and are still being made in the treatment of mental illness, it might well become practicable within a reasonable time for her to leave and return home in the care of her daughter.

Although I agree with the judge that this is a borderline case, I think there was evidence on which he could find an intention to return to live in the house, and that is the conclusion to which I think he came. I would, therefore, dismiss the appeal.

A question was raised on behalf of Mrs. Hearn that in any event the landlords were estopped from asserting that the tenancy had ceased by reason of the conduct of their predecessors in title. In view of the conclusion to which I have come, it is unnecessary to consider this question, which does not appear to be without difficulty.

WILLMER L.J. I, too, find myself unable to differ from the conclusion at which the county court judge arrived. [His Lordship also stated the facts and continued:] The plaintiffs' claim is founded on an allegation that, the first defendant having left the premises in 1954 and never returned, her possession thereof has accordingly ceased. It is not in dispute that the second defendant has no independent right of her own.

The case for the landlords is that the passage of so long a time during which the tenant has been absent from the premises raises a presumption against her that she has abandoned her possession. This, it is said, she can only rebut by proving affirmatively (a) that she has retained an animus revertendi and (b) that she has in the meantime maintained what is described as a corpus possessionis. No question arises as to the latter in this case, for it is conceded that the continued occupation of the premises by

C. A.
1960
Tickner v. Hearn.
Willmer L.J.

her daughter, the second defendant, with her furniture would amount to a sufficient corpus possessionis. But as to the former it is contended that, so far from any intention to return being proved, the tenant, by reason of her mental condition, has been throughout, and still is, incapable of forming any intention at all. In this connection it is argued that it is not enough to prove merely a vague, general desire to return. There must, it is said, be something which is reasonably likely to be capable of practical fulfilment, and reliance is placed on Asquith L.J.'s well-known definition of "intention" in *Cunliffe* v. *Goodman*.[3]

On the other side, counsel for the defendants has argued that where, as here, the tenant's prolonged absence from the disputed premises has been due to mental illness, the mere fact of such prolonged absence raises no presumption against her or, if there is any such presumption, it is immediately rebutted on proof of the tenant's mental incapacity. For in the absence of capacity to form any intention there could not ever have been in law any abandonment of possession. Alternatively, it has been contended that on the facts, if and in so far as this tenant has been shown to have formed any intention at all, her intention throughout has been to return to "Quetta," which she has always regarded, and still regards, as her home.

The judge, while holding that the onus was on the tenant to prove that she had an intention to return or conversely no intention of leaving, came to the conclusion on the facts that she had discharged the onus that was on her. According to the note of his judgment he said: "On evidence such as this there is no "intention to abandon the premises at all. On the evidence "her intention is to return and she has never been in a position "mentally to alter that intention." In reaching his conclusion the judge relied on evidence given by the second defendant and by the medical superintendent of the hospital to the effect that the tenant always regarded, and spoke of, "Quetta" as her home, and frequently expressed the hope of going back there. The judge recognised that on the medical evidence it was unlikely that she would ever leave hospital, but having regard to the advances that have been made in medical treatment he declined to rule out the possibility that she might one day be able to give effect to her desires and return home. In such circumstances he expressed himself as satisfied that there had been no real abandonment of possession, and that, therefore, the landlords' claim must fail.

We have been referred to a number of authorities in which consideration has been given to the effect of prolonged absence from the disputed premises on the part of a tenant. This, however, appears to be the first occasion on which it has been necessary for this court to consider the effect of such an absence in the context of mental illness, though decisions either way have been arrived at by county court judges in cases to which our

[3] [1950] 2 K.B. 237, 253–254.

attention has been called. The argument for the landlords has been largely based on the judgment of this court delivered by Asquith L.J. in *Brown* v. *Brash and Ambrose*.[4] In that case the tenant's absence, for a period of something like 15 months, was due to the fact that he was serving a prison sentence as the result of a crime committed by him. The actual decision of the court in favour of the landlord was based on the fact that shortly after the tenant's imprisonment, his mistress, whom he had left in occupation, left the premises and removed most of the furniture, so that it was no longer possible to say that the tenant retained any corpus possessionis. In the course of delivering the judgment of the court, however, Asquith L.J. said[5]: "... absence "may be sufficiently prolonged or unintermittent to compel the "inference, prima facie, of a cesser of possession or occupation. "The question is one of fact and of degree. Assume an absence "sufficiently prolonged to have this effect: The legal result seems "to us to be as follows: (1) The onus is then on the tenant to "repel the presumption that his possession has ceased. (2) In "order to repel it he must at all events establish a de facto "intention on his part to return after his absence."

I do not read this statement on the part of Asquith L.J. as meaning that in all cases of prolonged absence, where a tenant appears as defendant to resist a landlord's claim to possession, the burden of proof is on the tenant throughout. What is meant, as I understand it, is no more than what has been described as a provisional onus, such as may arise in the course of any case where facts are proved which call for an explanation. The fact of long absence on the part of a tenant is a fact which calls for explanation, and which, in the absence of explanation, may, and will normally, prompt the inference of an intention to abandon possession. That this is the true view is, I think, confirmed by the way in which Lord Evershed M.R. expressed his decision in favour of the landlord in *Bushford* v. *Falco*,[6] when he said that "the tenant had not explained what must, on the facts, be "otherwise taken as an abandonment of occupation." These words of Lord Evershed, like the opening words of Asquith L.J. in the passage which I have cited, support the view, which for my part I am disposed to think is the right view, that the question which has to be determined in a case of this sort is whether there has or has not been a cesser or abandonment of possession or occupation. In determining this question the fact of prolonged absence is necessarily a potent circumstance, but it is not of itself sufficient. The intention of the tenant in thus absenting himself still has to be considered; and such intention may, of course, have to be inferred from all the circumstances of the case. This being so, it seems to me that once the tenant's absence is explained by proof of facts which do not of themselves involve an actual intention on his part to abandon possession, the plaintiff landlord

[4] [1948] 2 K.B. 247.
[5] [1948] 2 K.B. 247, 254.
[6] [1954] 1 W.L.R. 672, 676; [1954] 1 All E.R. 957, C.A.

C. A.
1960
Tickner
v.
Hearn.
Willmer L.J.

is left where he started, and he must prove affirmatively that the tenant has, in fact, abandoned possession. The fact of prolonged absence, once it is thus explained, loses its compelling significance.

If this be the true view, it appears to me that the landlords' claim here must inevitably fail. The only witnesses whose evidence was relevant to this part of the case were the medical superintendent of the hospital (Dr. Russell), the male plaintiff (Mr. Tickner) and the second defendant (Miss Hearn). Miss Hearn's evidence made it clear that when her mother originally left "Quetta" in June, 1954, she did so only for the purpose of paying a temporary visit to her other daughter. There was clearly no evidence of any intention to abandon possession at that stage. As to the effect of the evidence with regard to the period since the onset of the tenant's mental illness, two views are possible. Either she has been so ill that she has not so far been capable of forming any fresh intention at all, in which case I think the evidence falls short of proving that up to date she has abandoned possession. Alternatively, if during her time in hospital she has been capable of forming any intention, the evidence of Dr. Russell and of Miss Hearn showed that she has remained throughout of the same mind, and that she still regards "Quetta" as her home to which she hopes one day to return. Equally, on this view, it is impossible to say that the landlords have proved anything amounting to abandonment of possession on the part of the tenant.

I have not forgotten that in the view of Dr. Russell it is most unlikely that she will ever be fit enough to leave hospital. But, as pointed out by the judge, it is quite impossible in this case, having regard to the improvement already achieved and to the advances which have been made in methods of treatment, to rule out the possibility altogether. Had the evidence showed that in no conceivable circumstances could the tenant ever hope to leave hospital again, a different and, as I think, a difficult question would have arisen. It might well be held that in such circumstances the landlord had sufficiently discharged the onus of proof. That is a question which may possibly have to be considered on some future occasion, and I prefer to express no concluded view about it. It is not a question which arises in this case, where the evidence is far from proving anything of the sort. On the evidence given in this case I find it impossible to disagree with the conclusion reached by the judge. In my judgment the plaintiff landlords have failed to prove the case which they set out to prove, namely, that this tenant has abandoned her possession of the premises.

A further point was taken on behalf of the tenant, namely, that the landlords were estopped by reason of their own and their predecessors' conduct from alleging that the defendant's possession of the premises had ceased. This was countered on behalf of the landlords by a submission that a claim to the protection

of the Rent Restriction Acts cannot be founded on an estoppel. We were referred to a number of authorities from which it became clear that the point raised was one of some difficulty. For my part, having regard to the conclusion at which I have arrived on the main part of the case, I find it unnecessary to express any opinion on the question of estoppel.

UPJOHN L.J. As the county court judge recognised more than once in his judgment, this is a difficult and borderline case.

A statutory tenant in possession of rent-controlled premises has only a personal right of occupation; he has no estate or property as tenant at all, no right which he can transmit to others. This has been decided over and over again.

If he ceases to occupy the premises then he does not fall within the policy of the Rent Acts, which was to enable a person paying the proper rent fixed by Parliament to remain in occupation; see *Skinner* v. *Geary*,[7] *per* Scrutton L.J.

Whether a person is in occupation for the purposes of the Rent Acts is, however, essentially a question of fact and degree. If a man is personally absent from his house, he does not thereby necessarily cease to be entitled to the protection of the Acts. A man may be temporarily absent for business or holiday purposes, and he does not thereby cease to be in occupation. When absence is more prolonged a more difficult question arises. It was put in this way by Asquith L.J. in *Brown* v. *Brash and Ambrose*[8]: "Nevertheless, absence may be sufficiently prolonged "or unintermittent to compel the inference, prima facie, of a "cesser of possession or occupation. The question is one of fact "and of degree. Assume an absence sufficiently prolonged to "have this effect: The legal result seems to us to be as follows: "(1) The onus is then on the tenant to repel the presumption "that his possession has ceased. (2) In order to repel it he must "at all events establish a de facto intention on his part to return "after his absence."

In addition, of course, a tenant who is de facto out of possession must prove an animus possidendi, that is to say, he must clothe his inward intention with some formal and outward visible sign of it. It is, however, conceded that in this case that condition is satisfied by virtue of the continued occupation of the premises by the tenant's daughter and it is unnecessary, therefore, to consider that aspect of the matter further.

Counsel for the appellant landlord, relying on the passage in the judgment of Asquith L.J. which I have just quoted, has submitted to us that the onus is on the tenant to establish a de facto intention to return.

Counsel for the tenant has argued that the real question to be determined is whether the tenant has abandoned possession.

Speaking for myself, I accept the argument that where

[7] [1931] 2 K.B. 546, 560; 47 T.L.R. 597, C.A.

[8] [1948] 2 K.B. 247, 254.

C. A.
1960
Tickner v. Hearn.
Upjohn L.J.

absence is more prolonged than is to be explained by holiday or ordinary business reasons and is unintermittent, the onus lies on the tenant of establishing an intention to return if he seeks the protection of the Acts.

I do not think that the question whether the tenant has abandoned possession is the relevant test. It is true, I think, that in a number of the reported cases abandonment of possession has been treated as synonymous with failing to show an intention to return, and it is clear that in the case before us the county court judge did use the term "abandonment" as a short synonymic for expressing the idea that there was no intention to return. However, abandonment of possession and proving an intention to return are not the same thing. It would, I think, be easy to postulate circumstances where it could not be said that a tenant had abandoned possession, yet his intention to return was so vague and undetermined that he could not be said to have established an intention to return for the purposes of the Rent Acts.

The arguments of both counsel then proceed on the footing that by reason of the tenant's insanity, she has become incapable of expressing any further intention. Counsel for the tenant argues that she must be deemed to continue to have her last proved intention, namely, that to return to "Quetta." Counsel for the landlord argues that she can have no intention at all and, therefore, cannot establish any intention to return.

I cannot accept either of these submissions. To certify a person as mentally unsound does not necessarily make him incapable of forming an intention upon such a matter as this. It is a question of fact in each case whether his mental disease is such as to render him incapable of forming any intention or whether the disease falls short of that. Many persons who have been certified as insane are mentally incapable only in relation to certain matters or for certain periods and in relation to other matters or during lucid intervals they are perfectly capable of contracting, or making a will, or forming an intention to return home when fit. It is a question of fact in the light of the medical evidence in each case.

For my part, however, I am of opinion that to establish an intention to return by itself is not necessarily sufficient to obtain the protection of the Acts. The ultimate fact to be established is the fact of occupation, for it is only those in occupation whom the Act protects. If a tenant is out of occupation for some time he must at least prove an intention to return; but if the circumstances of the case are such that by reason of mental or physical illness or for some other reason the intention, even if clearly and bona fide held, seems most unlikely to be achieved within a reasonable time, it must surely be open to the judge in a proper case to find as a fact that the tenant is not in occupation. It seems to me that some of the reported cases have gone very far in the protection of the tenant.

The judge, in the course of his careful and full judgment, at one stage undoubtedly expressed the view that, having been certified, the tenant was not in a position mentally to alter her previous intention to return. For the reasons which I have given, I am unable to agree with that and, had the matter rested there, I should find myself unable to support his judgment. But the matter did not rest there. He went on to review the evidence very carefully in the greatest detail. He considered not only the tenant's present position but her future. Having dealt with her improvement so that she had become a voluntary patient, he said this: "Who am I to say that the stage might not be "reached within a reasonable time when the authorities would "say that her relationships had so improved as to make it safe "to let her out to the care of her daughters? I cannot say that "she is incurable." He concluded by saying: "The evidence is "just sufficient in this case to discharge the onus and has satis-"fied me that there has been no real abandonment of possession "and, therefore, the claim must fail."

I have already pointed out that, looking at the judge's judgment as a whole, it is plain that he is using the phrase "no real "abandonment" as being synonymous with stating the view that there was an intention to return. As I read his judgment, the conclusion which he reached was that, looking at all the facts during her mental illness, he regarded it as a borderline case, but he came to the conclusion on those facts that she had established an intention to return and, at least, a real possibility of her return within a reasonable time.

I think there was evidence on which the county court judge could come to the conclusion that as a fact the tenant had not ceased to occupy the premises for the purposes of the Rent Acts and, for this reason, I would not disturb his judgment and would dismiss the appeal.

Appeal dismissed with costs.

Solicitors: *Crawley, Arnold, Ellis & Ellis for Horwood & James, Aylesbury; W. H. Thompson.*

M. M. H.

[RESTRICTIVE PRACTICES COURT.]

* *In re* WHOLESALE CONFECTIONERS ALLIANCE'S AGREEMENT.

R. P. Ct.† (E. & W.)

1960 *Oct.* 31; *Nov.* 1, 2, 3, 4, 7, 8, 9, 10, 11, 14. 15; *Dec.* 9.

[1959 No. 12 (E. & W.).]

Restrictive Practice—Restriction—Whether contrary to public interest —Price restriction—Confectionery industry—Recommended wholesale prices for confectionery—Wholesalers' buying and selling

† RUSSELL J., SIR STANFORD COOPER, MR. W. L. HEYWOOD and SIR JOHN CAMPBELL.

R. P. Ct.
(E. & W.)

1960

WHOLESALE CONFECTIONERS ALLIANCE'S AGREEMENT, *In re.*

schedules—Three tier price system—Small retailers large proportion of wholesalers' market—Confectionery only part of general trade of small retailers—Whether benefits or advantages conferred on public by restrictions—Restrictive Trade Practices Act, 1956 (4 *&* 5 *Eliz.* 2, *c.* 68), *s.* 21 (1) (*b*).

The Wholesale Confectioners Alliance of Great Britain and Northern Ireland was a trade association of 1,980 of a total of 3,500 wholesalers of chocolate and sugar confectionery throughout the United Kingdom. Most wholesalers dealt in other goods as well as confectionery; some wholesalers were also manufacturers and some retailers. Members of the alliance handled about 90 per cent. of all confectionery sold by wholesalers, and 500 large firms handled 80 per cent. of confectionery sold wholesale. Sales of confectionery through wholesalers had declined substantially, the proportion of such sales in 1959 being almost half what it was in 1953, when confectionery was derationed. Since 1953, there had been a substantial increase in direct sales by manufacturers to large retailers or retailer buying groups, and those sales now accounted for over 50 per cent. of the confectionery sold in the United Kingdom. The most numerous group of retail outlets were the back street and village shops which comprised the bulk of the wholesalers' customers; practically all those retailers dealt in other goods and they were the least price conscious and most unbusinesslike. Main street shops, chain stores, multiples, supermarkets, cinemas and restaurants generally bought direct from manufacturers; secondary retail shops, public-houses, cafés, petrol stations and school tuck-shops generally bought partly from manufacturers and partly from wholesalers. Manufacturers normally ticketed their confectionery with either fixed or recommended consumer prices. There was great competition between manufacturers and the market in confectionery was a buyers' market.

The alliance issued a schedule of prices at which members were recommended to buy confectionery from manufacturers, known as the "white buying price schedule," and a schedule of prices at which members were recommended to resell to retailers, known as the "yellow price schedule." The white schedule operated on a normal wholesalers' 3 cwt. purchase, and set out three maximum buying rates, "A," "B" and "C," at which members were recommended to buy confectionery from manufacturers; and the yellow schedule contained three comparable reselling price rates, "A," "B" and "C." Whenever a member bought goods at an "A" rate, he was recommended to resell at the comparable "A" rate in the yellow schedule. The schedules were designed to divide the total distributor's margin so as to give 25 per cent. to the wholesaler and 75 per cent. to the retailer in weigh-out goods, and 28 per cent. and 72 per cent. respectively in other goods. The National Union of Retail Confectioners disapproved of the yellow schedule, and issued its own schedule of recommended prices to be paid by retailers to wholesalers. Both the distributors' overall and the wholesalers' margins were not unreasonable.

The alliance contended that removal of the restrictions comprised in its schedules would deny to the public specific and substantial benefits within paragraph (*b*) of section 21 (1) of the Restrictive Trade Practices Act, 1956,[1] in that the schedules

[1] Restrictive Trade Practices Act, 1956, s. 21: "(1) For the purposes "of any proceedings before the court "... a restriction accepted in pursu- "ance of any agreement shall be "deemed to be contrary to the public "interest unless the court is satisfied "of any one or more of the following "circumstances, that is to say— ... "(*b*) that the removal of the restric-

(1) enabled wholesalers to sell confectionery in populous and in sparsely populated areas at uniform margins, whereas under price competition the higher costs of distribution in sparsely populated areas would require wholesalers to increase their margins in those areas to such an extent that retailers in sparsely populated areas would go out of business or increase prices substantially; (2) enabled manufacturers to increase trade prices without increasing consumer prices; (3) enabled retailers, particularly the smaller retailers, to avoid having to "shop" for confectionery; and (4) avoided "disputes" between wholesalers and retailers:—

Held, (1) that the fact that the overall margins were not unreasonable did not exclude the possibility of manoeuvre, embracing also manufacturers such as in the absence of the schedule would ensure the continued supply of confectionery to and by retailers in the more sparsely poulated areas and at the overall ticket prices; the relevant retailers almost invariably stocked confectionery as a part only of a general trade, there were indications of elasticity in the retailers' share of the distributors' margin, and it was to be expected that in the absence of the schedules the less efficient wholesalers would go out of business, and that those who remained would be more capable of ensuring that their retail outlets would be maintained (post, pp. 1426, 1427).

(2) That the court was not satisfied that it would follow from the loss of the schedules that any increase in price by manufacturers would necessarily lead to an increase in the consumer price (post, pp. 1427, 1428).

(3) That the court was not satisfied that in a free market small retailers would be incapable of profitably comparing the differing prices of the different wholesalers seeking to sell them the same goods, and that such time and trouble as might now be saved to the small retailer by the operation of the schedules was not a substantial benefit or advantage (post, pp. 1428, 1429).

In re Black Bolt and Nut Association's Agreement (1960) L.R. 2 R.P. 50; [1960] 1 W.L.R. 884; [1960] 3 All E.R. 122 distinguished.

(4) That, whatever was meant by "disputes," the existence of the schedules did not avoid a general attitude of opposition between wholesalers and retailers, for retailers in fact disliked it, preferring their own schedule; but that, in any event, the avoidance of differences of opinion in the course of bargaining, was not a specific and substantial benefit to retailers, particularly when most of them were likely to benefit from such bargaining by a reduction in prices (post, p. 1429).

The alliance, therefore, had failed to establish its case under paragraph (*b*) of section 21 (1), and the restrictions comprised in the schedules must be declared contrary to the public interest.

REFERENCE.

On May 1, 1959, the Registrar of Restrictive Trading Agreements, pursuant to section 20 (2) (*a*) of the Restrictive Trade Practices Act, 1956, referred to the court the agreement subsisting between the members of the Wholesale Confectioners Alliance of Great Britain and Northern Ireland, numbered 169 on the register of agreements.

"tion would deny to the public as "purchasers, consumers or users of "any goods other specific and substantial benefits or advantages "enjoyed or likely to be enjoyed by "them as such . . ."

R. P. Ct.
(E. & W.)

1960

WHOLESALE CONFECTIONERS ALLIANCE'S AGREEMENT, *In re.*

The following statement of facts is taken from the judgment of the court.

The Wholesale Confectioners Alliance of Great Britain and Northern Ireland is a trade association. It is an alliance of four members: these are the British Federation of Wholesale Confectioners, the Scottish Federation of Wholesale Confectioners' Associations, the South Wales and Monmouthshire Federation of Wholesale Confectioners, and the Belfast and Northern Ireland Wholesale Confectioners Association. The three federations have as their constituent members local associations of local wholesalers, and the association has as its members wholesale confectioners in Northern Ireland. These wholesalers deal by wholesale either in part or sometimes solely with confectionery, that is chocolate and sugar confectionery (sweets). Wholesale members of the alliance (through the federations and associations) total 1,980 odd, being divided approximately 220 Scottish, 80 South Wales and Monmouthshire, 110 Belfast and Northern Ireland, and 1,560 English.

The purposes of the alliance include that of formulating policy and advancing agreed views on behalf of all wholesale confectionery interests, and also the encouraging of the maintenance of standard prices and terms in the distributive sections of the confectionery industry, and the issuing of price lists.

There are some 500 confectionery manufacturers, producing some 20,000 lines. About 80 per cent. is produced by fifty of these manufacturers, and 200 manufacturers have a national distribution of their goods. On the chocolate side ten manufacturers produce over 80 per cent.; on the sugar confectionery side twenty-five manufacturers produce over 50 per cent. There is great competition among manufacturers. The market now and in the foreseeable future must be regarded as a buyers' market. Since the termination of confectionery rationing in 1953, the proportion of confectionery sold through wholesalers has sharply declined, there being a substantial increase in direct sales by manufacturers to the larger retailers, or chain stores, or retailer buying groups. Normally manufacturers are prepared to sell to anyone who will buy enough at a time; their price lists are commonly on a sliding scale related to quantity and applicable to wholesaler and retailer alike. The wholesalers' proportion has been estimated at 35 to 40 per cent. in 1959 (225,000 tons) as compared with 60 to 70 per cent. (390,000 tons) in 1953–54.

The alliance membership consists of nearly 2,000 wholesalers, out of some 3,500 who handle confectionery to some extent. About 1,000 of these do so to such a small extent that they are primarily wholesalers in some other line or lines and are likely to be members of other comparable trade associations. Members of the alliance probably handle about 90 per cent. of confectionery tonnage sold by wholesale, and about 500 big firms handle 80 per cent. of such tonnage. Confectionery wholesalers handling confectionery only are probably less than 20 per

cent. of the total members. Some wholesalers also manufacture; some wholesalers also retail. Far the largest group of wholesalers deal in other commodities as well, such as tobacco, groceries, stationery, dry goods, chemists sundries and so forth. In some of these mixed businesses confectionery predominates.

Retail confectionery outlets vary considerably in character. Main street confectionery shops tending to specialise in confectionery ordinarily buy from manufacturers direct. So also do chain stores, multiples, supermarkets, cinemas and restaurants. Retail outlets such as public-houses, cafés, petrol stations, school tuck-shops, buy partly from manufacturers and partly from wholesalers; and so do secondary thoroughfare retail shops, which usually deal also in other goods. The most numerous group, and that which absorbs the greater part of the wholesalers' total tonnage, consists of back street shops and village shops which cannot order in quantities which make delivery by manufacturers worth while: all these may for practical purposes be regarded as dealing also in goods other than confectionery. It is estimated that there may be as many as 250,000 retail confectionery outlets in the United Kingdom (excluding automatic vending machines), the greater number being in the category of small mixed shops served predominantly by the wholesaler. There is a retail trade association, the National Union of Retail Confectioners, with about 8,300 members. Though perhaps half that number are small retailers, it is nevertheless not regarded by the alliance's secretary as very representative of those retailers who form the majority of the wholesalers' customers. Retail prices to the consumer are normally either fixed or recommended by the manufacturer.

Confectionery from 1941 to 1953 was subject to rationing and consumer price control, the three sections of the trade being left to settle trade prices together. At the end of price control, the three sections agreed price schedules which were issued in 1953 and 1954 by the alliance. These incorporated a broad division of the distributors' margin between wholesaler and retailer of 25 : 75 for weigh-out goods and 28 : 72 for other goods, which broad division had been basically accepted in the wartime agreements

In 1955, the leading, or "A," chocolate manufacturers were persuaded by the wholesalers to investigate distribution costs with a view to increasing the total distributors' margin. In the result these chocolate manufacturers increased the margin, and the alliance in 1956 produced a new schedule of prices, whose details need not be canvassed, since this was later superseded by the 1958 price schedules the subject of the reference. In 1957, the alliance again took the view that increases in costs justified an increase in the distributors' margin, and approached the leading chocolate manufacturers with costs figures. In the result those manufacturers agreed an increase in the distributors' margin of 1 per cent. and lowered their prices to the trade

R. P. Ct. (E. & W.)

1960

WHOLESALE CONFECTIONERS ALLIANCE'S AGREEMENT, *In re.*

accordingly. The alliance ultimately produced the yellow price schedule (prices of wholesaler to retailer) and the white buying price schedule (manufacturer to wholesaler). It will be convenient to describe the operation and nature of these schedules —which involve the restrictions now before the court—and then revert to the manner in which they were produced. The key schedule is the white buying price schedule. This is divided into four categories of confectionery, namely, (1) weigh-out lines; (2) prepacked lines; (3) chocolate blocks, bars and other count lines; (4) sugar confectionery count lines. In each category is given in ascending order fixed or ticket price rates to the consumer: against each such consumer price rate is set, marked "A," a manufacturer to wholesaler price rate, which (as is indicated later) the alliance recommends should be the maximum price rate which a wholesaler should pay to any manufacturer for a normal wholesaler's order of about 3 cwt. for confectionery in that category retailing at that consumer price rate. This recommendation as to maximum prices to be paid by wholesaler to manufacturers is not intended to apply to special circumstances or special lines, when (though rarely) wholesalers may pay more than the "A" price rate. In addition there are in the buying price schedule (for most of its range) "B" and "C" manufacturer price rates in respect of each consumer price rate, "B" being lower than "A," and "C" than "B." This price schedule in setting out the "B" and "C" price rates does not impose directly a restriction: those rates are designed to form a basis for working the yellow price schedule, since not all manufacturers' goods retailing in any particular category at the same consumer price rate can command the top "A" trade price rate (as can, for example, the leading chocolate manufacturers with their intensive advertising leading to heavy demand and quick turnover), and those who cannot will charge at a lower trade price rate, which may be anywhere down to and below the "C" figure, "B" and "C" being only labelled steps in a downward trend. The principle of the yellow price schedule is this: in respect of each item in each category (again listed by increasing consumer price rates) prices are set out as the recommended trade reselling prices to retailers. Wherever in the white buying price list there are "A," "B" and "C" manufacturers' trade selling price rates, there are comparable "A," "B" and "C" trade selling price rates by wholesalers to retailers in the yellow price schedule. The recommendations are that when a wholesaler has bought a particular consumer price rate line at "A," he should resell at the comparable yellow schedule "A"; when at "B," similarly at "B"; when at "C," similarly at "C"; when between "A" and "B," then at "A"; when between "B" and "C," then at "B"; when below "C," then at "C"; when (exceptionally) at above "A," then at "A," plus the appropriate increase. The yellow price schedule "A," "B" and "C" figures are, in relation to the white

buying price schedule "A," "B" and "C" figure and in relation to the relevant consumer prices, designed to reproduce the rates of 28 : 72 and 25 : 75 already mentioned. The calculations are made to the nearest upward coin denomination, but are recalculated in the various weights or quantities which are set out in the yellow schedule for convenience as a ready reckoner.

The alliance white buying schedule works upon a manufacturer's price rate to wholesalers for approximately a 3 cwt. purchase. Should a wholesaler buy less, he is not restricted in the price he pays, nor in the price he charges to retailers. Also, if by reason of buying more than 3 cwt. he receives a quantity reduction from the manufacturer, he is not permitted to give to any retailer a quantity reduction, subject to federation modifications later mentioned. Next it is understood that if a wholesaler receives a special bargain by a manufacturer giving him a discount in kind (for example, one free package in ten), the schedules do not restrict him on resale at all. Lastly, the schedule is calculated on the assumption that the wholesaler receives from the manufacturer a discount of 1¼ per cent. or 3d. in the £ and gives to the retailer the same rate of discount.

The yellow schedule evolved thus. In some parts of the country it was already the practice of wholesalers to give the 1¼ per cent. discount to retailers. In other parts it was not. Originally the alliance suggested two wholesalers' reselling price schedules, one for the non-discount areas and one for the discount areas. The former assumed no discount to retailers. The latter assumed the discount throughout the whole range, but equivalently stepped up the trade reselling prices throughout the whole range. However, the inconveniences of the division into discount and non-discount areas led to the production of the compromise yellow schedule, which assumed the 1¼ per cent. discount throughout, but in part of the range did not step up the prices to offset it. The National Union of Retail Confectioners did not (and does not) approve of this schedule, and has its own white schedule of recommended prices to be paid by retailers to wholesalers; this works upon the same "A," "B," "C," principle: the prices are different, and are intended to be diminished by 1¼ per cent. discount where that can be obtained, though not everywhere. In summary, the retailers' union prefers its own schedule because it considers that it is more profitable for retailers; and, indeed, we think on the whole it is. Notwithstanding the views of the National Union of Retail Confectioners, the alliance insisted on bringing their yellow schedule into operation, though some retailers, on the evidence, manage to persuade wholesalers to sell on the N.U.R.C. schedule and to allow the 1¼ per cent. discount.

The alliance sought to justify the restrictions under paragraph (*b*) of section 21 (1) of the Act of 1956.

Further facts are stated in the judgment.

R. P. Ct.
(E. & W.)

1960

WHOLESALE CONFECTIONERS ALLIANCE'S AGREEMENT, *In re.*

Guy Aldous Q.C., *Bryan Clauson* and *William Aldous* for the alliance.

Neville Faulks Q.C. and *Arthur Bagnall* for the registrar.

The following case was cited in argument in addition to that referred to in the judgment: *In re Doncaster and Retford Co-operative Societies Agreement.*[2]

Cur. adv. vult.

December 9. RUSSELL J. read the following judgment of the court, which stated the facts as set out above and continued: The facts set out above are the general background against which we have to consider the relevant restrictions.

There was a certain amount of dispute as to the relevant restrictions and the correct method of their statement. We consider that they are correctly stated in the list of restrictions filed on behalf of the registrar. These are five in number and are: "1. Not to acquire from manufacturers chocolate or sugar "confectionery, the buying price of which exceeds the 'A' buy-"ing price shown in the price list as appropriate to the consumer "price indicated by the manufacturer. 2. If, exceptionally, choco-"late or sugar confectionery is acquired from a manufacturer at "prices exceeding the 'A' buying price shown in the price list "as appropriate to the consumer price indicated by the manufac-"turer, not to offer or supply same to retailers save at the appro-"priate 'A' selling price proportionately increased. 3. Not to "offer or supply chocolate or sugar confectionery bought by the "offerer or supplier at the appropriate 'A' buying price, or at a "price lower than the appropriate 'A' buying price but exceed-"ing the appropriate 'B' buying price, except at the appropriate "'A' reselling price. 4. Not to offer or supply chocolate or sugar "confectionery bought by the offerer or supplier at the appro-"priate 'B' buying price, or at a price lower than the "'appropriate 'B' buying price but exceeding the appropriate 'C' "buying price, except at the appropriate 'B' reselling price. "5. Not to offer or supply chocolate or sugar confectionery "bought by the offerer or supplier at the appropriate 'C' buying "price except at the appropriate 'C' reselling price."

For the alliance it was suggested that the first restriction no longer existed, having regard to the absence from the 1958 lists of a phrase present in those of 1956; and that, though the alliance's evidence was that the restriction was intended to remain as a recommendation, nevertheless it was not found in the documents referred to the court. We do not agree with the suggestion. It was, however, made plain for the alliance that it had no wish to continue the first recommendation, and that if it was before the court it could not be justified under the Act of 1956. In the circumstances the first restriction must be declared contrary to

[2] [1960] 1 W.L.R. 1186; [1960] 3 All E.R. 541.

the public interest. It is right to add that the alliance contended that this was a harmless restriction, while accepting that this was no defence under the Act of 1956: we need express no opinion on that contention.

In respect of the remaining restrictions, the alliance sought to justify them under section 21 (1) (*b*) of the Act of 1956 by satisfying the court that their removal would deny to the public, as purchasers or consumers of confectionery, specific and substantial benefits or advantages enjoyed or likely to be enjoyed by them as such by virtue of the restrictions or of any arrangements or operations resulting therefrom. No distinction was made between the four remaining restrictions, which stand or fall together.

A great deal of ground was covered in the course of the hearing, but it finally emerged that the alliance rested its case under section 21 (1) (*b*) under four heads. First head: that the removal of the restrictions would have the result that in the more sparsely populated, but substantial areas of the United Kingdom, where costs of distribution are relatively high, the margin available to retailers of confectionery would fall so low that no one would continue to retail confectionery in those areas; alternatively, that in those areas confectionery would be sold above the ticket prices, so that the general public as consumers and purchasers living in or visiting those areas would either be deprived of confectionery or would have to pay more for it. Second head: that the existence of the price schedules, with their three-tier system of prices, enable the manufacturer to make more than trivial increases in his price to the wholesaler to cover increased manufacturer's costs without increasing the ticket price of the articles to the consumer. Here again the sweet-eating public is the relevant public. Third head: that the existence of the price lists makes it unnecessary for retailers of confectionery (many of whom are in a small way of business and lack business experience) to "shop" for their goods, and makes it possible for them to ascertain quickly and easily, when any goods are offered to them, whether the price being charged is a reasonable one. Here the relevant public is a substantial section of the many retailers of confectionery as purchasers. Fourth head: that the removal of the restrictions would inevitably lead to disputes between retailers and wholesalers over the division between them of the distributors' margin—the difference between the manufacturers' price to the wholesaler and the ticket price to the public.

As to the first head. The basis of this contention is as follows: (a) It is agreed by the registrar that the overall position revealed in the trade—operating for the most part under the relevant restrictions—is that hitherto, and now, the total distributors' margin is not unreasonable, that the total wholesalers' share thereof is not unreasonable, and that the total retailers' share thereof is not unreasonable. (b) The cost of distribution by wholesalers in populous areas must be lower than their costs of

R. P. Ct. (E. & W.)

1960

WHOLESALE CONFECTIONERS ALLIANCE'S AGREEMENT, *In re.*

distribution in sparsely populated areas. (c) In populous areas it is to be expected that, in a free market, with competition between wholesalers, there would be a cutting of the wholesalers' share of the distributors' margin in favour of the retailers in those areas, but this would mean that in the sparsely populated areas the wholesalers would have to demand a larger share of that margin in order to compensate for the diminution in the populous areas, the increase being so substantial that there would be left to the retailer in the sparsely populated areas no sufficient inducement for him to continue to sell confectionery at the ticket prices. (d) The result would, it is submitted, be probably no confectionery in those areas, or possibly sales in those areas at above normal ticket prices.

While we are satisfied that, without the restrictions, competition between wholesalers—the market in confectionery being a buyers' market—will tend to reduce the prices charged by wholesalers to retailers in many areas, we are not satisfied that either of the results submitted would follow in sparsely populated areas. Reliance was placed on the evidence of a wholesaler from the north of Scotland whose company is a member of the Aberdeen and District Wholesale Confectioners' Association, and deals by wholesale in confectionery, groceries, tea, hardware, toys and fancy goods. The company to a minor extent manufactures and retails confectionery. The company deals with 2,900 retailers of, inter alia, confectionery, in wide areas of Scotland including sparsely populated areas. In his statement, he said (in effect) that if his total share of the distributors' margin in confectionery were reduced, he would, if continuing in business in the remote areas, have to send confectionery there carriage forward, involving a very big increase in prices to the retailers, with the results submitted above. This was challenged in cross-examination, at a time when it was far from obvious that this point about sparsely populated areas was to find its place in the forefront of the alliance's submissions, and the witness produced the much qualified statement that if the abandonment of the schedule affected (by price cutting) his share of distributors' margins in Aberdeen and 30 miles around—the more profitable areas—(I quote) "we might find that we were "in difficulties in carrying on at the same prices to the more "distant places." Without quoting further, it suffices to say that he was no more definite in re-examination.

It appears to us that the fact that the overall margins are admittedly "not unreasonable" does not exclude the possibility of manoeuvre (embracing also manufacturers, who must maintain their outlets) such as will ensure the continued supply of confectionery, to and by retailers in the more sparsely populated areas and at the overall ticket prices. The relevant retailers almost invariably stock confectionery as a part only of a general trade—such mixture of activities being reflected also in the wholesalers. It is difficult to envisage such a retailer closing down the

confectionery side of his business while any profit remained in it. It is to be observed that in some remoter parts the same wholesale company in the north of Scotland already charges more to retailers than in other parts—by not giving a discount of 1¼ per cent. or 3d. in the £—without affecting the retail availability or price of confectionery, which indicates elasticity in the retailers' share. He also obtains special terms from certain manufacturers, which indicates elasticity in the manufacturers' margins of profit. Moreover, particularly in the light of the fact that it was generally agreed that there are too many wholesalers in this industry, it is to be expected that in the absence of the schedule the less efficient wholesalers will go out of business and those who remain are to be expected to be, as a result, more capable of ensuring that their retail outlets will be maintained. We are, accordingly, not satisfied that this first head has been established.

As to the second head. It is to be observed that in order to fit the section this contention must be rewritten. It is necessary for the alliance to satisfy the court that without the restrictions contained in the schedule the manufacturer would not be able to make any increase (other than trivial) in his price to wholesalers to cover an increase in his costs, unless he simultaneously increased the consumer or ticket price.

So stated the proposition seems to us plainly wrong. The argument is put thus. A wholesaler deprived of the schedule would have to have some system of fixing his prices to retailers. The system he would choose would be the cost to him (manufacturers' charge) plus a percentage. If a manufacturer made an increase such as is envisaged the whole of that increase plus a percentage thereon would therefore be passed on to the retailer, whose share of the distributors' margin would be so reduced that in given cases he would not take the goods unless the ticket price were increased to compensate him. On the other hand (it is said) if the price schedule operates, a manufacturer can increase his price (to cover his increased costs) from (say) "C" to "A," and this diminution of the distributors' margin will be borne proportionately by the wholesaler and the retailer, and the increase in consumer price will not in any given case be required.

This argument appears to us to presuppose that a manufacturer would be forced to increase his ticket price by virtue of a system which was described by counsel for the alliance as lunatic —a system by which any increase in a manufacturer's price due to an increase in his costs is automatically added to the price to the retailer, plus, for good measure, a percentage. If a manufacturer's charges must be increased to an extent which under existing ticket price rates cannot produce a sufficient total distributors' margin, the consumer must, of course, pay more. But if they are increased to a lesser extent we cannot accept—particularly in a buyers' market—that without the price schedule

R. P. Ct. (E. & W.)

1960

WHOLESALE CONFECTIONERS ALLIANCE'S AGREEMENT, *In re.*

the result will, on the grounds urged, be the same. We are not satisfied under this head for the purposes of section 21 (1) (*b*).

We add that no doubt the three-tier system has advantages that might be lacking in a single-price system. But that is not, of course, sufficient. It has certain obvious disadvantages (probably impossible of solution) in that, while flexible in some respects, it is rigid in others: for example, a move in the manufacturer's charge from fractionally below "B" to fractionally above "B" in the buying price schedule would mean a move under the yellow schedule in the charge to the retailer from "B" to "A." But such considerations would be relevant only under the balancing provisions of section 21 (1).

As to the third head. This ground was introduced at the hearing by amendment, no doubt as a result of the decision of this court in *In re Black Bolt and Nut Association's Agreement.*[1] That case was very special, and the circumstances totally different from those in the present case. Indeed counsel for the alliance did not suggest the contrary, his reference to it being no more than to indicate that the avoidance of "shopping" is capable of being a relevant benefit or advantage, dependent of course on the circumstances.

We have heard—and accept—a good deal of evidence to the effect that the majority of those who retail confectionery are not experienced in business matters. The argument on this point is, shortly, that with the existence of the schedule—which admittedly allows a not unreasonable share to the retailer—all that the small retailer needs to do is to check that he is being charged the schedule price: and for this he does not need the actual schedule, he need only ask the wholesaler's traveller to confirm that it is the approved trade price. Without such a yardstick he would (it is said) have to compare wholesalers' price lists, whose contents, due to possible differences in methods of layout, might be difficult truly to compare. Moreover, it is said, the comparisons would take time which the small retailer cannot afford. It may well be true that these small retailers, by and large, are in one sense not price conscious, in that they do not normally inquire as to prices, but accept the price quoted to them for goods they want. But as things stand at present, and have stood for many years, they have operated in a field in which substantially one price only has ruled for a given line, based on the schedule. We are not persuaded that in a free market these small retailers are incapable of profitably comparing the differing prices of the different (though numerically limited) wholesalers whose travellers seek to sell them the same lines. Indeed it appears to be accepted under the first head that in populous areas competition between wholesalers will have the effect of reducing prices to retailers, which presupposes that retailers will compare prices either of their own volition or at

[1] (1960) L.R. 2 R.P. 50; [1960] 1 W.L.R. 884; [1960] 3 All E.R. 122.

the instance of wholesalers. Such time and trouble as may now be saved to the small retailer by the operation of the schedule does not appear to us to be a substantial benefit or advantage, and we are not under this head satisfied that the case for the alliance under section 21 (1) (*b*) is established.

As to the fourth head. This was, in our judgment, rightly referred to by counsel for the alliance as perhaps a "minor "point." We do not exactly know what is meant by "disputes," and the analogy which was introduced of two dogs at one dinner bowl only suggests a breach of the peace which we do not envisage in the distributors' section of the trade. If disputes means differences of opinion in the course of bargaining, we cannot regard their avoidance as a specific and substantial benefit or advantage to the relevant parties (the retailers), particularly when most of them are likely to benefit from such bargaining by a reduction in prices. If by disputes is meant a general attitude of opposition between organised retailers and organised wholesalers, we only comment that this exists now, the one preferring the National Union of Retail Confectioners' white schedule, the other preferring the yellow schedule. An attempt was made to suggest by a process of mathematics that the difference between the two was negligible (if the retailers could only have the sense to see it), so that such "dispute" was unreal: but in our view that mathematical process was founded on a false assumption. Accordingly, under this fourth and last head, the alliance also fails to satisfy the court under section 21 (1) (*b*).

Having regard to the limitation, in the end, of the alliance's case to those four heads, and to the fact that under none of them is the court satisfied, it is unnecessary to consider a number of aspects of the case which were fully canvassed in argument and evidence, some of which would or might have required review under the "balancing" provisions of section 21 (1).

We have not referred, so far, to the fact that certain of the federations, constituent members of the alliance, have from time to time introduced modifications of the alliance restrictions, as constitutionally they are entitled to do. Generally speaking these modifications are designed to permit within the federation's area certain quantity discounts by wholesalers to retailers, or to retail buying groups, or to permit special terms to cash-and-carry retailers. Strictly the restrictions came before us without those area modifications, and in so far as those area modifications are in themselves restrictions under the Act of 1956 they are not strictly before the court. But if we are to treat (in the relevant areas) the alliance restrictions as so modified, there is, in our judgment, nothing in the modifications which can improve the case for the alliance under the four heads mentioned. Taken by themselves, the area modifications cannot, of course, survive the abolition of the restrictions considered by us.

R. P. Ct.
(E. & W.)

1960

WHOLESALE CONFECTIONERS ALLIANCE'S AGREEMENT, *In re.*

Accordingly, we declare that the restrictions contained in the registrar's list are under the Act of 1956 contrary to the public interest.

Declaration accordingly.

Solicitors: *Stafford Clark & Co.; Treasury Solicitor.*

N. P.

END OF VOLUME 1.

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